

Assembly Hearing Slip

(Please print plainly)

Date: 7/7/99  
Bill No. AB 390  
Or Subject \_\_\_\_\_  
By Michael J. Moran  
(Name) \_\_\_\_\_  
103W State Capitol  
(Street Address or Route Number) \_\_\_\_\_  
(City & Zip Code) \_\_\_\_\_  
(Representing) \_\_\_\_\_

Speaking in favor:   
Speaking against:   
Registering in favor:   
Registering against:   
Speaking for information only; Neither for nor against:

Please return this slip to a messenger promptly.  
Assembly Sergeant at Arms:  
Room 411 West  
State Capitol  
Madison, WI 53702

Assembly Hearing Slip

(Please print plainly)

Date: 7/7/99  
Bill No. AB 390  
Or Subject \_\_\_\_\_  
Tom Ourada - Vicki Gibbons  
(Name) DOR  
(Street Address or Route Number) \_\_\_\_\_  
(City & Zip Code) \_\_\_\_\_  
(Representing) \_\_\_\_\_

Speaking in favor:   
Speaking against:   
Registering in favor:   
Registering against:   
Speaking for information only; Neither for nor against:

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Assembly Sergeant at Arms:  
Room 411 West  
State Capitol  
Madison, WI 53702

# Assembly Committee on Ways and Means

DATE \_\_\_\_\_

Moved by Leh Seconded by Wood

AB 390 SB \_\_\_\_\_ Clearinghouse Rule \_\_\_\_\_

AJR \_\_\_\_\_ SJR \_\_\_\_\_

A \_\_\_\_\_ SR \_\_\_\_\_ Other \_\_\_\_\_

A/S Amdt \_\_\_\_\_

A/S Amdt \_\_\_\_\_ to A/S Amdt \_\_\_\_\_

A/S Sub Amdt \_\_\_\_\_

A/S Amdt \_\_\_\_\_ to A/S Sub Amdt \_\_\_\_\_

A/S Amdt \_\_\_\_\_ to A/S Amdt \_\_\_\_\_ to A/S Sub Amdt \_\_\_\_\_

Be recommended for:

Passage

Introduction

Adoption

Rejection

Indefinite Postponement

Tabling

Concurrence

Nonconcurrency

	Committee Member	Aye	No	Absent	Not voting
1.	Rep. Mickey Lehman, chair	1			
2.	Rep. Tom Sykora, vice-chair	2			
3.	Rep. Bob Goetsch	3			
4.	Rep. Mike Huebsch	4			
5.	Rep. Frank Lasee	5			
6.	Rep. John Ainsworth			1	
7.	Rep. Suzanne Jeskewitz	6			
8.	Rep. Carol Owens	7			
9.	Rep. Joan Spillner	8			
10.	Rep. Wayne Wood	9			
11.	Rep. John La Fave	10			
12.	Rep. Lee Meyerhofer	11			
13.	Rep. Johnie Morris-Tatum	12			
14.	Rep. Jeffrey Plale	13			
15.	Rep. Bob Turner	14			
16.	Rep. Bob Ziegelbauer	15			
	Totals	15	0	1	

MOTION CARRIED

MOTION FAILED

# Assembly Committee on Ways and Means

DATE \_\_\_\_\_

Moved by Leh Seconded by Wood

AB 390 SB \_\_\_\_\_ Clearinghouse Rule \_\_\_\_\_

AJR \_\_\_\_\_ SJR \_\_\_\_\_

A \_\_\_\_\_ SR \_\_\_\_\_ Other \_\_\_\_\_

A/S Amdt 0642/1

A/S Amdt \_\_\_\_\_ to A/S Amdt \_\_\_\_\_

A/S Sub Amdt \_\_\_\_\_

A/S Amdt \_\_\_\_\_ to A/S Sub Amdt \_\_\_\_\_

A/S Amdt \_\_\_\_\_ to A/S Amdt \_\_\_\_\_ to A/S Sub Amdt \_\_\_\_\_

*Intro w/6*  
*A/N*  
*15/0* (1)

Be recommended for:

- |  |  |
|--|--|
| <input type="checkbox"/> Passage             | <input type="checkbox"/> Indefinite Postponement |
| <input type="checkbox"/> Introduction        | <input type="checkbox"/> Tabling                 |
| <input checked="" type="checkbox"/> Adoption | <input type="checkbox"/> Concurrence             |
| <input type="checkbox"/> Rejection           | <input type="checkbox"/> Nonconcurrency          |

	Committee Member	Aye	No	Absent	Not voting
1.	Rep. Mickey Lehman, chair	1			
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9.	Rep. Joan Spillner	8			
10.	Rep. Wayne Wood	9			
11.	Rep. John La Fave	10			
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13.	Rep. Johnie Morris-Tatum	12			
14.	Rep. Jeffrey Plale	13			
15.	Rep. Bob Turner	14			
16.	Rep. Bob Ziegelbauer	15			
	Totals	15	0	1	

MOTION CARRIED

MOTION FAILED


## 1999 - 2000 LEGISLATURE

1999 ASSEMBLY BILL 390 


**June 24, 1999 - Introduced by Representatives M. Lehman and Wood, by request of Department of Revenue. Referred to Committee on Ways and Means.**

Pg1Ln1 **An Act** to amend 77.51 (20) of the statutes; relating to: the definition of tangible  
Pg1Ln2 personal property that is subject to a sales or use tax.

