



## 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 given herein, the answers may not apply. Unless otherwise indicated, tax releases apply for all periods open to adjustment. All references to section numbers are to the Wisconsin Statutes unless otherwise noted.

The following tax release is included:

### Sales and Use Taxes –

1. Occasional Sale Exemption in Section 77.54(7)(a), Wis. Stats.: When Does it Apply ?..... 30
2. Taxability of Computer Programs (Software)..... 38

### SALES AND USE TAXES

**Note:** The following tax releases interpret the Wisconsin sales and use tax law as it applies to the 5% state sales and use tax. The 0.5% county sales and use tax and the 0.5% football stadium and 0.1% baseball stadium sales and use taxes may also apply. For information on sales or purchases that are subject to the county or stadium sales and use tax, refer to Wisconsin Publication 201, *Wisconsin Sales and Use Tax Information*.

### 1 Occasional Sale Exemption in Section 77.54(7)(a), Wis. Stats.: When Does it Apply?

**Statutes:** Sections 77.51(9)(a) and 77.54(7)(a), Wis. Stats. (1997-98)

#### Purpose of Tax Release:

This tax release explains which sales qualify for the occasional sale exemption in sec. 77.54(7)(a), Wis. Stats. (1997-98).

**Caution:** This tax release does not apply to the following sales:

- Sales of business assets, sold after the seller has ceased actively operating in the regular course of business as a seller (sec. 77.51(9)(am), Wis. Stats.).

- Auction sales (sec. 77.51(9)(e), Wis. Stats.).
- Sales of motor vehicles, snowmobiles, mobile homes, trailers, semitrailers, all-terrain vehicles or aircraft registered or titled, or required to be registered or titled, in Wisconsin (sec. 77.54(7)(b), Wis. Stats.).
- Sales of boats registered or titled, or required to be registered or titled, in Wisconsin or under the laws of the United States (sec. 77.54(7)(b), Wis. Stats.).
- Sales by nonprofit organizations, including governmental units (sec. 77.54(7m), Wis. Stats.).

#### Law:

Section 77.54(7)(a), Wis. Stats. (1997-98), provides a sales and use tax exemption for:

“...the **occasional sales** of tangible personal property and services and the storage, use or other consumption in this state of tangible personal property the transfer of which to the purchaser is an occasional sale.” (Emphasis supplied)

Section 77.51(9)(a), Wis. Stats. (1997-98), provides that “**occasional sales**” include:

“Isolated and sporadic sales of tangible personal property or taxable services where the infrequency, in relation to the other circumstances, including the sales price and the gross profit, support the inference that the seller is not pursuing a vocation, occupation or business or a partial vocation or occupation or part-time business as a vendor of personal property or taxable services. No sale of any tangible personal property or taxable service may be deemed an occasional sale if at the time of such sale the seller holds or is required to hold a seller’s permit, except that this provision does not apply to an organization required to hold a seller’s permit solely for the purpose of conducting bingo games and except as provided in par. (am).” (**Note:** “Par. (am),” as used in sec. 77.51(9)(a), Wis. Stats. (1997-98), relates to sales of business assets, sold after the seller has ceased actively operating in the regular course of business as a seller. This tax release does not apply to such sales.)

**Questions Answered in This Tax Release:**

**Question 1:** If a seller's "taxable sales"\* are less than \$1,000 in a calendar year, does the occasional sale exemption in sec. 77.54(7)(a), Wis. Stats. (1997-98), apply for that year?.....See page 32

**Question 2:** If a seller's "taxable sales"\* are \$1,000 or more in a calendar year, does the occasional sale exemption in sec. 77.54(7)(a), Wis. Stats. (1997-98), apply for that year?.....See page 34

**Question 3:** If a seller's "taxable sales"\* are \$1,000 or more in a calendar year and do not qualify for the occasional sale exemption in sec. 77.54(7)(a), Wis. Stats. (1997-98), does the occasional sale exemption apply to the first \$999 of "taxable sales"\*? .....See page 36

**Question 4:** If a seller's "taxable sales"\* qualify for the occasional sale exemption in sec. 77.54(7)(a), Wis. Stats. (1997-98), may the seller give its supplier an exemption certificate claiming resale on tangible personal property or taxable services it purchases for resale?....See page 36

**Question 5:** May a seller inactivate its seller's permit and qualify for the occasional sale exemption in sec. 77.54(7)(a), Wis. Stats. (1997-98), for "taxable sales"\* made after it inactivates its permit?...See page 37

**Caution:** The following notes apply to this tax release:

**Note 1:** Page numbers refer to the page numbers of the tax release as it appears in *Wisconsin Tax Bulletin 122* (October 2000).

**Note 2:** The transactions and situations described in this tax release occur in Wisconsin, unless otherwise indicated.

**Note 3:** "Tangible personal property" and "Taxable services" are defined as follows:

- "Tangible personal property" means all tangible personal property, whether or not sales or use tax is imposed on the sale of such property.

**Example.** Manufacturer A sold \$50,000 of widgets (with no tax imposed) to wholesalers who provided Manufacturer A with exemption certificates claiming resale. It also sold furniture that it used in its office for \$10,000.

"Tangible personal property" of \$60,000 was sold by Manufacturer A. This includes both (1) the \$50,000 of widgets sold to wholesalers, and (2) the \$10,000 sale of furniture.

- "Taxable services" means those services listed in sec. 77.52(2)(a), Wis. Stats. (1997-98), whether or not sales or use tax is imposed on the sale of such services.

