



Tax Releases

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

The following tax release is included:

Sales and Use Tax

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SALES AND USE TAX

1 Purchases Made by a Person Under a Contract with the Federal Government for the Sale of Real Property, Tangible Personal Property, or Services

Statutes: Sections 77.51(5), (14r), and (14)(g); 77.52(2m)(a) and (b) and (15); and 77.55(1), Wis. Stats. (2007-08).

Wis. Adm. Code: Section Tax 11.67(2) and (3)(e)2., Wis. Adm. Code (April 2000 Register).

Background: Section 77.51(5), Wis. Stats. (2007-08), defines the term “incidental” to mean “...depending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal; something incidental to the main purpose of the service. Tangible personal property transferred by a service provider is incidental to the service if the purchaser's main purpose or objective is to obtain the service rather than the property, even though the property may be necessary or essential to providing the service.”

Section 77.51(14r), Wis. Stats. (2007-08), provides that a sale of tangible personal property takes place when and where the possession of the property is transferred by the seller or the seller's agent to the purchaser or the purchaser's agent.

Section 77.51(14)(g), Wis. Stats. (2007-08), provides that the definition of “sale,” “sale, lease or rental,” “retail sale,” and “sale at retail” includes a sale of tangible personal property to a contractor or subcontractor for use in the performance of contracts with the United States or its instrumentalities for the construction of improvements on or to real property.

Section 77.52(2m)(a) and (b), Wis. Stats. (2007-08), provides the following:

“(a) With respect to the services subject to tax under sub. (2), no part of the charge for the service may be deemed a sale or rental of tangible personal property if the property transferred by the service provider is incidental to the selling, performing or furnishing of the service, except as provided in par. (b).

(b) With respect to the services subject to tax under sub. (2) (a) 7., 10., 11., and 20., all property physically transferred to the customer in conjunction with the selling, performing or furnishing of the service is a sale of tangible personal property separate from the selling, performing or furnishing of the service.”

Section 77.52(15), Wis. Stats. (2007-08), states, in part, that “(i)f a purchaser who gives a resale certificate makes any use of the property other than retention, demonstration or display while holding it for sale, lease or rental in the regular course of the purchaser's operations, the use shall be taxable to the purchaser under s. 77.53 as of the time the property is first used by the purchaser, and the sales price of the property to the purchaser shall be the measure of the tax. ...”

Section 77.55(1), Wis. Stats. (2007-08), provides that the sale of any tangible personal property or services to the United States and its unincorporated agencies and instrumentalities is exempt from Wisconsin sales tax.

Question: What is the proper sales and use tax treatment of purchases made by a person under contract with the federal government for the sale of real property, tangible personal property, or services?

Answer: The general sales and use tax treatment is as follows:

- A. Sales of tangible personal property and taxable services that are made directly to the federal government are exempt from sales and use tax.
- B. Property physically transferred to the federal government, except property used in real property construction (see Part G) or transferred incidentally with a service (see Part C), may be purchased by the contractor without tax for resale (or as an ingredient or component part of property manufactured and destined for sale).

NOTE: Property that is transferred in the performance of certain services is deemed to be sold separately from the selling, performing or furnishing of the service. These services are photographic services subject to tax under sec. 77.52(2)(a)7., Wis. Stats.; repair or other services to tangible personal property subject to tax under sec. 77.52(2)(a)10., Wis. Stats.; producing, fabricating, processing, printing or imprinting of tangible personal property subject to tax under sec. 77.52(2)(a)11., Wis. Stats.; and landscaping services subject to tax under sec. 77.52(2)(a)20., Wis. Stats. The property transferred in the performance of these specific services is not transferred incidentally with these services and may be purchased by the contractor without tax for resale.

- C. Property transferred incidentally with a service is consumed by the contractor in performing its service; therefore, the contractor is liable for sales or use tax on its purchases of such property. (See Parts B and G.)

Section Tax 11.67(2)(a), Wis. Adm. Code (April 2000 Register), provides that persons engaged in the business of furnishing services are consumers, not retailers, of the tangible personal property which they use incidentally in rendering their services and tax applies to the sale of the tangible personal property to them. Specifically, sec. Tax 11.67(3)(e)2., Wis. Adm. Code (April 2000 Register), provides that a person performing research and development services is the consumer of materials used in providing

those services. As such, the person performing the services is subject to Wisconsin sales or use tax on materials used in research and development, including items transferred incidentally with the service. (See the NOTE in Part B for property that is deemed to be sold separately from the service and, therefore *not* transferred incidentally with the service.)

