

PRIVATE LETTER RULINGS

"Private letter rulings" are written statements issued to a taxpayer by the department that interpret Wisconsin tax laws to the taxpayer's specific set of facts. Any taxpayer may rely upon the ruling to the same extent as the requestor, provided the facts are the same as those set forth in the ruling.

The number assigned to each ruling is interpreted as follows: The first two digits are the year issued, the next two digits are the week issued, and the last three digits are the number in the series of rulings issued that year. "Issued" means when the ruling is available to be published (80 days after being mailed to the requestor). The date following the 7-digit number is the date the ruling was mailed to the requestor.

Certain information contained in the ruling that could identify the taxpayer requesting the ruling has been deleted. Wisconsin Publication 111, "How to get a Private Letter Ruling From the Department of Revenue", contains additional information about private letter rulings.

W9027004, April 17, 1990

Type Tax: Sales/Use

Statutes: Sections 77.51(9)(am), (13)(b) and (14)(a) and (e) and 77.54(7), Wis. Stats. (1987-88)

Issue: Disposition of business assets—occasional sales exemption

This letter responds to your request for a private letter ruling regarding the disposition of various business assets.

Facts

Company A, a division of Corporation B, is in the business of performing general contracting services for large construction projects in Wisconsin and Illinois.

Prior to February 1, 1990, Company A held a valid seller's permit for its Wisconsin office location. Company A rents land in Wisconsin for the purpose of storing and maintaining certain construction equipment. During the period preceding February 1, 1990, Company A would periodically rent certain construction equipment from the Wisconsin yard to other contractors. Although these transactions were neither large dollars nor numerous, Company A collected sales tax on such rentals and remitted the collections to the Wisconsin Department of Revenue.

On October 20, 1989, the Board of Directors of Corporation B decided to complete the work under signed construction contracts existing at that date and dispose of the assets of the construction division. No new contracts would be entered into after that date.

As of February 1, 1990, the division is in the process of completing its obligations under two contracts in Illinois. The projected date of

substantial completion for these contracts is approximately August 1, 1990. All contracts in Wisconsin are substantially complete. However, there is some work being performed to "finalize" these Wisconsin contracts in a manner which is acceptable to the owner of the project (e.g. completion of construction punchlists and warranty work).

Company A warrants its work under construction contracts for a period of one year after substantial completion of the project. Therefore, Company A will continue to incur warranty costs over the next year. The estimate of man hours required for warranty work is 1% of man hours projected for the projects or approximately 3,500 hours. No additional revenues are derived from warranty work. The management and administration of the warranty work is expected to be performed from the Wisconsin office location.

Company A's seller's permit was surrendered to the Wisconsin Department of Revenue on January 31, 1990. Company A no longer rents equipment to other contractors and conducts no other activities except those which are subject to this ruling request which would require Company A to have a seller's permit. Corporation B has two other divisions. The other divisions continue to hold seller's permits.

Company A's office and yard locations are regular business locations for Company A but are separate and distinct from all other operations of Corporation B.

Company A has hired a professional auction service to conduct an auction in early April 1990 to dispose of the majority of the assets of the construction business. The auction will be held at the yard location. In addition, office furniture will be sold from the office location as the business is concluded over the next year. It is also possible that Company A will sell certain equipment directly from either of the two Illinois construction jobsites.

Request

You have requested a ruling that the sales of the construction equipment and office furniture are exempt from sales and use tax as an "occasional" sale under sec. 77.51(9)(am), Wis. Stats.

You ask whether the fact that Company A has decided to liquidate its business, take on no new contracts and has discontinued renting equipment from the yard location, is sufficient for the taxpayer to meet the requirement that the taxpayer has "ceased operating the business at that location", even though Company A (as the general contractor) is in the process of completing construction work in Illinois and providing warranty work and completing punchlists in Wisconsin.

Ruling

The sale of construction equipment and office furniture at auction does not qualify as an exempt occasional sale. Rather the receipts from the auction sale of such items are taxable to the auction company.

