



# Wisconsin Department of Revenue

## TAX BULLETIN

October 2014  
Number 186

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### Change in Wisconsin Income Tax Treatment of Same-Sex Couples

On October 6, 2014, the U.S. Supreme Court denied Wisconsin's petition for certiorari in *Walker v. Wolf* regarding the ban on same-sex marriage. Upon consulting with the Wisconsin Department of Justice, the Department of Revenue recognizes same-sex marriage as legal in Wisconsin. As a result, the department has updated its [guidance](#) on filing status and [common questions](#) for same-sex couples.

**Note:** The above change applies to a lawfully married same-sex couple. The Wisconsin income tax treatment of domestic partners is **not** affected. (Additional information concerning the Wisconsin income tax treatment of domestic partners is available in previously published guidance titled [Health Insurance Benefits To Domestic Partner May Result in Taxable Income to Employee](#) and [Effect Of Recent IRS Ruling On Wisconsin Domestic Partnerships](#).)

### Common Questions Address New Modification and Much More

The department recently issued [common questions](#) concerning a modification for taxable years beginning after December 31, 2013, to adjust the Wisconsin basis of depreciated or amortized assets. This is just one example of the wide variety of common questions available to both [individuals](#) and [businesses](#).

## Administrative Rule Addresses Registration of Qualified Wisconsin Businesses

Effective September 1, 2014, Section [Tax 2.986](#), Wis. Adm. Code (August 2014 Register), establishes the method of valuing property and the deadline for registering with the department as a "qualified Wisconsin business."

### Method of Valuing Property

Real and tangible personal property owned by a business must be valued at its original cost. Real and tangible personal property rented by a business must be valued at an amount equal to the annual rental paid by the business, less any annual rental received by the business from sub-rentals, multiplied by 8.

### Registration Deadline

A business must register with the department on or before the close of the calendar year for which the business desires registration. (For example, a business must register with the department for calendar year 2014 on or before December 31, 2014.) However, if a business begins doing business in Wisconsin, as defined in sec. [71.22\(1r\)](#), Wis. Stats. (2011-12), during a calendar year, the business must register with the department during the following calendar year.

**Example:** Business A began doing business in Wisconsin on March 8, 2014. Business A must register with the department for calendar year 2014 between January 1, 2015, and December 31, 2015.

[Common questions](#) that provide additional information concerning the registration of qualified Wisconsin businesses are available on the department's website.

## New Forms for 2015 Filing Season

The 2015 filing season brings several new forms and schedules that tax preparers and others should be aware of:

- Form X-NOL ([2012](#) and [2013](#)), *Carryback of Wisconsin Net Operating Loss (NOL)*
- [Schedule CF](#), *Carryforward of Unused Credits*
- [Schedule CS](#), *College Savings Accounts (EdVest and Tomorrow's Scholar)*
- [Schedule DE](#), *Disregarded Entity Schedule*
- [Schedule PS](#), *Private School Tuition*

The new [Form 6](#), *Wisconsin Combined Corporation Franchise or Income Tax Return*, and other major changes to the corporate income/franchise tax returns were summarized in an article in *Wisconsin Tax Bulletin 185* (July 2014) titled "New 2014 Form 6 – Combined Corporate Income/Franchise Tax Return."

## Form WT-4B Eliminated

Form WT-4B, *Certificate of Exemption From Wisconsin Withholding for 2014 Based on the Working Families Tax Credit*, will be eliminated for 2015. Individuals who qualify for the working families tax credit were eligible to claim an exemption from withholding for 2014 using Wisconsin Form WT-4B. Due to increases in the standard deduction and personal exemption, many individuals no longer need to claim the working families tax credit to obtain the same relief from Wisconsin income tax.

Individuals who are full-year legal residents of Wisconsin with income under \$10,000 (married couples under \$19,000), are not claimed as a dependent, and had no liability for income tax in 2014 may claim complete exemption from withholding by using Wisconsin Form WT-4, *Employee's Wisconsin Withholding Exemption Certificate*.

## Individual Filers: Are You Using the Correct Wisconsin Income Tax Form?

Every year, the department finds many individuals have not filed the correct Wisconsin income tax form. A common example of this is when a Wisconsin penalty on an early distribution from a qualified retirement plan is not reported because Form 1A is filed instead of Form 1.

The instructions for Forms WI-Z, 1A, and 1 include information about which form should be filed. [Common questions](#) on this subject are also available.

## Changing an Election to Apply a Refund to Estimated Tax

Sections [71.09\(7\)](#) and [71.29\(3\)](#), Wis. Stats. (2011-12), provide an election to apply all or a portion of a claimed refund to the following year's estimated tax payments, provided the refund has not been paid or applied elsewhere (for example, against a delinquent tax liability).

An election to apply a refund to estimated tax may be changed to:

- request payment of the refund,
- credit the refund against an amended return tax liability for any year, or
- credit the refund against a notice of amount due for any year.

### When a Change in Election May Be Made

For individual and fiduciary income tax, notification of a change in election must occur on or before the due date of the final estimated tax installment payment (January 18, 2016, for a calendar-year filer changing an election to apply a refund from a 2014 return to 2015 estimated tax payments).

For corporation franchise and income tax, notification of a change in election must occur on or before the unextended due date of the following year's tax return (March 15, 2016, for a calendar-year filer changing an election to apply a refund from a 2014 return to 2015 estimated tax payments) or before the following year's tax return is filed, whichever is earlier.