## Analysis by the Legislative Reference Bureau

AB390 


Under current law, the state generally imposes a sales tax on all retailers at the rate of 5% of the gross receipts from the sale of tangible personal property. The state also generally imposes a use tax on all consumers, at the rate of 5% of the sales price, for the consumption, use or storage of tangible personal property in this state that the consumer purchases from out-of-state retailers.

AB390 

This bill clarifies the current law by specifying that tangible personal property, which is subject to a sales or use tax, includes books, videotapes, newspapers, magazines, video game cartridges, audiotapes, compact disks, laser disks, photocopies, artwork, and data, information or intellectual property transferred in a tangible form.

For further information see the state fiscal estimate, which will be printed as an appendix to this bill.

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

AB390, s. 1 

Pg1Ln3 **Section 1.** 77.51 (20) of the statutes is amended to read:

AB390, s. 1 - continued



Pg1Ln4  
Pg1Ln5  
Pg2Ln1  
Pg2Ln2  
Pg2Ln3  
Pg2Ln4  
Pg2Ln5  
Pg2Ln6  
Pg2Ln7  
Pg2Ln8  
Pg2Ln9

77.51 (20) "Tangible personal property" means all tangible personal property of every kind and description and includes electricity, natural gas, steam and water and also leased property affixed to realty if the lessor has the right to remove the property upon breach or termination of the lease agreement, unless the lessor of the property is also the lessor of the realty to which the property is affixed. "Tangible personal property" also includes coins and stamps of the United States sold or traded as collectors' items above their face value; data, information or intellectual property transferred in tangible forms, including books, videotapes, newspapers, magazines, video game cartridges, audiotapes, compact disks, laser disks, photocopies and artwork; and computer programs except custom computer programs.

(End)

*The point is to make intangible property transferred in tangible form should be taxable.*

*→ Not Δ the stats as they relate to the trans of tang prop as a result of the providing ~~BA~~ of an intangible service.*

This distribution has been  
authorized by

*Mary Schma*  
Signature



**State of Wisconsin • DEPARTMENT OF REVENUE**

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*Tommy G. Thompson*  
Governor

**AB 390**

*Cate Zeuske*  
Secretary of Revenue

**Background**

For many years, sales taxes have been collected on the sale of books, phonograph records, compact discs and audio/video tapes (whether blank or prerecorded), video game cartridges, photocopies and artwork. These and similar items have been taxed as the sale of tangible personal property under sec. 77.52(1), Wis. Stats., unless an exemption applied (e.g., newspapers are exempt under sec. 77.54(15), Wis. Stats., and film or tape sold, leased or rented to theaters, radio or television stations is exempt under sec. 77.54(23m), Wis. Stats.).

Litigation exists seeking refunds of taxes collected and paid to the State on the sale of phonograph records, compact discs and prerecorded audio/video tapes and video game cartridges, claiming that such sales are not subject to sales tax. The Petitioners argue that the purchase of such items is really the sale of an intangible, as the purchaser is seeking the information or data contained in an insignificant tangible personal property form. This argument relies on the decision in *Janesville Data Center, Inc v. Wisconsin Department of Revenue* (Wisconsin Supreme Court, June 30, 1978, 84 Wis. 2d 341).

In that case, the Court held that the "essence of the transaction" in the sale of keypunched computer cards and magnetic tapes containing the data of the customer was the purchase of the transcribed data, which it held to be an intangible. This decision was relied upon to exclude from taxation all computer software in later litigation, resulting in refunds exceeding \$50 million. Effective May 1, 1992, the Legislature amended the definition of "tangible personal property" in sec. 77.51(20), Wis. Stats., to include all software, except custom, thus reversing the *Janesville Data* decision in that area.

**Summary of the Bill**

This bill, with the sole exception of preprinted mailing lists (see fiscal note), does not expand the scope of the current sales tax law. Instead, it preserves the current sales tax law from the date of enactment should there be an adverse decision in the courts in the current litigation.

This bill also adds clarity to the law by listing current forms of technology, but leaves the door open to new forms of technology not yet apparent. This clarity should avoid potential future litigation, as well as potential revenue loss simply because of technological changes.

Despite charges to the contrary, this bill does not change the current law regarding nontaxable services where tangible personal property is transferred incidental to the service. Writers will still be able to provide original manuscripts to their book editors, architects will still be able to provide their clients with blueprints, and lawyers will still be able to provide copies of wills to estate planning clients. These items are considered to be transferred incidentally with the nontaxable services (such as the architectural design services). It is only the subsequent transfers of tangible personal property, when not done incidentally to a nontaxable service, which remain taxable (such as sales to the public of the novel or copies of architectural blueprints transferred by themselves, without the provision of design services).