The non-auction sale of construction equipment and office furniture from the yard, the office, or directly from a construction site administered by the office, by Company A after the February 1, 1990 surrender of its sellers permit may qualify as exempt occasional sales under secs. 77.51(9)(am) and 77.54(7), Wis. Stats.

Analysis

The auction company will provide a complete auction service and is deemed the retailer of property sold at the auction under rule Tax 11.50(2) Wis. Adm. Code and secs. 77.51(13)(b) and (14)(a) Wis. Stats. The auction company is making the retail sale under 77.51(14)(e) Wis. Stats., thus the auction company's receipts from the sale of Company A's equipment are subject to sales and use tax regardless of whether Company A held or is required to hold a sellers permit at the time of the auction.

As for the balance of equipment or furniture, not sold at auction, to be exempt from sales tax as an "occasional sale" under Wisconsin Statute 77.54(7), all three of the following conditions under sec. 77.51(9)(am) Wis. Stats., must be met:

1. The sale is of personal property (other than inventory held for sale) previously used by the seller to conduct its trade or business at a location.
2. The sale occurs after the seller ceased operating the business at that location.
3. The seller delivers its seller's permit to the Department of Revenue for cancellation within ten days after the last sale of personal property (other than inventory held for sale) at that location.

Requirement one has been met. The construction equipment and office furniture are personal property previously used in the construction business, rather than items held in inventory for resale. As a general contractor, Company A is considered the consumer of such items.

It should be noted that Company A stored certain construction equipment at the yard when not being used. Occasionally this equipment was rented to other contractors. The rental of the equipment was minor in relation to its use in Company A's construction projects. This incidental rental does not preclude its being sold as an exempt occasional sale under sec. 77.51(9)(am), Wis. Stats.

Requirement two is the primary issue on which the taxpayer is requesting a ruling. Has Company A ceased operating the equipment leasing and construction business at its Wisconsin office and yard location?

The construction business is a unique business unlike a retail store. Very little, if any, of Company A's construction work is actually done at its business (i.e., office) location. The business location is

where the administrative portion of the transaction takes place. Invitations to bid are delivered and contemplated there. Bids are initiated there and accepted bids are delivered there. Purchases of various supplies and materials to be used on the various projects are initiated there. Billing and collection activity would be conducted from that office location. However, the actual construction activities would be conducted at the various job sites around the state and/or country.

The business office is considered to be Company A's "place of operations" which required the holding of the seller's permit. That permit for the business office covered Company A's various construction projects throughout the state rather than having a permit for each individual job site.

The question is not whether all business activities cease at the business location, but whether all activities which require the holding of a sellers permit cease for business centered at that location.

The activities Company A will conduct from its business location after February 1, 1990 fall into two categories.

First, there are two construction projects located in Illinois. Personal property construction contracts performed outside of Wisconsin are not Wisconsin sales and thus not subject to Wisconsin sales tax, providing possession of the items transferred outside of Wisconsin. Real property construction contracts are not subject to sales tax whether performed in Wisconsin or elsewhere. No Wisconsin's sellers' permit is needed for these projects.

Second, all Wisconsin contracts are substantially complete except for some work being performed to "finalize" the contracts in a manner which is acceptable to the owner of the project. Company A warrants its work for one year after substantial completion. They could continue to conduct warranty work over the next year or so. The cost to the project owner for any warranty work would have been calculated in the original contract price. There will be no additional revenues (i.e., taxable receipts) from conducting the warranty work.

Under the particular facts and circumstances presented, Company A is no longer conducting any activities from its Wisconsin business location which require the holding of a seller's permit. For the purposes of requirement number two and sec. 77.51(9)(am) Wis. Stats., Company A has ceased operating the business at these locations.

Requirement three has already been met. Effective January 31, 1990, Company A surrendered all sellers' permits for the construction division.

Any sales of personal property directly from either of the Illinois construction sites where possession takes place in Illinois are not subject to Wisconsin sales tax if Company A does not hold or is not required to hold a Wisconsin seller's permit.