### How a Change in Election is Made

Notification of a change in election must be in writing. This includes the filing of an amended return or sending an email, fax, or letter to:

#### Individuals

[DORIncome@revenue.wi.gov](mailto:DORIncome@revenue.wi.gov)

Fax: (608) 267-1030

Wisconsin Department of Revenue  
Mail Stop 5-77  
PO Box 8949  
Madison WI 53708-8949

#### Fiduciaries

[DORStateandFiduciary@revenue.wi.gov](mailto:DORStateandFiduciary@revenue.wi.gov)

Fax: (608) 267-0834

Wisconsin Department of Revenue  
Mail Stop 5-144  
PO Box 8906  
Madison WI 53708-8906

#### Corporations

[DORFranchise@revenue.wi.gov](mailto:DORFranchise@revenue.wi.gov)

Fax: (608) 267-0834

Wisconsin Department of Revenue  
Mail Stop 5-144  
PO Box 8906  
Madison WI 53708-8906

## Reminder: Controlled Group Election for Combined Reporting

The designated agent of a commonly controlled group of corporations is allowed to make an election to include every corporation in the combined group without determining if each corporation is a unitary business.

### How to Make Election

The designated agent of the combined group makes the election by checking the box on line D6 on the first page of Form 6. Once the election has been made, the box should not be checked in subsequent tax years.

### When to Make Election

The designated agent must make the election on the timely filed original return by the extended due date or on an amended return filed on or before the end of automatic 7-month extension period for filing the original return.

### What to Include

The first year the election is made, the designated agent must include a statement with the return that includes the following:

- A listing of every corporation in the combined group,
- A statement that each member agrees to be bound by the election, and
- A statement that the election will apply to any member that subsequently joins the group.

### Length of Election

The election is binding on all members of the combined group for the year the election is made and for the next nine taxable years. Any members that join the group are also bound by the election; however, a member is not bound by the election upon departure from the group.

After the ten-year election expires, the designated agent may renew the election for another ten years by checking the box on line D6 on the first page of Form 6. The requirements for making the renewal are the same as making the initial election described earlier.

### Limitations

The controlled group election does not have an effect on the commonly controlled group test or the water's edge test. If the designated agent makes the controlled group election, all of the corporations will forgo the unitary business test, but all the corporations must still meet the requirements of the commonly controlled group and water's edge test as explained in [s. Tax 2.61\(3\) and \(4\), Wis. Adm. Code](#).

Finally, the department may not disregard the tax effect of an election, or disallow the election for any year the election applies.

### Negligence Penalties

Prior to 2011 Act 68, the statutes had numerous provisions for imposing negligence penalties for different tax types, but the language varied slightly. All the provisions required the taxpayer to prove that they had reasonable cause for their conduct, which was not due to neglect or willful neglect.

Section 73.16(4), Wis. Stats., as created by 2011 Act 68, provides that "[t]he department shall not impose a penalty on a taxpayer under ss. 71.09 (11) (d), 71.83 (1) (a) 1. to 4. and (3) (a), 76.05 (2), 76.14, 76.28 (6) (b), 76.39 (3), 76.645 (2), 77.60 (2) (intro.), (3), and (4), 78.68 (3) and (4), and 139.25 (3) and (4), unless the department shows that the taxpayer's action or inaction was due to the taxpayer's willful neglect and not to reasonable cause." This statute implemented a uniform standard for imposing negligence penalties, and shifted the burden of proof from the taxpayer to the department, but it did not establish a new standard for what needs to be proved to impose negligence penalties.

Although "willful neglect" and "reasonable cause" are not defined in the statutes, these standards have a long statutory and case history in Wisconsin. See e.g. *Ruhl Enterprises, Inc. v. Wis. Dep't of Revenue*, Wis. Tax Rep. (CCH) ¶201-924 (WTAC 1981). "Reasonable cause" means the taxpayer's action or inaction occurred even though the taxpayer exercised ordinary business care and prudence. "Willful neglect" does not mean intentional conduct. Other provisions in the tax statutes penalize intentional or fraudulent conduct, and those penalties are significantly higher than the penalties for negligence. In addition, similar use of this "willful neglect" and "reasonable cause" language can be found in the imposition of penalties under the Internal Revenue Code § 6651 and its regulations.

## New Fact Sheet for Multipurpose Facility Rentals

The rental of a multipurpose facility is subject to Wisconsin sales tax if the facility is used for an amusement, athletic, entertainment, or recreational purpose. A new fact sheet for [Multipurpose Facility Rentals \(Fact Sheet 2107\)](#) has been posted to the department's website. The fact sheet includes a chart that provides the tax treatment for certain uses of a facility.

## Sales and Use Tax Report Available

The latest issue of the [Sales and Use Tax Report](#) became available on the Department of Revenue's website in September. The *Sales and Use Tax Report* provides information concerning recent sales and use tax law changes and other pertinent sales and use tax information. Listed below are the articles in the September 2014 *Sales and Use Tax Report* (Issue 3-14). Links provided are to articles in [News for Tax Professionals](#) concerning the same subject matter.

- Reminder! Village of Stockholm's Premier Resort Area Tax Becomes Effective October 1, 2014
- Internet Access Services Are Taxable
- Motor Vehicle Dealers' Measure of Use Tax Increased to \$152
- [Wisconsin Tax Update Seminars](#)
- [Amusement Device Operators: How Do Wisconsin Sales/Use and Income/Franchise Taxes Apply?](#)
- [Janitorial Services](#)
- [Hospitals and Medical Clinics: Do You Owe Wisconsin Sales Tax on Your Sales?](#)
- Disregarded Entities – Notice of Name Change
- Sellers of Heavy Trucks and Trailers – Change in Requirements for Reporting Sales Tax
- Sales and Use Tax Rules Amended to Reflect Statutory Changes
- [My Tax Account Email Address Update](#)
- Rentals of Multipurpose Facilities May Be Taxable

## Credit Card Purchases – Don't Pay Twice!

Many businesses and individuals pay for purchases using credit cards. Typically, these purchases are made from out-of-state vendors. The order may be placed on the Internet, via FAX, or by telephone, and the purchaser may not always print or keep a copy of the receipt.