**Example.** Landscaper B sold \$100,000 of landscaping services to customers who provided Landscaper B with exemption certificates claiming resale. Landscaper B also sold lawn seeding services of \$2,000 to Customer C who did not provide an exemption certificate, and snowplowing services of \$30,000 to Customer D.

"Taxable services" of \$102,000 were sold by Landscaper B. This includes both (1) the \$100,000 of landscaping services for which it received exemption certificates, and (2) the \$2,000 sale to Customer C. "Taxable services" does not include the \$30,000 of snowplowing services. Snowplowing services are not listed in sec. 77.52(2)(a), Wis. Stats. (1997-98).

**Note 4:** "Taxable sales" means total taxable receipts from sales of tangible personal property and taxable services, after subtracting "allowable deductions." For those persons filing a sales and use tax return (Form ST-12), "allowable deductions" includes amounts properly reportable on the following lines of Form ST-12 (9/00 Revision):

- Line 2, Resale and exemption certificate sales
- Line 3, Sales of exempt property and services (interstate commerce, real property, groceries, highway fuel, etc.)
- Line 4, Other (sales tax if included in line 1, returns, trade-ins, etc.)

**Exception:** "Allowable deductions" does not include "tax paid purchases resold," which is deducted on line 4, Form ST-12. For example, Seller A sells tangible personal property to Seller B for \$100 plus \$5 sales tax. Seller B then sells the tangible personal property to Customer C for \$150 plus \$7.50 sales tax. Seller B may take a deduction of \$100 for "tax paid purchases resold" on line 4 of its Form ST-12, when reporting the tax on its sale to Customer C. However, the \$100 on line 4 is not

\* See Note 4 on pages 31 and 32 for a definition of "taxable sales."

an allowable deduction in determining “taxable sales.” Seller B’s “taxable sales” do include the \$150 sale of tangible personal property to Customer C.

For those who do not file a sales and use tax return, “allowable deductions” includes amounts which would be properly reported on lines 2 through 4 (except “tax paid purchases resold”), if the seller had filed an ST-12.)

### Examples of “Taxable Sales”:

**Example 1.** Individual D operates a business providing accounting services and also sells soda water beverages. Individual D’s total gross receipts from sales of accounting services and soda water beverages are \$30,900. The “accounting services” portion of Individual D’s total gross receipts is \$30,000. Soda water beverage sales are \$900.

Individual D’s “taxable sales” are \$900. Since accounting services are nontaxable services, the \$30,000 of receipts are not included in “taxable sales.”

**Example 2.** Company E operates a home construction business and also makes repairs to tangible personal property. Company E’s total gross receipts are \$51,500. Nontaxable real property construction activities generate \$50,000 of Company E’s total gross receipts. Repairs to tangible personal property generate \$1,500 of Company E’s total gross receipts. Company E receives exemption certificates for \$1,400 of the repairs to tangible personal property.

Company E’s “taxable sales” are \$100 (\$1,500 repairs to tangible personal property less \$1,400 of such repairs for which it receives properly completed exemption certificates).

**Note 5: “Required to hold a seller’s permit”:** A seller is “required to hold a seller’s permit” if it makes sales of tangible personal property or taxable services which:

- (a) Do not meet the definition of “occasional sales” in any of the following 3 provisions:
- Section 77.51(9)(a), Wis. Stats. (1997-98), which relates to isolated and sporadic sales,
  - Section 77.51(9)(am), Wis. Stats. (1997-98), which relates to certain sales of business assets, or

- Section 77.51(9)(e), Wis. Stats. (1997-98), which relates to certain auction sales; **and**

- (b) Are retail sales on which sales tax should be imposed (for example, sales of computers for which the seller does not receive an exemption certificate).

“Seller’s permit,” as used in this tax release, includes both seller’s permits and use tax registration certificates. Use tax registration certificates are generally issued by the Wisconsin Department of Revenue to retailers who do not have a physical location in Wisconsin.

### Questions, Answers, and Examples:

**Question 1:** If a seller’s “taxable sales”<sup>\*</sup> are less than \$1,000 in a calendar year, does the occasional sale exemption in sec. 77.54(7)(a), Wis. Stats. (1997-98), apply for that year?

**Answer 1:** Yes.

**Exception:** The “taxable sales”<sup>\*</sup> **do not qualify** for the occasional sale exemption if the seller:

- (a) Holds a seller’s permit at the time of the sales, or does not hold a seller’s permit but is required to hold a seller’s permit, and
- (b) The tangible personal property sold is a business asset of the seller (including inventory), or the taxable services sold are sold in the seller’s business to which the seller’s permit, or seller’s permit requirement, relates.

**Note:** If a seller’s “taxable sales”<sup>\*</sup> are less than \$1,000 during the calendar year, and the exception above does not apply, the seller’s sales qualify for the occasional sale exemption, regardless of the frequency of the seller’s “taxable sales.”<sup>\*</sup>

### A. Examples - “Taxable Sales”<sup>\*</sup> Are Less Than \$1,000, Seller Is Not in a Business

**Example 1.** From April to October each year, Individual A mows lawns for neighbors. Individual A does not hold a seller’s permit and does not make any other “taxable sales”<sup>\*</sup> of tangible personal property or taxable services. Individual A’s receipts from providing lawn mowing services are \$500 for the calendar year 2000.

<sup>\*</sup> See Note 4 on pages 31 and 32 for a definition of “taxable sales.”