A sale of personal property from a location other than the Wisconsin yard, the Wisconsin office, or a Wisconsin construction site administered from the office, would not meet the requirements of "occasional sale" under sec. 77.51(9)(a) or (am), Wis. Stats., since Corporation B holds active seller's permits.

□

W9027005, April 18, 1990

Type Tax: Sales/Use

Statutes: Sections 77.51(9)(am), 77.52(7) and (9) and 77.54(7), Wis. Stats. (1987-88)

Issue: Sale of business assets — occasional sales exemption

This letter responds to your request for a Private Letter Ruling regarding the sales and use tax status of the sale of various cable television system assets as an exempt occasional sale.

Facts

Company A is the seller in this transaction.

Company A holds franchises to operate cable television systems in Wisconsin communities and is currently operating in those communities. These systems operate continuously, on a 24-hour, 7-day a week basis.

Company A presently operates its business from its offices in Wisconsin. Company A has a seller's permit.

The purchaser is Company B, or an affiliate or assignee to whom Company B may assign its rights under the Purchase Agreement (as defined below) prior to the closing (collectively, Company B).

Company B currently operates cable television systems in a number of Wisconsin communities. Company B is also registered to collect sales tax on its monthly billings to subscribers and to report and remit the sales tax to the Department.

The provision of cable television services is a taxable service under Section 77.52(2)(a)12, Wis. Stats.

Company A and Company B signed an Asset Purchase Agreement (the "Purchase Agreement"), pursuant to which Company A agreed to sell to Company B and Company B agreed to purchase from Company A certain assets used by Company A in the operation of its cable television system. The closing date has not yet been set.

Certain assets will be excluded from the sale, pursuant to the Purchase Agreement which Company A intends to retain. These assets are equipment that has been used, and is currently being used, by Company A, in its various construction activities. Company A

will transfer ownership of such assets to corporations controlled by one of Company A's principals. You have indicated that such corporations hold seller's permits and are registered to collect, report and remit sales tax as required.

Under FCC regulations certain consents, based on subscriber or subscriber equivalents, must be obtained before a cable television system franchise can be transferred.

In the event Company A is unable to acquire the necessary consents to transfer some franchises (i.e. system community units), those unconsented franchises will also be excluded from the assets transferred to Company B. Company B will act as manager of the retained franchises until such time as the necessary consents are obtained and the remaining franchises are transferred to Company B. Company B is to be responsible for collecting, reporting and remitting sales tax due for the providing of cable television system service for the franchises it manages.

Under the Purchase Agreement, all expenses and income attributable to the cable television business prior to the closing date are for the account of Company A and all expenses and income attributable to the cable television business for the period on and after the closing date are for the account of Company B.

The procedure will be one of the alternatives described in Alternatives (A) and (B), below.

Alternative (A). On the closing date, the representatives of Company A and Company B will meet to sign the various documents necessary to consummate the transactions. Such documents will be exchanged at such meeting, and the purchase price will be paid to Company A. Title to the subject assets will be deemed to pass to Company B effective as of immediately after the preceding midnight. Company A will discharge all Company A employees employed solely in connection with Company A's cable television operations effective as of immediately before the midnight preceding the closing date. All business activity from immediately after the midnight preceding the closing date will be attributed to Company B. At no time will programming services be discontinued by going "off the air."

Alternative (B). On the day before the closing date, the representatives of Company A and Company B will meet to sign the various documents necessary to consummate the transaction, and such documents, together with the purchase price, will be placed in escrow. Interest earned on the purchase price placed in escrow pending disbursement of the purchase price will be paid to Company B. Effective as of 11:59 p.m. on the day before the closing date, Company A will discharge all Company A employees employed solely in connection with Company A's cable television operations, and, at 11:59 p.m. on that date, Company A will discontinue all of its programming services in all communities by going "off the air." At 12:01 a.m., Company A and Company B will provide notice to the escrow agent indicating whether their respective conditions to closing have been satisfied. If such notice is to the effect that such conditions have been satisfied, the transaction shall be irrevocably

closed and Company B shall assume responsibility for the operation of the subject assets (including the risk of loss) and will resume the programming services by going back "on the air." If such notice is to the effect that such conditions have not been satisfied, the transaction will be abandoned, and Company A will reassume responsibility for the operation of the subject assets (including the risk of loss) and will resume the programming services by going back "on the air". Later that day, i.e., on the closing date, the escrow agent shall distribute the documents and funds to the parties entitled to receive them.