It is presumed that all purchases of tangible personal property, or items, property, or goods specified under [sec. 77.52 \(1\)\(b\), \(c\), or \(d\)](#), Wis. Stats. (2011-12), or taxable services are subject to use tax, unless the contrary is established. Without a copy of the receipt with the tax separately stated, the purchaser is liable for the tax. Section [77.53\(2\)](#), Wis. Stats. (2011-12), states, in part, the following:

**“The person's liability is not extinguished until the tax has been paid to this state, but a receipt with the tax separately stated from a retailer engaged in business in this state ... given to the purchaser ... relieves the purchaser from further liability for the tax to which the receipt refers.”** (Emphasis added.)

When auditing a business, the Department of Revenue will make adjustments where no documentation exists to show that sales or use tax has been paid on a taxable transaction. Businesses and individuals should make sure they have copies of receipts showing that tax has been paid to ensure they don't pay the tax twice!

**Reminder: Village of Stockholm Adopts Premier Resort Area Tax Effective October 1, 2014**

**Beginning October 1, 2014**, the 0.5% premier resort area tax is in effect in the Village of Stockholm.

Retailers who (1) make sales of taxable products or taxable services that take place in the Village of Stockholm after September 30, 2014 **and** (2) are classified under one of the Standard Industrial Classification numbers noted in the department's [Premier Resort Area Tax](#) common questions must remit premier resort area tax on such sales.

If you are a retailer who meets both of the conditions above, you must be registered to report premier resort area tax. If you are not already registered for premier resort area tax, send us your legal name, address, and 15-digit sales tax number by one of the following:

**Email:** [DORRegistration@revenue.wi.gov](mailto:DORRegistration@revenue.wi.gov)

**Fax:** (608) 327-0232

**Mail:** Wisconsin Department of Revenue  
Registration Unit  
PO Box 8902  
Madison, WI 53708-8902

**Note:** Premier resort area tax is filed separately from the sales and use tax return.

For more information about the premier resort area tax, see [Publication 403](#), *Premier Resort Area Tax*.



## Report on Litigation

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

The following decision is included:

### Sales and Use Tax

Service charges	
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## SALES AND USE TAX

**Service charges.** *NEJA Group, LLC vs. Wisconsin Department of Revenue* (Walworth County Circuit Court, August 22, 2014). This is a judicial review of the Wisconsin Tax Appeals Commission decision dated January 13, 2014. See *Wisconsin Tax Bulletin* 183 (January 2014), page 18, for a summary of the Wisconsin Tax Appeals Commission's decision.

At issue in this case is whether the taxpayer, operator of Alpine Valley Music Theatre at the time of audit, owes sales and use tax on the total customer convenience charges and handling fees charged by Ticketmaster Corporation ("Ticketmaster").

The Commission held (1) that Ticketmaster was an agent of the taxpayer for the purpose of selling tickets to Alpine Valley shows, (2) the customer convenience charges and handling fees charged by Ticketmaster were part of the gross receipts from the sale of admissions, (3) the Ticketmaster service charges were taxable because they were part of the total sales price of the tickets and were related to the sale and (4) the taxpayer can be taxed for the gross receipts of Ticketmaster's sales of Alpine Valley admissions.

The Circuit Court affirmed the Commission's decision finding that the Commission's statutory interpretations are not contrary to the clear meaning of the statute and more reasonable interpretations do not exist. The Court further finds that the Commission's interpretation of the administrative code is consistent with the clear meaning or purpose of the rule.

It is not known whether the taxpayer will appeal this decision.



# Tax Releases

“Tax Releases” are designed to provide answers to the specific tax questions covered, based on the facts indicated. In situations where the facts vary from those in a tax release, the answers may not apply. Unless otherwise indicated, tax releases apply for all periods open to adjustment, and all references to section numbers are to the Wisconsin Statutes. (Caution: Tax releases reflect the position of the Wisconsin Department of Revenue, of laws enacted by the Wisconsin Legislature as of the date published in this Bulletin. Laws enacted after that date, new administrative rules, and court decisions may change the answers in a tax release.)

The following tax release is included:

## Sales and Use Tax

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## SALES AND USE TAX

### 1 Common and Contract Carrier Exemption

**Introduction:** This tax release replaces the tax release by the same title that appeared in *Wisconsin Tax Bulletin* 110 (July 1998), pages 31 through 37. This tax release reflects the change in the definition of "common carrier" in sec. 194.01(1), Wis. Stats., as amended by 2013 Wis. Act 364. It also reflects the Wisconsin Tax Appeals Commission's decision in *Freight Lime and Sand Hauling, Inc. vs. Wisconsin Department of Revenue* (November 20, 2002).

**Statutes:** Sections 77.54(5)(b), 194.01(1), (2), and (4), and 340.01(4), (31), (34), (53), (57), (71), and (73), Wis. Stats. (2011-12)

**Wis. Adm. Code:** Section Tax 11.16, Wis. Adm. Code (November 2010 Register)

- I. Background:** This tax release explains the requirements that must be met for sales of trucks, trailers, etc., to common or contract carriers to qualify for the sales and use tax exemption in sec. 77.54(5)(b), Wis. Stats. (2011-12).

Section 77.54(5)(b), Wis. Stats. (2011-12), provides a sales and use tax exemption for the sales price from the sale of and the storage, use, or other consumption of:

“Motor trucks, truck tractors, road tractors, buses, trailers and semitrailers, and accessories, attachments, parts, supplies and materials therefor, sold to common or contract carriers who use such motor trucks, truck tractors, road tractors, buses, trailers and semitrailers exclusively as common or contract carriers, including the urban mass transportation of passengers as defined in s. 71.38.”

### II. Requirements for Exemption:

#### A. General

Three requirements must be met to qualify for the sales and use tax exemption in sec. 77.54(5)(b), Wis. Stats. (2011-12).