Individual A's 2000 sales of \$500 of lawn mowing services qualify as exempt occasional sales because Individual A:

- (a) Does not hold a seller's permit, and is not required to hold a seller's permit, and
- (b) Has "taxable sales"\* of less than \$1,000 in the calendar year 2000.

**Example 2.** Individual B holds a two-day garage sale at her home in July 2000 and sells \$600 of household goods. Individual B does not hold a seller's permit and makes no other "taxable sales"\* of tangible personal property or taxable services during the calendar year 2000.

Individual B's 2000 sales of \$600 of household goods qualify as exempt occasional sales because Individual B:

- (a) Does not hold a seller's permit, and is not required to hold a seller's permit, and
- (b) Has "taxable sales"\* of less than \$1,000 in the calendar year 2000.

**Example 3.** Individual C makes quilts and sells them at a craft fair. Individual C has "taxable sales"\* of \$900 of quilts in the calendar year 2000. Individual C does not hold a seller's permit.

Individual C's 2000 quilt sales of \$900 qualify as exempt occasional sales because Individual C:

- (a) Does not hold a seller's permit, and is not required to hold a seller's permit, and
- (b) Has "taxable sales"\* of less than \$1,000 in the calendar year 2000.

### **B. Examples - "Taxable Sales"\* Are Less Than \$1,000, Seller Is in a Business**

**Example 1.** On October 20, 2000, Company D purchases the following equipment: truck, trailer, three riding lawn mowers, and two push mowers. Company D begins mowing lawns for residential and commercial customers. From October 20, 2000 through November 5, 2000 (the end of the 2000 mowing season), Company D's receipts from providing lawn mowing services are \$900. Company D does not hold a seller's permit and does not make any other "taxable sales"\* of tangible

personal property or taxable services during the calendar year 2000.

Company D's 2000 sales of \$900 of lawn mowing services do not qualify as exempt occasional sales because Company D was required to hold a seller's permit, starting on October 20, 2000. The facts and circumstances indicate that Company D is pursuing a business as a vendor of taxable services (i.e., landscaping services) starting on October 20, 2000.

**Example 2.** Company E opens a restaurant and begins making "taxable sales"\* of meals, food, and beverages on December 26, 2000. Company E obtains a seller's permit on January 1, 2001. Company E's "taxable sales"\* for the period of December 26, 2000 through December 31, 2000 are \$900. Company E makes no other "taxable sales"\* of tangible personal property or taxable services during the calendar year 2000.

Company E's 2000 sales of \$900 of meals, food, and beverages do not qualify as exempt occasional sales because Company E was required to hold a seller's permit, starting on December 26, 2000. The facts and circumstances indicate that Company E is pursuing a business as a vendor of personal property starting on December 26, 2000.

**Example 3.** Individual F obtains a seller's permit on December 15, 2000 for a bookstore. Individual F's "taxable sales"\* of books for the period of December 15, 2000 through December 31, 2000 are \$900. Individual F makes no other "taxable sales"\* of tangible personal property or taxable services during the calendar year 2000.

Individual F's 2000 book sales of \$900 do not qualify as exempt occasional sales because Individual F held a seller's permit at the time of the sales and the tangible personal property sold (books) is business inventory of Individual F.

**Example 4.** Company G is a retailer of carpeting and rugs, with its store located in Illinois. Company G does not hold a Wisconsin seller's permit. Company G's total gross receipts from sales of carpeting and rugs are \$500,000 for the calendar year 2000. Of the \$500,000 of receipts, \$499,200 are from sales which occurred in Illinois. The remaining \$800 are from sales of rugs in Wisconsin.

\* See Note 4 on pages 31 and 32 for a definition of "taxable sales."

Company G's calendar year 2000 "taxable sales"\* are \$800, and such sales qualify as exempt occasional sales because Company G:

- (a) Does not hold a Wisconsin seller's permit and is not required to hold a Wisconsin seller's permit, and
- (b) Has "taxable sales"\* of less than \$1,000 in the calendar year 2000.

**Example 5.** Individual H is a farmer who sells \$100,000 of vegetables during the calendar year 2000. (The vegetable sales are nontaxable sales.) Individual H does not hold a seller's permit. In August 2000, Individual H sells a garden tractor, which is a business asset of Individual H, to a nonfarmer for \$500. Individual H makes no other "taxable sales"\* of tangible personal property or taxable services during the calendar year 2000.

Individual H's calendar year 2000 "taxable sales"\* are \$500 (sale of the garden tractor). The sale of the garden tractor qualifies as an exempt occasional sale because Individual H:

- (a) Does not hold a seller's permit and is not required to hold a seller's permit, and
- (b) Has "taxable sales"\* of less than \$1,000 in the calendar year 2000.

**(Note:** Example 2, page 35, column 2, is the same as this example, except the garden tractor is sold for \$1,500, and the sale **does not** qualify as an exempt occasional sale.)

**Question 2:** If a seller's "taxable sales"\* are \$1,000 or more in a calendar year, does the occasional sale exemption in sec. 77.54(7)(a), Wis. Stats. (1997-98), apply for that year?

**Answer 2:**

- **If the seller holds a seller's permit** and the tangible personal property sold is a business asset (including inventory) of the seller, or the taxable services sold are sold in the seller's business, then the occasional sale exemption does not apply and the sales are taxable. **(Note:** All sales of tangible personal property by a partnership or corporation are considered to be sales of business assets. All taxable services sold by a partnership or corporation are considered to be sold in the seller's business.)

