



## 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 interpretations by 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 interpretations in a tax release.) The following tax releases are included:

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## INDIVIDUAL INCOME TAXES

### 1 Subtraction for Tuition Paid with EdVest Distributions

**Statutes:** Section 71.05(6)(b)28, 32, and 33, Wis. Stats. (2001-02)

**Background:** Section 71.05(6)(b)28, Wis. Stats. (2001-02), provides a subtraction for the amount paid by a claimant for tuition expenses for a student who is the claimant or the claimant’s child who is claimed as a dependent under sec. 151(c) of the Internal Revenue Code (“IRC”). The subtraction may not exceed \$3,000. The tuition must generally be paid to attend a university, college, or technical college located in Wisconsin or a public vocational school or public institution of higher education in Minnesota under the Minnesota-Wisconsin reciprocity agreement. The subtraction is reduced if the taxpayer’s federal adjusted gross income is above certain amounts.

Section 71.05(6)(b)28.h, Wis. Stats. (2001-02), provides that the subtraction for the amount paid for tuition expenses may not be claimed if the source of the payment is an amount withdrawn from a Wisconsin college savings account or college tuition and expenses program and if the claimant has claimed a deduction under sec. 71.05(6)(b)32 or 33 that relates to such an amount.

Section 71.05(6)(b)32 and 33, Wis. Stats. (2001-02), provides a subtraction for the amount contributed to a Wisconsin college savings account or college tuition and expenses program. The subtraction may not exceed \$3,000 per beneficiary per year. These Wisconsin accounts are commonly known as “EdVest” or “tomorrow’s scholar” and are qualified tuition programs under sec. 529 of the IRC.

Distributions from a qualified tuition program under sec. 529, IRC, are not taxable to the beneficiary of the account to the extent used to pay qualified education expenses. Distributions in excess of qualified education expenses are taxable to the beneficiary of the account to the extent due to investment earnings on the account. Qualified education expenses are tuition, fees, books, supplies, and equipment required for enrollment or attendance at an eligible educational institution and reasonable costs of room and board.

(Note: This tax release generally refers to the “EdVest” program, but applies in the same manner to the “tomorrow’s scholar” program.)

**Facts and Question 1:** The parents have been contributing to an EdVest account for several years. The beneficiary of the account is their son. The son is claimed as a dependent on the parent’s 2004 federal income tax return. In 2004, the son attended a university located in Wisconsin as a full-time student. In that year, \$4,000 was distributed from the EdVest account to the son for payment of educational expenses. The son incurred the following qualified education expenses in 2004:

|                    |            |   |
|--------------------|------------|---|
| Tuition            | \$2,600    | (\$3,000 tuition less \$400 nontaxable scholarship used to pay tuition) |
| Room and board     | 2,400      |   |
| Books and supplies | <u>400</u> |   |
| Total expenses     | \$5,400    |   |

The parents have records to show that they gave \$4,000 to their son during the year. The parents and son agreed that the \$4,000 was to be used for any educational expenses not covered by the EdVest distribution and for other living expenses.

Who may claim the subtraction for tuition paid in 2004?

**Answer 1:** Both the parents and the son may claim the subtraction for tuition paid. The portion of the tuition paid from the EdVest distribution was paid by the son as he is the beneficiary of the EdVest account. The remainder of the tuition was paid by the parents.

The following formula is used to determine the amount of tuition paid by the son from the EdVest distribution.

$$\begin{array}{r} \text{Tuition} \\ \text{expenses} \end{array} \times \begin{array}{r} \text{EdVest} \\ \text{distribution} \end{array} = \begin{array}{r} \text{Amount of} \\ \text{tuition} \\ \text{paid by son} \end{array}$$

In this case, the son has paid tuition of \$1,926 ( $\$2,600 \div \$5,400 \times \$4,000 = \$1,926$ ).

Assuming income limitations do not apply, the son may claim a subtraction for tuition paid of \$1,926, and the parents may claim a subtraction of \$674 ( $\$2,600$  tuition less  $\$1,926$  paid by the son).

**Facts and Question 2:** A father has been contributing to an EdVest account for several years. The beneficiary of the account is his daughter. The daughter is claimed as a dependent on the father's federal income tax return. In 2004, the daughter attended a university located in Wisconsin as a full-time student. The father issued a check directly to the university for \$3,200 in payment of his daughter's tuition. In 2004, \$3,000 was distributed from the EdVest account to the daughter. Of the \$3,000, \$2,800 was used for room and board and \$200 was used for books and supplies.