1. Item must be **sold to a common or contract carrier**.

2. Item sold must be a **motor truck, truck tractor, road tractor, bus, trailer, or semitrailer, or accessory, attachment, part, supply, or material for a motor truck, truck tractor, road tractor, bus, trailer, or semitrailer.**
3. Item sold must be **used** by the common or contract carrier **exclusively as a common or contract carrier.**

Additional information about each of the three requirements follows.

**Note:** A licensed carrier (LC) number is required under the Department of Transportation rules if a common or contract carrier hauls goods of others for hire. The holding of an LC number does not, in itself, fulfill the requirements of the sales and use tax exemption. The sales and use tax exemption applies only if the common or contract carrier uses the vehicle exclusively for hauling goods of others for hire.

#### **B. Requirement 1: Item must be sold to a common or contract carrier.**

For purposes of the exemption in sec. 77.54(5)(b), Wis. Stats. (2011-12), “**common carrier**” has the same meaning as “common motor carrier” in sec. 194.01(1), Wis. Stats. (2011-12). “**Contract carrier**” has the same meaning as “contract motor carrier” in sec. 194.01(2), Wis. Stats. (2011-12). See definitions below.

“**Common motor carrier**” is defined in sec. 194.01(1), Wis. Stats. (2011-12), as amended by 2013 Wis. Act 364, as “any person who holds himself or herself out to the public as willing to undertake for hire to transport passengers or property by motor vehicle upon the public highways. The transportation of passengers in taxicab service or in commuter car pool or van pool vehicles that are designed to carry less than 8 passengers, including the driver or in a school bus under s. 120.13 (27) is not transportation by a common motor carrier.”

“**Contract motor carrier**” is defined in sec. 194.01(2), Wis. Stats. (2011-12), as “any person engaged in the transportation by motor vehicle over a regular or irregular route upon the public highways of property for hire, including the transportation of buildings, as defined in s. 348.27 (12m) (a) 1.”

“**For hire**” as used in sec. 194.01(1) and (2), is defined in sec. 194.01(4), Wis. Stats. (2011-12). It means “for compensation, and includes compensation obtained by a motor carrier indirectly, by subtraction from the purchase price or addition to the selling price of property transported, where the purchase or sale thereof is not a bona fide purchase or sale. Any person who pretends to purchase property to be transported by such person or who purchases property immediately prior to and sells it immediately after the transportation thereof shall be deemed to be transporting the property for hire and not a bona fide purchaser or seller thereof. The rental of a motor vehicle to a person for transportation of the person’s property which rental directly or indirectly includes the services of a driver shall be deemed to be transportation for hire and not private carriage. This subsection does not apply to motor vehicle operations which are conducted merely as an incident to or in furtherance of any business or industrial activity.”

#### **C. Requirement 2: Item sold must be a motor truck, truck tractor, road tractor, bus, trailer, or semitrailer, or accessory, attachment, part, supply, or material for a motor truck, truck tractor, road tractor, bus, trailer, or semitrailer.**

##### **1. Definitions of Motor Truck, etc.**

For purposes of the exemption in sec. 77.54(5)(b), Wis. Stats. (2011-12), the following definitions apply:

“**Bus**” means a motor vehicle designed primarily for the transportation of persons rather than property and having a passenger-carrying capacity of 16 or more persons, including the operator. Passenger-carrying capacity shall be determined by dividing by 20 the total seating space measured in inches. (Same as definition of “motor bus” in sec. 340.01(31), Wis. Stats. (2011-12).)

“**Motor truck**” means every motor vehicle designed, used or maintained primarily for the transportation of property. (sec. 340.01(34), Wis. Stats. (2011-12))

“**Road tractor**” means a motor vehicle designed and used for drawing other vehicles and not so constructed as to carry any load thereon either independently or any part of the weight of the vehicle or load so drawn. (sec. 340.01(53), Wis. Stats. (2011-12))

“**Semitrailer**” means a vehicle of the trailer type so designed and used in conjunction with a motor vehicle that some part of its own weight and that of its own load rests upon or is carried by another vehicle, but does not include a mobile home. A vehicle used with a ready-mix motor truck to spread the load is considered a semitrailer. (sec. 340.01(57), Wis. Stats. (2011-12))

“**Trailer**” means a vehicle without motive power designed for carrying property or passengers wholly on its own structure and for being drawn by a motor vehicle, but does not include a mobile home. (sec. 340.01(71), Wis. Stats. (2011-12))

“**Truck tractor**” means a motor vehicle designed and used primarily for drawing other vehicles and not so constructed as to carry a load other than a part of the weight of the vehicle and load so drawn. (sec. 340.01(73), Wis. Stats. (2011-12))

(**Note:** Motor truck, road tractor, and truck tractor do not include an automobile as defined in sec. 340.01(4), Wis. Stats. (2011-12), unless the automobile is registered as a truck.)

2. **Accessories, attachments, parts, supplies, and materials for motor trucks, etc.** Accessories, attachments, parts, supplies, and materials for motor trucks, etc., includes items that are assigned to and carried on an exempt vehicle.

Examples include dollies, pianoboards, ladders, walkboards, tire chains, fire extinguishers, flares, bug deflectors, engine block heaters, defroster fans, auxiliary heaters and cooling units and their fuel, radios, flag kits including flags and reflectors, cell phones, tracking devices, GPS units, on-board recorders, and items designed to be used with a vehicle which protect or secure the vehicle’s load including tape, fitted tarpaulins, tarpaulin straps, furniture pads and covers, load holding chains, logistic straps, and shoring beams.

The exemption in sec. 77.54(5)(b), Wis. Stats. (2011-12), for accessories, etc., does not include corrugated boxes, containers, and related materials that are transferred to customers in conjunction with the selling, performing, or furnishing of a moving service.

Equipment acquired by a carrier for the repair, service, or maintenance of its exempt vehicles is also not exempt, including repair tools, welding torches, battery chargers, and grinding discs.