- **If the seller does not hold a seller's permit** and the "taxable sales"\* are:

- (a) Isolated and sporadic, and the facts and circumstances indicate that the seller is not pursuing a business or a part-time business as a vendor of tangible personal property or taxable services (as provided in sec. 77.51(9)(a), Wis. Stats. (1997-98)), the "taxable sales"\* are exempt occasional sales.
- (b) Not isolated and sporadic, and the facts and circumstances indicate that the seller is pursuing a business or a part-time business as a vendor of tangible personal property or taxable services (as provided in sec. 77.51(9)(a), Wis. Stats. (1997-98)), the "taxable sales"\* are taxable.

#### Summary of Tax Treatment - "Taxable Sales"\* of \$1,000 or More

The following summarizes the sales and use tax treatment for various situations involving "taxable sales"\* of \$1,000 or more in a calendar year.

#### "Taxable Sales"\* by Individuals ("Taxable Sales"\* Are \$1,000 or More in the Calendar Year)

##### Individual holds a seller's permit

If the tangible personal property sold is a business asset (including inventory) of the seller, or the taxable services sold are sold by the seller in the seller's business, the sales of the tangible personal property or taxable services do not qualify as exempt occasional sales.

If the tangible personal property sold is **not** a business asset (including inventory) of the seller, or the taxable services sold are **not** sold in the seller's business, the facts and circumstances are used to determine whether the sales of the tangible personal property or taxable services qualify as exempt occasional sales.

**Example 1.** Individual A operates a restaurant as a sole proprietor and holds a seller's permit. Between January 2000 and July 2000, she builds a roll-top desk as a hobby. The desk is not a business asset of Individual A. On September 1, 2000, she sells the desk for \$2,500. The desk is her only sale of tangible personal property or taxable services during the calendar year 2000 (other than restaurant sales).

\* See Note 4 on pages 31 and 32 for a definition of "taxable sales."

Individual A's sale of the desk is an exempt occasional sale because (1) it is an isolated and sporadic sale of tangible personal property, and the facts and circumstances indicate that the seller is not pursuing a business or a part-time business as a vendor of desks (tangible personal property), and (2) the desk is not a business asset.

**Example 2.** Individual B operates a photography studio and holds a seller's permit. In addition, Individual B has receipts of \$10,000 for the calendar year 2000 from repairing electronic equipment in his home, making approximately three to four repairs each month.

Individual B's repairs of electronic equipment do not qualify as exempt occasional sales because the facts and circumstances indicate that Individual B is pursuing a business as a vendor of taxable electronic equipment repair services.

#### Individual does not hold a seller's permit

If (1) the facts and circumstances indicate that the individual is pursuing a business or a part-time business as a vendor of tangible personal property or taxable services, and (2) the tangible personal property sold is a business asset (including inventory) of the seller or the taxable services sold are sold in the seller's business, the individual's sales do not qualify as exempt occasional sales.

If the facts and circumstances indicate that the individual is **not** pursuing a business or a part-time business as a vendor of personal property or taxable services, the individual's sales qualify as exempt occasional sales.

**Example 1.** Individual A provides accounting services as a sole proprietor. Individual A does not hold a seller's permit.

Individual A sells \$100 of photocopies, that are not transferred with accounting services, during the calendar year 2000, making "taxable sales"\* of photocopies on a total of five days in 2000. Individual A sells \$10,000 of office furniture and equipment used in the accounting business on August 15, 2000.

Both the \$100 of photocopy sales and the \$10,000 sale of office furniture and equipment qualify as exempt occasional sales. Such sales are isolated and sporadic and the facts and circumstances indicate that Individual A is not pursuing a business or part-time business as a vendor of personal property or taxable services.

**Example 2.** Individual B is a farmer who sells \$100,000 of vegetables during the calendar year 2000. (Note: The vegetable sales are nontaxable sales.) Individual B does not hold a seller's permit. In August 2000, Individual B sells a garden tractor, which is a business asset of Individual B, to a nonfarmer for \$1,500. Individual B makes no other "taxable sales"\* of tangible personal property or taxable services during the calendar year 2000.

Individual B's sale of the garden tractor does not qualify as an exempt occasional sale because:

- (a) Individual B is engaged in business as a vendor of tangible personal property,
- (b) Individual B's "taxable sales"\* (sale of garden tractor for \$1,500) are \$1,000 or more for the calendar year 2000, and
- (c) the garden tractor is a business asset of Individual B.

(**Note:** Example 5, page 34, is the same as this example, except the garden tractor is sold for \$500, and the sale qualifies as an exempt occasional sale.)

#### ***"Taxable Sales"\* by Partnerships and Corporations ("Taxable Sales"\* Are \$1,000 or More in the Calendar Year)***

##### Partnership/Corporation holds a seller's permit

"Taxable sales"\* do not qualify for the occasional sale exemption.

##### Partnership/Corporation does not hold seller's permit

The facts and circumstances are used to determine whether the "taxable sales"\* qualify as exempt occasional sales.

If the facts and circumstances indicate that the partnership or corporation is pursuing a business or a part-time business as a vendor of tangible personal property or taxable services, the partnership's or corporation's sales do not qualify as exempt occasional sales.

If the facts and circumstances indicate that the partnership or corporation is **not** pursuing a business or a part-time business as a vendor of personal property or taxable services, the partnership's or corporation's sales qualify as exempt occasional sales.

\* See Note 4 on pages 31 and 32 for a definition of "taxable sales."