Who may claim the subtraction for tuition paid in 2004?

**Answer 2:** Assuming income limitations do not apply, the father paid the tuition and may claim a subtraction of \$3,000 (maximum amount) for tuition paid in 2004.

**Facts and Question 3:** A mother has been contributing to an EdVest account for several years. The beneficiary of the account is her son. The son is claimed as a dependent on the mother's federal income tax return. In 2004, the son attended a university located in Wisconsin as a full-time student. In that year, \$6,000 was distrib-

uted from the EdVest account to the son for payment of educational expenses. The son incurred the following qualified education expenses in 2004:

|                    |            |
|--------------------|------------|
| Tuition            | \$ 8,000   |
| Room and board     | 2,500      |
| Books and supplies | <u>500</u> |
| Total expenses     | \$11,000   |

The mother has records to show that she gave \$8,000 to the son during the year. The mother and son agreed that the \$8,000 was to be used for any educational expenses not covered by the EdVest distribution and for other living expenses.

What amount may be claimed by the son and by the mother as a subtraction for tuition paid?

**Answer 3:** Using the formula in Answer 1, the son paid tuition of \$4,364 ( $\$8,000 \div \$11,000 \times \$6,000 = \$4,364$ ). Assuming income limitations do not apply, the son may claim a subtraction of \$3,000 (maximum amount) for tuition paid in 2004.

The mother has paid tuition for her son of \$3,636 ( $\$8,000$  tuition less  $\$4,364$  paid by the son). Assuming income limitations do not apply, the mother may also claim a subtraction of \$3,000 (maximum amount) for tuition paid in 2004.

**Facts and Question 4:** A mother has been contributing to an EdVest account for several years. The beneficiary of the account is her daughter. On her 2001, 2002, and 2003 Wisconsin income tax returns, the mother claimed a \$3,000 subtraction for contributions to the EdVest account. In 2004, the daughter attended a university located in Wisconsin as a full-time student. The daughter used \$6,000 that was distributed in 2004 from the EdVest account and her own savings to pay her tuition and other education expenses.

Does the fact that the mother previously claimed the subtraction for contributions to the EdVest account prevent the daughter from claiming the subtraction for tuition paid from the EdVest distribution?

**Answer 4:** No. The daughter may claim the subtraction for tuition paid even though the source of the payment is an amount distributed from the EdVest account.

Section 71.05(6)(b)28.h, Wis. Stats. (2001-02), provides that the subtraction for an amount paid for tuition expenses may not be claimed if the source of the payment is an amount withdrawn from a Wisconsin college sav-

ings account or college tuition and expenses program (for example, the EdVest program). This applies only if the claimant has claimed the subtraction for the amount contributed to such program (up to \$3,000 annually). In this case, the claimant (person who is claiming the subtraction for tuition expenses) is the daughter. Because the daughter never claimed the subtraction for contributions to the EdVest program, the daughter may claim the subtraction for the amount paid for tuition expense.

**Facts and Question 5:** The taxpayer is single and has been contributing to an EdVest account for several years. When he opened the account, he named himself as beneficiary of the account as he intended to enroll in college at some time in the future.

In 2004, the taxpayer attended a university located in Wisconsin as a full-time student. He received a distribution from the EdVest account of \$6,500 in 2004. The taxpayer paid his remaining educational and living expenses from his personal savings.

Prior to the distribution, the taxpayer had contributed a total of \$27,000 to the EdVest account and had claimed \$9,000 on his income tax returns as a subtraction for contributions to the EdVest account.

The taxpayer incurred the following qualified education expenses in 2004:

|                    |            |
|--------------------|------------|
| Tuition            | \$4,200    |
| Room and board     | 2,400      |
| Books and supplies | <u>400</u> |
| Total expenses     | \$7,000    |

What amount may the taxpayer claim as a subtraction for tuition paid in 2004?

**Answer 5:** The taxpayer may claim \$2,900 as a subtraction for tuition paid in 2004. This amount is determined as follows.

Using the formula in Answer 1, the taxpayer must first determine what portion of the tuition was paid with the EdVest distribution. In this case, \$3,900 of the EdVest distribution was used to pay tuition ( $\$4,200 \div \$7,000 \times \$6,500 = \$3,900$ ). The balance of the tuition (\$300) was paid from personal savings.