**D. Requirement 3: Item sold must be used by the common or contract carrier exclusively as a common or contract carrier.**

“Exclusively,” as used in sec. 77.54(5)(b), Wis. Stats. (2011-12), means that “the motor trucks, truck tractors, road tractors, buses, trailers and semitrailers are used solely as common or contract carriers to the exclusion of all other uses, except that the sales and use tax exemption for this tangible personal property will not be invalidated by an infrequent and sporadic use other than as a common or contract carrier.” (Section Tax 11.16(1)(am), Wis. Adm. Code (November 2010 Register))

When determining whether a waste hauler's purchase of vehicles qualifies for the exemption in sec. 77.54(5)(b), Wis. Stats. (2011-12), it must be determined whether the vehicle is used in contract carriage or in providing a disposal service.

In *Freight Lime and Sand Hauling, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, November 20, 2002), the Commission ruled that the value of the property being transported is not a factor in whether a company is considered to be a contract carrier or providing a disposal service:

“We believe that the important distinction between a disposal firm (which may dispose of waste as it sees fit, without regard to the wishes of the waste generator) and a contract carrier is that the latter is mandated to transport property owned by another to a party or place of the shipper’s choosing, and that a contract carrier does not take title to the property. The value of the property is immaterial.”

An explanation of how this decision applies is provided in [Wisconsin Tax Bulletin #134](#) (April 2003), in the article titled "Waste Hauler May Qualify for Common or Contract Carrier Exemption," on page 4 of the bulletin.

A waste hauler's purchase of a vehicle *does not* qualify for the exemption in sec. 77.54(5)(b), Wis. Stats. (2011-12), if **either** of the following applies:

- The waste hauler may dispose of the waste as it sees fit, without regard to the wishes of its customers, OR
- The waste hauler takes title to the property being hauled.

The waste hauler is considered to be hauling property of others for hire and the vehicle qualifies for exemption under sec. 77.54(5)(b), Wis. Stats. (2011-12), if **all** of the following apply:

- All of the waste hauler's customers direct the waste hauler to transport the waste to a party or place of the customer's choosing , AND
- The waste hauler does not take title to the property that is being hauled, AND
- The vehicle is used *exclusively in this manner*.

**III. Examples:** The following examples illustrate how the exemption provided in sec. 77.54(5)(b), Wis. Stats. (2011-12), applies to purchases of motor trucks, etc.

**A. Company engaged in business as a common or contract carrier only**

**Example 1:**

*Facts:*

- Company A holds itself out to the public as willing to transport property for compensation upon the public highways by advertising in the yellow pages and by other advertising (i.e., Company A is a common carrier).
- Company A is not engaged in any business other than as a common carrier.

*Tax Treatment:*

Company A qualifies for exemption under sec. 77.54(5)(b), Wis. Stats. (2011-12), on its purchases of motor trucks, etc., which it uses exclusively as a common carrier.

**Example 2:**

*Facts:*

- Company B enters into an agreement with Company C to transport Company C’s products for compensation upon the public highways to various locations, as determined by Company C. Company B only hauls for persons it contracts with and does not hold itself out to the public as willing to transport persons or property for hire (i.e., Company B is a contract carrier).
- Company B is not engaged in any business other than as a contract carrier.

*Tax Treatment:*

Company B qualifies for exemption under sec. 77.54(5)(b), Wis. Stats. (2011-12), on its purchases of motor trucks, etc., which it uses exclusively as a contract carrier.

**B. Company engaged in business as a common or contract carrier and has non-carrier business activities****Example 3:***Facts:*

- Company F is engaged in business as a manufacturer and seller of widgets and as a common carrier.
- Company F's primary business is the manufacture and sale of widgets.
- Company F has 10 motor trucks; 9 of which it uses exclusively in private carriage to transport its own widgets, and one which it uses exclusively in for-hire transportation of property.
- Company F's common carrier operations account for approximately 5% of its business activities.
- For its common carrier operations, Company F meets the definition of "common carrier" (i.e., Company F holds itself out to the public as willing to transport property for hire over the public highways by advertising in the yellow pages and by other advertising).

*Tax Treatment:*

Company F must pay sales or use tax on the 9 motor trucks it uses to transport its own widgets. It qualifies for exemption under sec. 77.54(5)(b), Wis. Stats. (2011-12), on its purchase of the one motor truck which it uses exclusively as a common carrier.

**Example 4:***Facts:*

- Company G is engaged in business as a manufacturer and seller of widgets and as a contract carrier.
- Company G's primary business is the manufacture and sale of widgets.
- Company G has 10 motor trucks; 9 of which it uses exclusively in private carriage to transport its own widgets, and one which it uses exclusively as a contract carrier.
- Company G's contract carrier operations account for approximately 5% of its business activities.
- For its contract carrier operations, Company G enters into an agreement with Company H to transport Company H's products to various locations, as determined by Company H.

*Tax Treatment:*

Company G must pay sales or use tax on the 9 motor trucks it uses to transport its own widgets. It qualifies for exemption under sec. 77.54(5)(b), Wis. Stats. (2011-12), on its purchase of the one motor truck which it uses exclusively as a contract carrier.

**Example 5:***Facts:*

- Company D meets the definition of "common carrier" (i.e., Company D holds itself out to the public as willing to transport property for hire over the public highways by advertising in the yellow pages and by other advertising).
- Company D does not hold itself out to the public as being engaged in business as a retailer of gravel.
- Company D enters into an agreement with Company E to transport gravel upon the public highways to Company E's construction site.

- Company D purchases gravel from a gravel pit operator who immediately loads the gravel into Company D's motor trucks.
- Company D transports the gravel to Company E's construction site and immediately transfers possession of the gravel to Company E by dumping it in a pile.
- Company D bills Company E for the gravel plus a charge for transportation.
- Company D makes its profit by hauling. Company D's hauling operations are not conducted as an incident to or in furtherance of any business or industrial activity.
- Company D is not engaged in any business other than that described above, and does not use its motor trucks other than as described above.