**Example 1.** Corporation A provides medical services at its clinic. Corporation A does not hold a seller's permit. During the calendar year 2000, Corporation A sells \$2,500 of photocopies of medical records, averaging approximately three sales each week. These photocopies are not transferred incidentally with medical services.

Corporation A's sales of photocopies of medical records do not qualify for the occasional sale exemption because such sales are not isolated and sporadic. The facts and circumstances indicate that Corporation A is pursuing a business as a vendor of personal property or taxable services.

**Example 2.** Corporation B provides medical services at its clinic. Corporation B does not hold a seller's permit. From January 1, 2000 to June 30, 2000, Corporation B sells \$500 of photocopies of medical records. These photocopies are not transferred incidentally with medical services.

On July 1, 2000, Corporation B sells computers it used in its business for \$10,000. From July 1, 2000 through December 31, 2000, Corporation B sells an additional \$1,000 of photocopies of medical records. Corporation B averages two "taxable sales"\* of photocopies of medical records each week.

Both the sales of the photocopies of medical records (the entire \$1,500 of photocopies sold during the calendar year 2000) and the sale of the computers are taxable. Neither the sales of photocopies nor the sale of the computers qualify for the occasional sale exemption. The facts and circumstances indicate that Corporation B is pursuing a business as a vendor of personal property or taxable services for the calendar year 2000.

The fact that Corporation B had not yet reached \$1,000 in "taxable sales"\* of photocopies at the time it sold the computers does not mean that Corporation B was not required to hold a seller's permit. The facts and circumstances indicate that Corporation B was required to hold a seller's permit for the entire calendar year 2000.

**Example 3.** Company C operates an accounting business. Company C does not hold a seller's permit. On May 1, 2000, Company C sells office furniture for \$800. On November 15, 2000, Company C sells a computer for \$3,000. The office furniture and computer are business assets of Company C. Company C makes no other sales of tangible personal property or taxable services during the calendar year 2000.

Because Company C's sales of tangible personal property are isolated and sporadic, and the facts and circumstances indicate that Company C is not pursuing a business or a part-time business as a vendor of tangible personal property or taxable services, its sales of both the office furniture and computer during the calendar year 2000 qualify as exempt occasional sales.

**Question 3:** If a seller's "taxable sales"\* are \$1,000 or more in a calendar year and do not qualify for the occasional sale exemption in sec. 77.54(7)(a), Wis. Stats. (1997-98), does the occasional sale exemption apply to the first \$999 of "taxable sales"\*?

**Answer 3:** No.

**Example.** Individual A files an application for a seller's permit, Form A-101, with the Wisconsin Department of Revenue on February 15, 2000, indicating that monthly "taxable sales"\* at his restaurant will be \$5,000. On February 20, 2000, Individual A is issued a seller's permit. Individual A opens the restaurant on March 1, 2000.

None of Individual A's year 2000 sales of food, beverages, etc. (including the first \$999 of sales) at the restaurant qualify for the occasional sale exemption, because Individual A held a seller's permit at the time of the sales.

**Note:** Even if Individual A did not hold a seller's permit, the first \$999 of sales at the restaurant would still be subject to tax, because Individual A is engaged in the business of selling tangible personal property and is required to hold a seller's permit.

**Question 4:** If a seller's "taxable sales"\* qualify for the occasional sale exemption in sec. 77.54(7)(a), Wis. Stats. (1997-98), may the seller give its supplier an exemption certificate claiming resale on tangible personal property or taxable services it purchases for resale?

**Answer 4:** No. If a seller is not pursuing a business or a part time business as a vendor of tangible personal property or taxable services (that is, the seller's sales are "occasional sales" as provided in sec. 77.51(9)(a), Wis. Stats. (1997-98)), the seller is liable for sales or use tax on its purchases of tangible personal property or taxable services it transfers to customers.

**Example.** Individual A sells \$500 of popcorn during the calendar year 2000. Individual A does not hold a seller's

\* See Note 4 on pages 31 and 32 for a definition of "taxable sales."

permit and is not required to hold a seller's permit. Individual A makes no other sales of tangible personal property or taxable services during the calendar year 2000. Individual A's sales of popcorn qualify as exempt occasional sales. Individual A may not claim a resale exemption on his purchases of popcorn which he sells as exempt occasional sales.

**Question 5:** May a seller inactivate its seller's permit and qualify for the occasional sale exemption in sec. 77.54(7)(a), Wis. Stats. (1997-98), for "taxable sales"\* made after it inactivates its permit?

**Answer 5:** Yes, provided that, after the seller inactivates its seller's permit, the seller is not **required** to hold a seller's permit.

**Note:** If a seller "guesses" wrong (inactivates seller's permit anticipating that it will not be required to hold a seller's permit, but after the seller's permit is inactivated, the seller is required to hold a seller's permit), the seller's "taxable sales"\* do not qualify for the occasional sale exemption.

**Example 1.** Individual A is a landlord who rents apartments for \$750 per month. If a person wants a parking space, Individual A charges an extra \$50 per month. Individual A obtains a seller's permit on January 1, 1997. Individual A has the following receipts from the \$50 parking charge:

1997 - \$1,200  
 1998 - \$1,250  
 1999 - \$1,300  
 1/1/00 to 7/31/00 - \$600  
 8/1/00 to 12/31/00 - \$200

On July 31, 2000, Individual A sold an apartment building and expects her parking receipts to be less than \$1,000 per year, and expects to make no other sales of tangible personal property or taxable services. Individual A inactivates her seller's permit on July 31, 2000.