Under either Alternative (A) or (B), on the closing date, or within ten (10) days after the closing date, Company A will surrender its seller's permit to the Department for cancellation.

Request

Company A requests a ruling that the transaction described as alternative A qualifies as an exempt occasional sale under sec. 77.51(9)(am), Wis. Stats., or if the department will not rule that the procedure described in alternative A qualifies as an exempt occasional sale, Company A requests a ruling that the procedure described as Alternative B qualifies as an exempt occasional sale under sec. 77.51(9)(am), Wis. Stats.

Ruling

Based on the information submitted, the transaction described as Alternative A may be structured to qualify as an exempt occasional sale under secs. 77.51(9)(am) and 77.54(7) Wis. Stats.

Analysis

Occasional sales are exempt from sales and use tax under sec. 77.54(7) Wis. Stats., and are defined in part in sec. 77.51(9)(am) Wis. Stats. as follows:

"The sale of personal property, other than inventory held for sale, previously used by a seller to conduct its trade or business at a location after that person has ceased actively operating in the regular course of business as a seller of tangible personal property or taxable services at that location if the seller delivers its seller's permit to the department for cancellation within 10 days after the last sale at that location of that personal property other than inventory held for sale. This transaction is an occasional sale, even though the seller holds a seller's permit for one or more other locations."

There are essentially 3 requirements that must be met under this statute. First, the property must have been previously used by the seller to conduct its trade or business at a particular location. This exemption does not include items which the seller sold or held for sale in its regular course of business.

Second, the sale must occur after the seller has ceased actively operating in the regular course of business as a seller of tangible

personal property or taxable service (i.e., any activity that would require the holding of a seller's permit) at that location.

Third, the seller must deliver its seller's permit for that location, to the Department of Revenue within 10 days after the last sale of this business property at that location.

We must examine the facts presented in the ruling request to determine if they meet these requirements.

The property which is the subject of this ruling request is described as "assets used by Company A in the operation of its cable television system." The assets in question are not inventory to Company A, thus the first requirement has been met.

The second requirement contains two parts which must be addressed. When has a seller ceased actively operating as a seller of tangible personal property or tangible services, and perhaps unique to the cable television industry, what is the definition of location for which a seller's permit is required for the operation of a cable television system?

Section 77.52(7) and (9), Wis. Stats., provide that persons desiring to operate as a seller in Wisconsin shall have a separate seller's permit for each place of operations. This department has previously indicated its opinion that each "system community unit" owned by a cable television operator constitutes a "place of operations (i.e. location) which requires the holding of a seller's permit under sec. 77.52(7) and (9) Wis. Stats.

Under alternative A, Company A will cease actively operating its cable television system as of midnight preceding the closing. Title to the subject assets are deemed in the closing documents to have passed to Company B effective as of immediately after the preceding midnight. Company A will discharge all its employees (employed solely in connection with the cable tv operations) as of immediately before the midnight preceding the closing date. All business activity on the closing date will be attributed to Company B.

For purposes of sec. 77.54(9)(am), Company A will cease actively operating in the regular course of business as the seller of taxable cable television service as of midnight preceding the closing date, thus the second requirement will be met.

Company A must then surrender its seller's permit for each system community unit that is being sold within 10 days of the sale.

This procedure can be repeated for each of the retained system community units at such time as those units are sold.

It is noted that Company A holds a single seller's permit for its numerous system community units. This does not preclude Company A from the occasional sale exemption even if it will continue to need a seller's permit to operate the retained systems.