*Tax Treatment:*

Company D qualifies for exemption under sec. 77.54(5)(b), Wis. Stats. (2011-12), on its purchases of motor trucks. Company D meets the definition of "common motor carrier" in sec. 194.01(1), Wis. Stats. (2011-12), because it holds itself out to the public as willing to transport property (gravel) upon the public highways "for hire."

The transportation performed by Company D is "for hire," as defined in sec. 194.01(4), Wis. Stats. (2011-12), because: (1) Company D purchases property immediately prior to transporting it and sells it immediately after transporting it; and (2) Company D's motor vehicle operations are not conducted merely as an incident to or in furtherance of any business or industrial activity.

Company D qualifies for exemption under sec. 77.54(5)(b), Wis. Stats. (2011-12), on its purchases of motor trucks because it uses the motor trucks exclusively as a common carrier.

**Example 6:**

*Facts:*

- Company A is engaged in business as a landscaper.
- Company A also holds itself out to the public as a seller of fill dirt and topsoil as part of its landscaping business.
- Company A enters into an agreement with customers to sell fill dirt and topsoil and deliver the fill dirt and topsoil to the customers.
- Company A purchases fill dirt and topsoil from various suppliers and immediately loads the fill dirt and topsoil into Company A's trucks.
- Company A transports the fill dirt and topsoil to the customers' locations and transfers possession of the fill dirt and topsoil to the customers, by dumping it in piles.
- Company A bills the customers for the fill dirt and topsoil, plus a charge for transportation.
- Company A makes its profit from buying and selling fill dirt and topsoil, from transporting fill dirt and topsoil, and from landscaping activities.

*Tax Treatment:*

Company A must pay sales or use tax on the trucks it uses to transport fill dirt and topsoil to its customers. Company A's transportation of fill dirt and topsoil is not "for hire," as defined in sec. 194.01(4), Wis. Stats. (2011-12), because the transportation is conducted in furtherance of its business of landscaping and buying and selling fill dirt and topsoil.

**C. Company engaged in a non-carrier business only****Example 7:***Facts:*

- Company I is engaged in business as a manufacturer and seller of widgets.
- Company I has 10 motor trucks, all of which it uses to transport the widgets it manufactures to its customers (i.e., private carriage).

*Tax Treatment:*

Company I must pay sales or use tax on the 10 motor trucks which it uses in private carriage.

**D. Non-exclusive use****Example 8:***Facts:*

- Company J is engaged in business as a manufacturer and seller of widgets and as a common carrier.
- For its common carrier operations, Company J meets the definition of “common carrier” (i.e., Company J holds itself out to the public as willing to transport property for hire over the public highways by advertising in the yellow pages and by other advertising).
- Company J has one motor truck which it uses 40% in private carriage to transport its own widgets and 60% as a common carrier.

*Tax Treatment:*

Company J's purchase of the motor truck does not qualify for exemption under sec. 77.54(5)(b), Wis. Stats. (2011-12), because it is not used exclusively as a common or contract carrier.

**E. Garbage and snow hauling****Example 9:***Facts:*

- Company M hires Hauler N to pick up its garbage.
- Landfill L charges Company M an amount per ton for dumping.
- Company M directs Hauler N to transport the garbage to Landfill L.
- Hauler N may not transport the garbage to any other landfill.
- Hauler N does not take title to the garbage that it hauls.
- Hauler N uses its motor truck exclusively to haul garbage for Company M, as described above.

*Tax Treatment:*

Hauler N's purchase of the motor truck qualifies for exemption under sec. 77.54(5)(b), Wis. Stats. (2011-12), because it is used exclusively in hauling property of others for hire.

**Example 10:***Facts:*

- Company O hires Hauler P to pick up its garbage and dispose of the garbage.
- Once Hauler P picks up the garbage, Hauler P may dispose of the garbage in any legal manner.

- Hauler P chooses to take the garbage to Landfill L.
- Landfill L charges Hauler P an amount per ton for dumping.
- Hauler P uses its motor truck exclusively in the manner described above.

*Tax Treatment:*

Hauler P does not qualify for exemption under sec. 77.54(5)(b), Wis. Stats. (2011-12), on its purchase of the motor truck, because it is not used in hauling property of others. The motor truck is used by Hauler P in its provision of a disposal service.

**Example 11:**

*Facts:*

- Municipality Q has excess snow which has been plowed from streets. Municipality Q does not have room to store the snow.
- Municipality Q hires Hauler R to haul excess snow to an empty lot where it will melt.
- Municipality Q directs Hauler R to haul the snow to a specific empty lot.
- Hauler R may not transport the snow to any other location.
- Hauler R does not take title to the snow that it hauls.
- Hauler R uses its motor truck exclusively in the manner described above.

*Tax Treatment:*

Hauler R's purchase of the motor truck qualifies for exemption under sec. 77.54(5)(b), Wis. Stats. (2011-12), because it is used exclusively in hauling property of others for hire.



## 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 ruling is included:

### Sales and Use Tax

Prosthetic devices and durable medical equipment  
W1434002 (p. 16)

✱ **W1434002** ✱

**June 4, 2014**

**Type Tax:** Sales and Use Tax

**Issue:** Prosthetic devices and durable medical equipment

**Statute:** Sections [77.51\(3pm\)](#) and [\(11m\)](#) and [77.54\(22b\)](#), Wis. Stats. (2011-12)

**Administrative Code:** Section Tax 11.08(2)(b) and (4)(b), Wis. Adm. Code (November 2010 Register)

This letter responds to your request for a private letter ruling postmarked April 8, 2014.

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

#### The Company

Company A is a commercial-stage oncology company dedicated to the development and commercialization of tumor treating fields (“TTFields”). TTFields therapy is for the treatment of cancer patients with solid tumors. TTFields therapy is a low-toxicity treatment that uses low-intensity, alternating electric fields to exert physical forces on the electrically charged components of dividing cancer cells, which is intended to disrupt cell division and cause cancer cell death.