Section 71.05(6)(b)28.h, Wis. Stats. (2001-02), provides that the subtraction for tuition paid may not be claimed if the source of the payment is an amount withdrawn from a Wisconsin college savings account or college tuition and expenses program **and** the claimant has

claimed a deduction under sec. 71.05(6)(b)32 or 33 that relates to such amount. Because the taxpayer previously claimed a deduction for contributions to the EdVest account, he must determine what portion of the amount paid for tuition from the EdVest distribution relates to that deduction. The following formula is used to determine the portion of the tuition paid from the EdVest distribution that relates to the deduction:

|  |   |                                   |   |   |
|--|---|-----------------------------------|---|---|
| Deduction<br>claimed for<br>contributions<br>to the EdVest<br><u>account</u><br>Total<br>contributed<br>to the EdVest<br>account | x | Tuition<br>paid<br>from<br>EdVest | = | Portion<br>that<br>relates<br>to the<br>deduction<br>distribution |
|--|---|-----------------------------------|---|---|

In this case, \$1,300 is considered to be paid from the EdVest distribution and for which the claimant previously claimed a deduction ( $\$9,000 \div \$27,000 \times \$3,900 = \$1,300$ ). The remaining \$2,600 (\$3,900 less \$1,300) is considered to not be related to the deduction and may be claimed as a subtraction for tuition paid.

The total amount allowed as a subtraction to this taxpayer for tuition paid in 2004 is \$2,900 (\$300 paid from personal savings plus \$2,600 paid from the EdVest distribution that is not related to the subtraction for contributions to the EdVest account. [☞](#)

## SALES AND USE TAXES

### 2 Boats Berthed in Wisconsin Boundary Waters by a Nonresident

**Statutes:** Section 77.53(17m), Wis. Stats. (2001-02)

**Background:** Section 77.53(17m), Wis. Stats. (2001-02), provides that the Wisconsin use tax is not imposed on the storage, use, or other consumption of a boat in Wisconsin that is owned by a nonresident if all of the following conditions are met:

- A. The boat was purchased in a state contiguous with Wisconsin (i.e., Illinois, Iowa, Michigan, or Minnesota).
- B. The boat was purchased by a person domiciled in that contiguous state.
- C. The boat is berthed in Wisconsin boundary waters adjacent to the state of domicile of the purchaser.

D. The boat was purchased in a transaction that was an exempt occasional sale under the laws of the state in which the purchase was made.

**Question 1:** What are the Wisconsin boundary waters adjacent to states contiguous with Wisconsin?

**Answer 1:** The following waters are Wisconsin boundary waters. The states adjacent to the boundary waters are given in parentheses.

- A. Lake Michigan (Illinois, Michigan)
- B. Mississippi River (Illinois, Iowa, and Minnesota)
- C. St. Croix River (Minnesota)
- D. Lake Superior and its tributaries [as provided in ARTICLE II, Section 1 of the Wisconsin Constitution] (Minnesota and Michigan)

**Facts and Question 2:** An individual, domiciled in Minnesota, purchases a boat in Minnesota. The individual berths the boat at a marina on the shores of the Mississippi River in Wisconsin. The sale of the boat was exempt from Minnesota sales or use tax as an occasional sale.

Is the boat subject to Wisconsin use tax because it is stored, used, or otherwise consumed in Wisconsin?

**Answer 2:** No. Since the boat was A) purchased in a state contiguous with Wisconsin (Minnesota) B) by a person who was domiciled in the state in which the boat was purchased, C) the boat is berthed in a boundary water adjacent to Wisconsin (Mississippi River), and D) the sale was exempt from Minnesota sales or use tax as an occasional sale, the storage, use, or other consumption of the boat in Wisconsin is exempt from Wisconsin use tax under sec. 77.53(17m), Wis. Stats. (2001-02).

**Facts and Question 3:** Assume the same facts as in Facts and Question 2, except that the boat was purchased in Illinois.

Is the boat subject to Wisconsin use tax because it is stored, used, or otherwise consumed in Wisconsin?

**Answer 3:** Yes. The exemption from use tax in sec. 77.53(17m), Wis. Stats. (2001-02), does not apply because the purchaser of the boat is not domiciled in Illinois, the state contiguous to Wisconsin where the boat was purchased.

**Facts and Question 4:** Assume the same facts as in Facts and Question 2, except that the boat was purchased in Minnesota by a resident of New York.