Individual A qualifies for the occasional sale exemption under secs. 77.51(9)(a) and 77.54(7)(a), Wis. Stats. (1997-98), on her receipts from parking during the period of August 1, 2000 through December 31, 2000. After inactivating her seller's permit, Individual A did not hold a seller's permit for the period of August 1,

2000 through December 31, 2000. Also, Individual A's "taxable sales"\* are less than \$1,000 for the calendar year 2000.

**Note:** Because Individual A held a seller's permit during the period of January 1, 2000 through July 31, 2000, Individual A's receipts from parking for this period do not qualify for the occasional sale exemption.

**Example 2.** Same as Example 1, except Individual A's receipts from parking are as follows:

1997 - \$2,000  
 1998 - \$2,100  
 1999 - \$2,050  
 1/1/00 to 7/31/00 - \$1,200  
 8/1/00 to 12/31/00 - \$250

On July 31, 2000, Individual A sold an apartment building and expects her parking receipts to be only \$600 per calendar year in the year 2001 and future years. Individual A inactivates her seller's permit on July 31, 2000.

Because Individual A's calendar year 2000 "taxable sales"\* of parking are \$1,000 or more, and the facts and circumstances of Individual A's sales indicate that Individual A is pursuing a business as a vendor of taxable services, Individual A's receipts from parking during the entire calendar year 2000 do not qualify for the occasional sale exemption.

**Note:** Individual A should not have inactivated her seller's permit on July 31, 2000, because her "taxable sales"\* during the entire calendar year 2000 are \$1,000 or more. Individual A may inactivate her seller's permit on December 31, 2000, because she expects her parking receipts to be only \$600 per year for the calendar year 2001 and after.

### Other Questions?

If you have questions about whether specific sales qualify for the occasional sale exemption, please write to Wisconsin Department of Revenue, Administration Technical Services, PO Box 8933, Madison WI 53708-8933. [✉](#)

\* See Note 4 on pages 31 and 32 for a definition of "taxable sales."



## 2 Taxability of Computer Programs (Software)

**Statutes:** Sections 77.51(14)(h) and (j) and (20) and 77.52(1) and (2)(a)10, Wis. Stats. (1997-98)

**Wis. Adm. Code:** Section Tax 11.71, Wis. Adm. Code (April 1993 Register)

**Note:** This tax release supersedes the tax release titled “Taxability of Computer Programs (Software)” that appeared in *Wisconsin Tax Bulletin* 79 (October 1992), page 23. The substantive changes to the previous draft are as follows:

- The Circuit Court for Dane County decision, in the case of *Manpower International, Inc. vs. Wisconsin Department of Revenue* (June 15, 1995, Case No. 94-CV-2858), is addressed to explain why all computer programs prior to May 1, 1992 are not tangible personal property and, therefore, are not subject to Wisconsin sales or use tax.
- Reference to the Court of Appeals decision in the case of *Wisconsin Department of Revenue v. International Business Machines* (CCH 202-983, June 23, 1988) is removed. This case may not be used in the determination of what is a custom computer program.

“Sale” for purposes of this tax release includes the license or lease of computer programs.

**Background:** Section 77.51(20), Wis. Stats. (1997-98), defines tangible personal property to include computer programs, except custom computer programs (effective May 1, 1992).

The Circuit Court for Dane County, in the case of *Manpower International, Inc. vs. Wisconsin Department of Revenue* (June 15, 1995, Case No. 94-CV-2858), affirmed a decision of the Wisconsin Tax Appeals Commission which held that prior to May 1, 1992, non-custom computer programs were not subject tangible personal property.

In summary, prior to May 1, 1992, the sale, lease, or license of computer programs (custom and noncustom) is not subject to Wisconsin sales or use tax. Beginning May 1, 1992, and thereafter, the sale, lease, or license of computer programs, except custom computer programs, is subject to Wisconsin sales or use tax, unless an exemption applies.

The determination of whether a computer program is a custom program is based on the criteria set forth in sec. Tax 11.71(1)(e), Wis. Adm. Code (April 1993 Register), which are as follows:

- a. The extent to which the vendor or independent consultant engages in significant presale consultation and analysis of the user's requirements and system.
- b. Whether the program is loaded into the customer's computer by the vendor, and the extent to which the installed program must be tested against the program's specifications.
- c. The extent to which the use of the programs requires substantial training of the customer's personnel and substantial written documentation.
- d. The extent to which the enhancement and maintenance support by the vendor is needed for continued usefulness.
- e. There is a rebuttable presumption that any program with a cost of \$10,000 or less is not a custom program.
- f. Custom programs do not include basic operational programs or prewritten programs.
- g. If an existing program is selected for modification, there must be a significant modification to the program by the vendor so that it may be used in the customer's specific hardware and program environment.

**Facts and Questions:** The following questions and answers illustrate the department's position regarding the taxability of sales of computer programs on or after May 1, 1992.

**Facts and Question 1:** Vendor SV-A develops and markets computer programs for users of computers that improve operating system performance and user productivity. The programs are system programs (i.e., basic operational programs as defined in sec. Tax 11.71(1)(c), Wis. Adm. Code), which activate and control the computer hardware. Other pertinent facts include:

- a. The exact programs or modules sold by Vendor SV-A exist at the time that the customer places an order. Vendor SV-A does not change the preexisting programs or modules based upon the customer's data or specific hardware or program environment.