TTFields therapy is delivered via a treatment which allows patients to maintain their normal daily activities while receiving continuous anti-cancer treatment. Company A developed the TTFields therapy to treat solid tumors of the head. The treatment works by producing alternating electrical fields within the human body that are believed to disrupt the rapid cell division exhibited by cancer cells. The alternating electrical fields are applied to the brain through electrodes placed on the scalp.

In April 2011, Company A received FDA approval to market the TTFields therapy as a stand-alone treatment for adults with confirmed glioblastoma or GBM that recurs (referred to as recurrent GBM). GBM is the most common and most aggressive malignant brain tumor. The approval is based on a Phase 3 study which demonstrated that TTFields therapy was equally as effective as standard of care chemotherapy for the treatment of recurrent GBM. Patients with recurrent GBM face a poor prognosis with a one-year survival rate of approximately 10% and a median overall survival time of three to five months when left untreated.

The FDA issues approvals for new drugs, biological licenses, and pre-market approval ("PMA") devices. Medical devices are classified into Class I, II, and III. Regulatory control increases from Class I to Class III. The device classification regulation defines the regulatory requirements for a general device type. Most Class I devices are exempt from Premarket Notification 510(k); most Class II devices require Premarket Notification 510(k); and most Class III devices require Premarket Approval. Company A's TTFields therapy device is a PMA approved device.

The PMA pathway is the FDA process of scientific and regulatory review to evaluate the safety and effectiveness of Class III medical devices. Class III devices are those that support or sustain human life, are of substantial importance in preventing impairment of human health, or which present a potential, unreasonable risk of illness or injury. Due to the level of risk associated with Class III devices, FDA has determined that general and special controls alone are insufficient to assure the safety and effectiveness of Class III devices. Therefore, these devices require a premarket approval (PMA) application under section 515 of the FD&C Act in order to obtain marketing clearance.

PMA is the most stringent type of device marketing application required by FDA. The applicant must receive FDA approval of its PMA application prior to marketing the device. PMA approval is based on a determination by FDA that the PMA contains sufficient valid scientific evidence to assure that the device is safe and effective for its intended use(s). An approved PMA is, in effect, a government issued license granting the applicant (or owner) permission to market the device in the United States. The PMA owner, however, can authorize use of its data by another.

Conversely, durable medical equipment is generally marketed under a different registration pathway as they are generally Class I or II medical devices.

As a matter of course, the FDA publishes documentation about approved drugs and products on its website. A copy of the documents pertaining specifically to Company A's TTFields therapy device is attached as Exhibit A and can be found online.

There are 3 primary components to the TTFields therapy:

- An electric field generator, connection cables, a portable battery, power supply, rack and a power cord.
- INE transducer arrays.
- Ancillary items and accessories consisting of boxes, TTF bags, operations manuals and self-exchange kits.

The therapy is designed for continuous use throughout the day - the patient is able to maintain a normal daily routine while treating the disease.

- The therapy delivers non-invasive alternating electric fields through insulated arrays that are attached to the mechanism and placed directly on the skin in the region surrounding the tumor. Typically the arrays are removed and replaced two to three times per week. The arrays are replaced to ensure sufficient contact with the patient's skin.
- The components of the therapy are small, weighing six pounds, and are powered by a rechargeable battery in a bag that is carried by the patient so they maintain mobility.
- The system can be plugged in while the patient is stationary.
- Patients pay a monthly fee for the therapy which is broken down into a charge for the durable components and a monthly fee to purchase transducer arrays.
- Around the clock technical support is included in the fees.

A descriptive video of the therapy can be found on Company A's website.

To obtain the therapy, certified physicians write a prescription for the patient and submit the prescription to Company A's shipping facility location. The prescription is filled and the components of the therapy are shipped to the closest local technical support staff specialist or to the certified physician's office. The patient will receive an agreement to review and sign once they are trained how to apply the therapy themselves. The technical staff and the certified physician are trained on how to administer the TTF therapy to the patient in advance.

The day the patient starts treatment, the local technical support staff delivers the components of the therapy to the patient, they train and educate the patient on the proper way to administer the treatment and the technical aspects of the TTF therapy. The patient is provided with a user manual and technical support phone number. The patient then receives additional training and guidance and treatment initiation from their physician. The ongoing care of the patient and the medical assessments are conducted by the treating physician. All medical questions are referred to the treating physician.

It is the patients' responsibility to request additional arrays. Company A replaces batteries once capacity falls below a certain threshold. After initial treatment starts Company A typically ships arrays and other components directly to patients.

Company A bills the patient's 3rd party insurance provider, managed care company or in some cases, the patient directly. If a patient decides to discontinue the therapy they return the equipment and any remaining supplies to Company A at Company A's expense. As the arrays cannot be reused, Company A is responsible for collection and proper disposition of the arrays.

Company A provides a monthly invoice that includes all equipment and transducer arrays in one consolidated charge.

**Additional Facts from the U.S. Food and Drug Administration's (FDA's) website and your submitted Exhibit A:**

PMA (i.e., premarket approval) is the FDA process of scientific and regulatory review to evaluate the safety and effectiveness of Class III medical devices. Class III devices are those that support or sustain human life, are of substantial importance in preventing impairment of human health, or which present a potential, unreasonable risk of illness or injury.

Patients carry the device in an over-the-shoulder bag or backpack and receive continuous treatment without changing their daily routine. When the patient plans to stay in the same place for a while (e.g., when the patient is sleeping), the patient is instructed to plug the device into an outlet, rather than carry it in the bag or backpack: "You can continue your normal daily life while carrying the device in a shoulder bag or backpack... For sleeping, or other times when you plan to stay in the same place for a while, plug the device into a standard outlet." (Excerpt from Exhibit A: Patient Information and Operation Manual)

The patient is instructed to keep the TTField treatment on all of the time, including both when the patient is awake and when the patient is sleeping. Breaks from treatment should be kept as short as possible. "Interrupt treatment only for personal needs such as bathing, exercise, or any time where the device may be a distraction." (Excerpt from Exhibit A: Patient Information and Operation Manual)

**Question:**

Is the retail sale of Company A's TTFields therapy exempt from sales and use tax in Wisconsin pursuant to sec. 77.54(22b), Wis. Stats.?