- D. A contractor may not purchase without tax, for resale, property that is never transferred to the federal government.

Only property that is actually transferred to the federal government may be purchased without tax for resale by the contractor. Section 77.51(14r), Wis. Stats. (2007-08), states that a sale involving transfer of ownership of property shall be deemed to have been completed at the time and place when and where possession is transferred by the seller or the seller's agent to the purchaser or the purchaser's agent.

- E. If the contractor makes any use before transferring possession to the federal government, the contractor is liable for Wisconsin sales or use tax on its purchase of the property.

A contractor who gives a resale certificate and makes any use of the property other than retention, demonstration or display while holding it for sale, lease or rental in the regular course of the contractor's operations, is liable for sales or use tax when the property is first used by the contractor (sec. 77.52(15), Wis. Stats. (2007-08)).

- F. *Prototypes* - When developing a prototype for the federal government, it must be determined whether the primary objective of the federal government is to receive the prototype or the information resulting from the production of the prototype.

- If the federal government's primary objective is to receive the prototype, the developer may purchase, without tax for resale, the materials used in the prototype that it transfers to the federal government without tax for resale. The sale of the prototype to the federal government is exempt from Wisconsin sales and use tax, since sales to the federal government are exempt from tax.

- If the federal government's primary objective is to obtain the information resulting from the production of the prototype, the prototype is transferred to the federal government incidentally with the research and development services provided. The person developing the prototype is the consumer of the materials that it purchases and uses to construct the prototype and is liable for tax on its purchase of such materials.

G. *Real Property Construction* – The contractor is the consumer of materials that it uses in real property construction activities for the federal government and is liable for Wisconsin sales or use tax on its purchase of such materials. The real property construction contractor may not purchase materials without paying sales or use tax and sell such materials to the federal government if the contractor is also the person performing the real property construction activity in which the materials are to be used. (NOTE: When a contractor hires a subcontractor to install materials, the contractor is considered to be the installer of the materials.)

If the federal government purchases the building materials **directly** from a supplier who does not install such materials, the federal government's purchase of such materials is exempt from Wisconsin sales or use tax, even though the materials are later used by a contractor in the erection of a building or structure, or in the alteration, repair, or improvement of real property for the exempt entity. Suppliers of building materials and equipment may presume that a sale is made **directly** to an exempt entity if the supplier receives a purchase order from the exempt entity, and payment for the building materials and equipment is received from the exempt entity.

See the tax release titled "Purchases of Building Materials by Exempt Entities for Use by Contractor in Real Property Construction," which was published in *Wisconsin Tax Bulletin* 115 (October 1999) beginning on page 27, for additional information about sales to exempt entities.

H. *Purchasing Agent for the Federal Government* - For Wisconsin sales and use tax purposes, a third-party, such as a contractor, may act as a purchasing agent for the federal government, separate and apart from its other activities, under common law. In order to show that a true agency relationship exists, the following conditions must be met:

- There must be some written indication, such as a contract or agency agreement that the contractor, in purchasing materials for a federal government project, is acting in good faith as a fiduciary of and or the welfare of the federal government. The purchasing agent must make known to suppliers that it is acting as the purchasing agent for the federal government.
- An agent cannot deal for its own benefit without the consent and the full knowledge of the federal government. An agent cannot act in two distinct and opposite characters in the same transaction.
- The written contract must contain a clause stating that all property belongs to the federal government and title passes to the federal government upon the contractor's receipt of the materials.
- The agency agreement must disclose that any advantages (such as savings or term discounts) or risks (such as defective materials) of the purchase of the materials must belong to, and must be passed on to, the federal government. The agency agreement must also provide that the federal government must approve all of its agent's purchases and be aware of the amount that the agent is paying for materials. When transferring the materials to the federal government, the agent may not make a profit and, with regard to its purchase of materials, the agent may only collect from the federal government the amount it paid for the purchase of those materials. The agency agreement must also provide that the liability for payment of materials ultimately belongs to the federal government in the event that full payment is not received by suppliers from the agent.

While a supplier is not required to determine whether a true agency relationship exists between a contractor and the federal government, the supplier may accept an exemption certificate in good faith from a contractor claiming exemption as a purchasing agent for the federal government if (1) the supplier receives written notice signed by an authorized person of the federal government that the contractor is acting as a purchasing agent for the federal government; (2) the supplier receives written notice that all liabilities relating to the sale rest with the federal government*; and (3) the supplier has no reason to believe that these statements are not true.

*If the bill for the materials is not paid (or paid with insufficient funds), the federal government is liable for the payment to the supplier.