- b. Vendor SV-A's salespersons determine which operating system program is appropriate for the customer's operating system environment when an order is placed.
- c. A copy of the program in machine-readable form is made by transferring a copy of the program from the master magnetic tape to a blank tape, which is then sent to the customer.
- d. Vendor SV-A instructs its customers to return the tape as soon as copies of the programs contained on the tape have been read into the customers' system. Vendor SV-A reuses the returned tapes to transmit the same or other programs to other customers.
- e. The customer has the option of making its own backup copies of the programs on its own tape or other media.
- f. Vendor SV-A does not load the programs into the customer's computer.
- g. Vendor SV-A provides maintenance and improvements to these programs for most of its customers.
- h. Vendor SV-A provides telephone support during and after installation.
- a. The exact programs or modules Vendor SV-B licenses exist at the time that the customer places an order. Vendor SV-B does not change the preexisting programs or modules based upon the customer's data or specific hardware or program environment.
- b. Vendor SV-B's salespersons determine which operating system program is appropriate for the customer's operating system environment when an order is placed.
- c. A copy of the program in machine-readable form is made by transferring a copy of the program from the master magnetic tape to a blank tape, which is then sent to the customer.
- d. Vendor SV-B's customer copies the tape, retains the tape in a vault for two years as a backup, and then discards the tape when a new release is issued.
- e. Vendor SV-B does not load the program into the customer's computer.
- f. Vendor SV-B provides maintenance and improvements to these programs for most of its customers.
- g. Vendor SV-B provides telephone support during and after installation.

Are the sales of the programs and maintenance of the programs by Vendor SV-A subject to Wisconsin sales and use tax?

**Answer 1:**

Yes. The programs sold by Vendor SV-A are systems programs and are tangible personal property. Section Tax 11.71(1)(e)6, Wis. Adm. Code, specifically provides that custom programs do not include basic operational programs (commonly referred to as "systems programs"). Since the systems programs are not custom programs, they are tangible personal property under sec. 77.51(20), Wis. Stats. (1997-98). Therefore, the sales of the programs and any maintenance associated with the programs are subject to Wisconsin sales or use tax.

**Facts and Question 2:** Vendor SV-B sells programs that assist a computer's operating system in monitoring usage levels to help prevent system crashes. The programs are systems programs. Other pertinent facts include:

Are the sales of the programs and maintenance for the programs by Vendor SV-B subject to Wisconsin sales and use tax?

**Answer 2:**

Yes. The programs sold by Vendor SV-B are systems programs. Section Tax 11.71(1)(e)6, Wis. Adm. Code, specifically provides that custom programs do not include basic operational programs (commonly referred to as "systems programs"). Since the systems programs are not custom programs, they are tangible personal property under sec. 77.51(20), Wis. Stats. (1997-98). Therefore, the sales of the programs and maintenance relating to the programs are subject to Wisconsin sales or use tax.

**Facts and Question 3:** Vendor SV-C sells utility programs, which capture and archive messages as jobs are run on mainframe computers. The prospective customer contacts Vendor SV-C, usually after reviewing a brochure or trade magazine. Other pertinent facts regarding these programs include:

- a. Vendor SV-C's salespersons determine which operating system program is appropriate for the customer's operating system environment when an order is placed.
  - b. The programs exist at the time a customer places an order, and modifications are not made to any programs prior to the shipment of the program to the customer.
  - c. Programs are transferred to the customer on magnetic tape.
  - d. Vendor SV-C's customer copies the tape and returns the tape to Vendor SV-C as instructed.
  - e. No training is provided to the customer's personnel, although installation instructions and user instructions are included with the programs.
  - f. The programs are loaded, installed, and tested by the customer.
  - g. The program is licensed annually. Maintenance and enhancements are included in the license fee.
  - h. A customer may modify the programs; however, modifications to the object code (the program itself) voids the warranty.
  - i. Corrections to the programs are released as needed, usually every six months. Enhancements are issued about once a year.
- a. Prior to a sale, Vendor SV-D personnel spend 40 to 60 hours in meetings with the customer to determine the needs of the customer.
  - b. The systems sold are made up of several modules (programs). Each module requires some modification. A minor modification might require adding another field or changing the length of a field. A major modification might require changing the method of computing discounts. Major modifications take 160 person-hours or more.
  - c. Vendor SV-D will install and test the programs on a customer's system, which normally takes 20 to 40 hours.
  - d. Training is available and strongly recommended to customers.
  - e. Documentation provided to each customer includes a reference manual and actual source code (the programs). The documentation is customized for each system.
  - f. Vendor SV-D provides modifications to the programs as its principal form of maintenance. A modem is set up to enable Vendor SV-D's computer to talk with the customer's computer. When a problem is encountered, the customer contacts Vendor SV-D via a hotline. A technician at Vendor SV-D's headquarters can make changes to the customer's program, compile it, test it, and have it ready for the customer without leaving his or her desk. Telephone support constitutes 98% of the support provided.
  - g. Program upgrades are made periodically. These upgrades are purchased separately, usually at 10% of the current list price.
  - h. Maintenance is billed separately.

Is the sale of the utility program by Vendor SV-C subject to Wisconsin sales or use tax?

**Answer 3:**

Yes. Based on the criteria in sec. Tax 11.71(1)(e), Wis. Adm. Code, the computer programs are not custom programs. Therefore, the programs are tangible personal property, and the sale of the programs is subject to Wisconsin sales or use tax.