**Answer:**

Yes, the sale of Company A's TTFields therapy is durable medical equipment and is, therefore, exempt from Wisconsin sales and use taxes when sold for use in a person's home.

**NOTE:** Sales of Company A's TTFields therapy for which the seller bills to and receives payment directly from Medicare are considered sales to the federal government and are, therefore, exempt from Wisconsin sales and use taxes to the extent of the amount of the reimbursement.

**Analysis:**

Wisconsin provides an exemption from Wisconsin sales and use taxes for prosthetic devices, as well as durable medical equipment that is sold for use in a person's home.

***Durable Medical Equipment***

Company A's TTFields therapy meets the definition of "durable medical equipment" in that it is equipment that 1) is primarily and customarily used for a medical purpose related to a person, 2) can withstand repeated use, 3) is not generally useful to a person who is not ill or injured, and 4) is not placed in or worn on the body.

In order to be mobile when using Company A's TTFields therapy, the user must place the device in an over-the-shoulder bag or backpack. Wearing an over-the-shoulder bag or backpack that holds the device is not considered to be "placed in or worn on the body." Although the electrodes are worn on the body, the electrodes qualify for the durable medical equipment exemption as accessories to the exempt device.

***Prosthetic Devices***

In order to meet the definition of "prosthetic device," a device must be a replacement, corrective, or supportive device that is placed in or worn on the body to artificially replace a missing portion of the body; to prevent or correct a physical deformity or malfunction or to support a weak or deformed portion of the body.

Section Tax 11.08(4)(b), Wis. Adm. Code (November 2010 Register), provides, in part, that "items that are attached to the body, but are either stationary or placed on a pole, cart, or other device that makes them portable are durable medical equipment and not prosthetic devices." Since Company A's TTFields therapy device must be placed in another device to make the TTFields system portable, the device is not considered to be placed in or worn on the body.

Therefore, with the exception of the electrodes, Company A's TTFields therapy is not "worn in or on the body" and does not meet the definition of "prosthetic device."

***Difference Between the Exemption for Durable Medical Equipment and Prosthetic Devices***

In order to qualify for exemption, durable medical equipment must be sold for use in a person's home. The exemption for prosthetic devices is not limited to devices that are sold for use in a person's home.

Based on the facts provided, Company A's TTFields therapy is sold for use in a person's home. While "use in a person's home" means that the equipment is sold to an individual for use where they are living, the exemption does not require that the *only* use of the durable medical equipment must be in a person's home to qualify for exemption. For example, durable medical equipment may still be considered to be for "use in a person's home," even if the person is using the device when shopping in a grocery store.

If Company A's TTFields therapy is not sold for use in a person's home (e.g., sold to a hospital or medical clinic that does not hold a Wisconsin Certificate of Exempt Status number), the sale of that system is subject to Wisconsin sales or use tax.

*Applicable Law*

Section 77.54(22b), Wis. Stats. (2011-12), provides an exemption from Wisconsin sales and use taxes for the following:

"The sales price from the sale of and the storage, use, or other consumption of durable medical equipment that is for use in a person's home, mobility-enhancing equipment, and prosthetic devices, and accessories for such equipment or devices, if the equipment or devices are used for a human being."

Section 77.51(3pm), Wis. Stats. (2011-12), defines "durable medical equipment" to mean "equipment, including the repair parts and replacement parts for the equipment, that is primarily and customarily used for a medical purpose related to a person; that can withstand repeated use; that is not generally useful to a person who is not ill or injured; and that is not placed in or worn on the body. 'Durable medical equipment' does not include mobility-enhancing equipment."

Section 77.51(11m), Wis. Stats. (2011-12), defines "prosthetic device" to mean "a replacement, corrective, or supportive device, including the repair parts and replacement parts for the device, that is placed in or worn on the body to artificially replace a missing portion of the body; to prevent or correct a physical deformity or malfunction; or to support a weak or deformed portion of the body."

Section Tax 11.08(2)(b), Wis. Adm. Code (November 2010 Register), explains the meaning of the phrase "for use in a person's home," for purposes of the exemption in sec. 77.54(22b), Wis. Stats. (2011-12):

"'Use in a person's home' means that the equipment is sold to an individual for use where they are living, regardless of whether the individual resides in a single family home, apartment building, nursing home, assisted living center, convalescent home, or school dormitory."

Section Tax 11.08(4)(b), Wis. Adm. Code (November 2010 Register), explains the meaning of the phrase "worn in or on the body," as used in the definition of "prosthetic device" in sec. 77.51(11m), Wis. Stats. (2011-12):

"A device is 'worn in or on the body' if the device is implanted or attached so that it becomes part of the body or if it is carried by the body and does not hinder the mobility of the individual. **Items that are attached to the body, but are either stationary or placed on a pole, cart, or other device that makes them portable are durable medical equipment and not prosthetic devices.** Therefore, these items are only exempt if they are purchased for use in a person's home." (Emphasis added)

Section Tax 11.45(6), Wis. Adm. Code (May 2010 Register), provides the following with respect to Medicare claims:

"The administrator of Medicare claims, such as surgical care-blue shield, is under contract to withdraw funds from the United States treasury to pay the providers of medical services or for medical supplies and equipment. If the provider of a taxable item bills the administrator directly in full or in part, the portion paid by the administrator is a tax exempt sale to the United States. If the provider of a taxable item bills an individual in full or in part who then seeks reimbursement from Medicare, the portion paid by the administrator to the individual is not an exempt sale to the United States."