Company A should immediately apply for seller's permits for each place of operations and include the \$5.00 fee for each location. If at

the appropriate time Company A has the locational seller's permits in its possession it can surrender them as necessary. If at the appropriate time Company A has not yet received the permits (i.e., Application has been made but the physical permit has not yet been received), Company A should follow the procedure outlined in sec. Tax 11.13(3)(c) Wis. Adm. Code, for surrendering a lost or otherwise unavailable seller's permit and clearly identify the locations being sold. The letter of explanation should indicate that Company A has applied for separate multiple location permits for each system community unit, but that it has not yet received the permits, and that it wishes them to be considered surrendered.

Since alternative A may qualify as an exempt occasional sale under sec. 77.51(9)(am) Wis. Stats., and alternative A was the primary position in the ruling request, alternative B is not examined or ruled upon herein.



W9033007, May 24, 1990

Type Tax: Sales/Use

Statutes: Section 77.54(5)(b), Wis. Stats. (1987-88)

Issue: Contract carrier — transfer of assets

This letter responds to your request for a private letter ruling regarding the sales and use tax status of the transfer of transportation assets from a parent to a subsidiary that operates as a contract carrier.

Facts

Company A is a 100% owned subsidiary of Company B, both of which are located in Wisconsin. Company A operates exclusively as a contract carrier for Company B and other unrelated companies. Company A holds a licensed carrier (L.C.) number.

Company B wishes to transfer to Company A the transportation assets it holds in a nontaxable exchange under sec. 351 of the Internal Revenue Code.

Requests

The following questions are raised as part of this request:

1. May Company A purchase qualified vehicles for use in its operation as a contract carrier without payment of Wisconsin sales tax or use tax by operation of sec. 77.54(5)(b), Wis. Stats. (1987-88)?
2. Is the transfer of transportation assets from Company B to Company A exempt from Wisconsin sales or use tax under sec. 77.54(5)(b), Wis. Stats. (1987-88)?

3. May Company A purchase replacement and repair parts and maintenance services with respect to these vehicles without payment of Wisconsin sales or use tax by operation of sec. 77.54(5)(b), Wis. Stats. (1987-88)?

Ruling

1. Company A may purchase motor trucks, truck tractors, road tractors, buses, trailers and semi-trailers without payment of Wisconsin sales or use tax provided Company A uses these vehicles exclusively for hire. Although Company A acts as a contract carrier for its parent company, the exemption is not invalidated provided the contract is for hire.
2. The transfer of transportation assets from Company B to Company A is not subject to Wisconsin sales or use tax provided the transportation assets are motor trucks, truck tractors, road tractors, buses, trailers or semi-trailers or are accessories, attachments, parts, supplies or materials relating to such vehicles used exclusively as contract carriers.
3. Replacement parts, repair parts, and maintenance services Company A purchases for motor trucks, truck tractors, road tractors, buses, trailer or semi-trailers used exclusively in its contract carrier operation are exempt from Wisconsin sales or use tax.

Note: The fact that Company A holds an L.C. number is not sufficient to qualify for the exemption under sec. 77.54(5)(b), Wis. Stats. (1987-88). Any person hauling the goods of others for hire is required to hold an LC authority, according to Department of Transportation regulations. The sales tax exemption only applies to vehicles used exclusively in hauling the goods of others for hire.

Analysis

Section 77.54(5)(b), Wis. Stats. (1987-88), provides an exemption from Wisconsin sales or use tax for:

“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...”

Section Tax 11.16(1)(a), Wis. Adm. Code, defines “exclusively” to mean used as common or contract carriers to the exclusion of all other uses, except that the exemption will not be invalidated by infrequent and sporadic use other than as a common or contract carrier.

With respect to the exemption for maintenance services on the vehicles used as contract carriers, sec. 77.52(2)(a)10, Wis. Stats. (1987-88), provides that if tangible personal property is exempt from sales and use tax, the repair, service, alteration, fitting, cleaning, painting, coating, towing, inspection and maintenance of such exempt tangible personal property is also exempt from sales and use tax.