Is the boat subject to Wisconsin use tax because it is stored, used, or otherwise consumed in Wisconsin?

**Answer 4:** Yes. The exemption from use tax in sec. 77.53(17m), Wis. Stats. (2001-02), does not apply because the purchaser of the boat is not domiciled in a state contiguous to Wisconsin.

**Facts and Question 5:** Assume the same facts as in Facts and Question 2, except that the boat is berthed at a marina on the shores of Lake Michigan in Wisconsin.

Is the boat subject to Wisconsin use tax because it is stored, used, or otherwise consumed in Wisconsin?

**Answer 5:** Yes. The exemption from use tax in sec. 77.53(17m), Wis. Stats. (2001-02), does not apply because the boat is not berthed in Wisconsin boundary waters adjacent to the state of domicile (i.e., Lake Michigan is not adjacent to Minnesota). [↗](#)

### 3 Motor Vehicle Purchased in Another State by a Nonresident Limited Liability Company

**Statutes:** Section 77.53(1),(16) and (17) Wis. Stats. (2001-02)

**Wis. Adm. Code:** Section Tax 11.83, Wis. Adm. Code (July 2002 Register)

**Background:** Section 77.53(1), Wis. Stats. (2001-02), imposes a Wisconsin use tax on the sales price of tangible personal property or taxable services that are used, stored, or consumed within Wisconsin, upon which a Wisconsin sales or use tax has not previously been paid, unless an exemption applies.

Section 77.53(17), Wis. Stats. (2001-02), provides that the use tax "... does not apply to tangible personal property purchased outside this state, other than motor vehicles, boats, snowmobiles, mobile homes not exceeding 45 feet in length, trailers, semitrailers, all-terrain vehicles and airplanes registered or titled or required to be registered or titled in this state, *which is brought into this state by a nondomiciliary* for the person's own storage, use or other consumption *while temporarily within this state* when such property is not stored, used or otherwise consumed in this state in the conduct of a trade, occupation, business or profession or



in the performance of personal services for wages or fees.” (Emphasis added.)

Section 77.53(16), Wis. Stats. (2001-02), provides a credit against Wisconsin sales and use tax for sales or use tax that is properly charged and paid to another state on tangible personal property and taxable services purchased outside Wisconsin, and brought into Wisconsin for storage, use, or consumption.

**Facts:**

- Individual A is a Wisconsin resident.
- Individual A creates a Montana limited liability company (LLC) that is domiciled in Montana.
- The LLC purchases a motor home in Montana and titles and registers the motor home in Montana.
- Since Montana does not impose a state sales or use tax, no tax is paid on the purchase of the motor home in Montana.
- Individual A is the sole member of the LLC. The LLC keeps the motor home in Wisconsin.
- The Wisconsin Department of Transportation does not require that the motor home be registered or titled in Wisconsin.

**Question 1:** Is a Wisconsin sales or use tax liability incurred?

**Answer 1:** Yes. The LLC is subject to Wisconsin use tax when the motor home is used, stored, or consumed in Wisconsin. The exemption under sec. 77.53(17), Wis. Stats. (2001-02), does not apply because the motor vehicle is kept in Wisconsin more than temporarily.

**Question 2:** Assume the same facts, except that the motor home is purchased in a state that imposes a sales or use tax on the sale in that state, which is paid by the LLC upon registration. Is a Wisconsin sales or use tax liability incurred?

**Answer 2:** Yes. However, a credit against the Wisconsin use tax due may be taken for tax properly charged and paid to the other state. See the tax release titled “Credit for Sales and Use Taxes Paid to Other States and Local Units of Government,” which was published on pages 29 through 40 of *Wisconsin Tax Bulletin* 100 (January 1997), for more information. [☞](#)

## 4 Telephone Support for Computer Software

**Statutes:** Section 77.51(20) and 77.52(2)(a)10, Wis. Stats. (2001-02)

**Wis. Adm. Code:** Section Tax 11.67(2)(c), Wis. Adm. Code (April 2000 Register), and secs. Tax 11.71(1)(n), (2)(b), and (3)(c), Wis. Adm. Code (April 1993 Register)

**Background:** Section 77.51(20), Wis. Stats. (2001-02), provides that tangible personal property includes computer programs, except custom computer programs.