**Facts and Question 4:** Vendor SV-D sells computer systems for manufacturers and distributors. Vendor SV-D sells both the hardware and programs to a customer. The base price of the program is \$20,000. The program is purchased independent of the hardware.

Other pertinent facts regarding Vendor SV-D include:

Are the programs and maintenance sold by Vendor SV-D subject to Wisconsin sales or use tax?

**Answer 4:**

No. The programs as described above are "custom" programs for the following reasons:

1. Significant modifications are being made to virtually all programs to meet the specific needs of an individual customer.

2. The extent of useful enhancements and maintenance support far exceed that which would be required for “canned” programs.

“Custom” programs are not tangible personal property. Therefore, the sale of the program is not subject to Wisconsin sales or use tax. Since the sale of the program is not subject to tax, any maintenance to the program is not subject to tax under sec. 77.52(2)(a)10, Wis. Stats. (1997-98).

Any charges for computer hardware are taxable.

**Facts and Question 5:** Vendor SV-E sells a computer program to Customer A (an accounting firm) for \$65,000. Other facts include:

- a. The program is a time/billing package used to track accountants’ time and generate billings to clients.
- b. The program is changed to meet the needs of Customer A. Modules are changed to customize fields (i.e. timekeeper numbers, matter numbers, account numbers, etc.), change field formats, and provide additional reports.
- c. Changes are also made to conform the program to Customer A’s operating environment. Interfaces to other program packages have been created. The program has been changed to accommodate Customer A’s printing capabilities.
- d. The program is loaded onto Customer A’s system by Vendor SV-E, with the actual code transferred by magnetic tape.
- e. Maintenance “fixes” are released as necessary. Enhancements are released on a quarterly or semi-annual basis.

Is the sale of the computer program and maintenance service for the computer program provided by Vendor SV-E subject to Wisconsin sales or use tax?

**Answer 5:**

No. The programs are “custom” programs for the following reasons:

1. The program purchased by Customer A is unique as compared to any other system sold by Vendor SV-E.

2. Significant modifications are made to the time and billing programs and other support programs based on the particular needs and system requirements of Customer A.

“Custom” programs are not tangible personal property. Therefore, the sale of the program is not subject to Wisconsin sales or use tax. Since the sale of the program is not subject to tax, any maintenance to the program is not subject to tax under sec. 77.52(2)(a)10, Wis. Stats. (1997-98).

**Facts and Question 6:** Customer C purchased a spreadsheet program for \$400 for use on its personal computer (PC). The program comes in a shrink-wrapped package and is available from many vendors.

Customer C’s personnel installed the program on the PC. An installation program prompted the user for information such as type of monitor, type of printer, and default drive. Customer C’s personnel took a course on how to use this program. In addition, several employees of Customer C spent in excess of 100 hours writing macros and designing templates that are used in conjunction with the program for budgeting, accounts receivable aging, inventory tracking, and other functions.

Is the sale of this computer program for \$400 to Customer C subject to Wisconsin sales or use tax?

**Answer 6:**

Yes. The spreadsheet program is not a custom program because:

1. The individual needs of Customer C were not considered in the design of the program.
2. The program existed at the time Customer C purchased the program.
3. The vendor makes no changes to the program because of Customer C’s computer environment. The work done by Customer C’s employees does not impact on the nature of the program. Any customizing, other than changes made by the vendor prior to the sale or license, does not affect the taxability of the sale.

Therefore, the program is tangible personal property, the sale of which is subject to Wisconsin sales or use tax.

**Facts and Question 7:** Customer D contracts with Vendor SV-G to obtain new computer programs for use on its mainframe computer. Included in the agreement are programs that will assist in the following areas:

- a. Order entry and billing.
- b. Accounts receivable.
- c. Purchasing.
- d. Accounts payable.
- e. General ledger.
- f. Financial reporting and budgeting.
- g. Inventory control.
- h. Product structure.
- i. Materials planning.
- j. Production scheduling.
- k. Product standard costing.
- l. Shop floor control.
- m. Capacity planning.

After an extensive review by Customer D and a professional consultant (Consultant E) of products on the market, Customer D purchases computer programs from Vendor SV-G for \$100,000.

Additional facts regarding these programs are as follows:

- a. The programs purchased existed at the time Customer D placed the order. Vendor SV-G did not change the pre-existing programs based on Customer D's data or specific hardware or program environment.
- b. The programs were shipped to Customer D via magnetic tape.

- c. In order to make the programs useful to Customer D, extensive modifications were necessary. Customer D did not employ Vendor SV-G to install and modify the program. Instead, the testing and installation were initially completed by Consultant E.
- d. Consultant E had difficulties in modifying the program to make it operational. After one year, only two of the modules were operational. The service contract with Consultant E was terminated.
- e. After another unsuccessful attempt to get the system operational using another consulting company, Vendor SV-G was hired to modify the programs to make them operational. This occurred two years after the original license of the base programs.

Is the sale of these programs for \$100,000 by Vendor SV-G subject to Wisconsin sales or use tax?

**Answer 7:**

Yes. The programs are not custom programs based on the criteria set forth in sec. Tax 11.71(1)(e), Wis. Adm. Code:

1. Vendor SV-G sold pre-written programs "as is."
2. No changes were made by Vendor SV-G prior to the licensing to tailor the programs to Customer D's data or hardware or program environment.

Modifications made by Customer D or other third parties, subsequent to the initial licensing, do not impact on the determination of taxability at the time of sale.

Therefore, the programs are tangible personal property, the sale of which is subject to Wisconsin sales or use tax.