Section 77.52(2)(a)10, Wis. Stats. (2001-02), provides, in part, that the repair, service, inspection, and maintenance of tangible personal property are subject to Wisconsin sales or use tax unless, at the time of such repair, service, inspection, or maintenance, the sale of the tangible personal property in this state would have been exempt from Wisconsin sales or use tax.

**Facts and Question 1:** Company A sells computer software that is not custom computer software. Company A charges Wisconsin sales tax on its sales of the computer software. A customer has the option of purchasing one year of telephone support for the software for an additional \$300 fee. If a customer has a problem using the computer software sold by Company A, the customer may telephone Company A for assistance. After the customer explains the problem, Company A informs the customer how the problem can be solved. Based on the instructions from Company A, the customer performs the functions that are necessary for the software to operate correctly.

Is the \$300 charge for the telephone support subject to Wisconsin sales or use tax?

**Answer 1:** No. Company A is not providing a taxable service when it provides the technical support by telephone for the customer. Company A has not repaired, serviced, inspected, or maintained the computer software (tangible personal property). The repair, service, inspection, and maintenance service is done by the customer. Therefore, the service sold by Company A is not subject to Wisconsin sales or use tax under sec. 77.52(2)(a)10, Wis. Stats. (2001-02).

**Facts and Question 2:** Assume the same facts as Facts and Question 1, except that, rather than instructing the customer how to solve the computer software problem, Company A connects by modem to the customer’s com-

puter system, inspects the software, and corrects the customer's problem. Correcting the customer's problem may include reconfiguring start-up information, installing functions inadvertently deleted by the customer, or adding new program code to repair an existing function of the program that is not operating correctly.

Is the \$300 charge for the telephone support subject to Wisconsin sales or use tax?

**Answer 2:** Yes. Company A has repaired, serviced, inspected, or maintained the computer software (tangible personal property). Therefore, the service is subject to Wisconsin sales or use tax under sec. 77.52(2)(a)10, Wis. Stats. (2001-02).

**Facts and Question 3:** Company A sells computer software that is not custom computer software. Company A, for an annual \$300 charge, will (1) inform the customer by telephone how a problem can be solved and the customer will perform the functions necessary for the software to operate correctly as described in Facts and Question 1, and (2) connect by modem to the customer's computer system, inspect the software, and correct the customer's problem as described in Facts and Question 2.

Is the \$300 charge for the telephone support subject to Wisconsin sales or use tax?

**Answer 3:** Yes. When there is a single charge for providing both taxable and nontaxable telephone support, the entire charge is subject to tax.

**Facts and Question 4:** Company A sells computer software that is not custom computer software. Company A also provides support services to its customer and bills the customer for the support provided per occurrence. During the month of August, Company A billed its customer for the following occurrences:

- Occurrence 1: Instruction by telephone - \$50
- Occurrence 2: Reconfiguration of start-up information via modem - \$140

- Occurrence 3: Reinstallation of functions inadvertently deleted via modem - \$80
- Occurrence 4: Adding new program code to repair existing functions via modem - \$130
- Occurrence 5: Writing program code to enable software to perform a function not currently available in the software and delivering via modem - \$240

Are any of the charges by Company A subject to Wisconsin sales or use tax?

**Answer 4:** Yes. Charges for Occurrences 2, 3, and 4 are subject to Wisconsin sales tax. Since Company A furnished each service separately and separately stated the services and charges for each service on its invoice to the customer, the tax is imposed on only the services that are subject to tax. Occurrences 2, 3, and 4 are for the repair, service, inspection, and maintenance of tangible personal property, which are taxable under sec. 77.52(2)(a)10, Wis. Stats.

**Facts and Question 5:** Company A sells custom computer software. A customer has the option of purchasing one year of telephone support for the software for an additional \$300 fee. If the customer has a problem using the computer software sold by Company A, the customer may telephone Company A for assistance. After the customer explains the problem, Company A connects by modem to the customer's computer system, inspects the software, and corrects the customer's problem by reconfiguring start-up information, installing functions inadvertently deleted by the customer, or adding new program code to repair an existing function of the program that is not operating correctly.

Is the \$300 charge for the telephone support subject to Wisconsin sales or use tax?

**Answer 5:** No. Since custom computer software is not tangible personal property, the repair, service, inspection, or maintenance of the custom computer software is not subject to Wisconsin sales or use tax under sec. 77.52(2)(a)10, Wis. Stats. (2001-02). [☞](#)