This bill also preserves the exemptions of manufacturers, like printers, who must produce tangible personal property to obtain exemptions on their equipment and supplies.

**DOR Asks Support for AB 390**

AB 390 was introduced at the request of the Department of Revenue and we would like your support of the bill today. As noted, the bill's purpose is to help to preserve the current sales tax revenue stream from future erosion due to potential litigation.

**CORRESPONDENCE/MEMORANDUM**

**STATE OF WISCONSIN**  
**Wisconsin Department of Revenue**

**Date:** June 30, 1999  
**To:** Representative Michael Lehman  
Representative Wayne Wood  
**From:** Tom Ourada  
**Subject:** AB 390 — Definition of Tangible Personal Property

**Background**

The department's current position is that sales of books, videotapes, newspapers, magazines, video game cartridges, audio tapes, compact disks, laser disks, photocopies, and artwork are tangible personal property when transferred in a tangible form (e.g., on paper, diskette, etc.). Therefore, sales of these items are taxable under sec. 77.52(1), Wis. Stats. (1997-98), unless an exemption applies (e.g., newspapers are exempt under sec. 77.54(15), Wis. Stats. (1997-98)).

In the case of *Janesville Data Center, Inc. v. Wisconsin Department of Revenue* (June 30, 1978, 84 Wis. 2d 341), the Wisconsin Supreme Court held that Janesville Data's transfer of cards, tapes, and printouts to customers was the sale of intangible coded or processed data and not tangible personal property. The Court reasoned that the object of the transaction was to obtain the coded information on the cards, tapes, and printouts.

In the case of *Manpower International, Inc. v. Wisconsin Department of Revenue* (August 22, 1996, CCH 400-240), the Wisconsin Court of Appeals, relying on *Janesville Data*, held that the sale of canned computer software, prior to May 1, 1992, was not taxable because the essence of the transaction was the intangible data embodied in these products. The Department of Revenue's petition for review was denied by the Wisconsin Supreme Court on December 17, 1996.

**Note:** Section 77.51(20), Wis. Stats., defining tangible personal property, was amended effective May 1, 1992, to specifically provide that computer software, except custom computer software, was tangible personal property. The department's position is that computer software is tangible personal property, whether provided electronically or by magnetic media (e.g., tape, diskette.)

Although the *Janesville Data* and *Manpower* decisions dealt with data processing and computer software, there are cases currently pending before the Wisconsin Tax Appeals Commission asserting that *Janesville Data* and *Manpower* decisions also apply to sales of books, videos, video game cartridges, compact disks, etc. The taxpayers are arguing that the essence of the transaction is the purchase of intangible information or data, with the paper, video tape, cartridge, or other tangible media merely containing the information or data.

Representatives Michael Lehman and Wayne Wood  
June 30, 1999  
Page 2

### Summary of Bill

In order to prevent the risk of substantial loss of sales tax revenues and prevent future costly litigation, the Department of Revenue has asked that the definition of tangible personal property be revised to clearly provide that books, videotapes, newspapers, magazines, video game cartridges, audio tapes, compact disks, laser disks, photocopies, and artwork are tangible personal property.

If the department were to lose pending litigation, the department would have to refund sales tax paid on the products in dispute, not only to the taxpayers in question, but to any other person who files a valid claim for refund, for sales prior to the effective date of this bill.

**Note:** This proposal does not affect exemptions that may apply to tangible personal property (e.g., newspapers, periodicals, etc.). However, this bill would reverse the Wisconsin Tax Appeals Commission decision in the case of *A-K Corp and Profile Publishing Co. dba Miles Kimball* (January 15, 1987, CCH 202-816). The Commission held that mailing lists sold in a tangible form (except cheshire labels) were not tangible personal property because the essence of the transaction was to obtain the names and addresses of potential customers.

TDO:VLG





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July 9, 1999

William M Babcock  
AIA Wisconsin  
321 S. Hamilton Street  
Madison, WI 53703

Dear Mr. Babcock:

This letter is in response to our conversation on July 7, 1999, regarding the effect of 1999 Assembly Bill 390 (AB 390) on the transfer of blueprints or plans with an architect's services.

The current sales and use tax treatment of architectural blueprints and plans will not change if AB 390 is enacted. Under AB 390, the blueprints will clearly be tangible personal property, which is the department's current position. Other provisions of the sales and use tax law and rules, relating to the incidental transfer of tangible personal property with nontaxable services, are not changed by AB 390 and will still apply (e.g., sec. 77.51(5) and (13)(e), Wis. Stats. (1997-98) and sec. Tax 11.67(1), (2)(a), and (3)(g), Wis. Adm. Code (November 1993 Register)).

In summary, both before and after enactment of AB 390, blueprints transferred with architectural services are tangible personal property and are considered transferred incidentally with the nontaxable architectural services. If no architectural services are provided with the transfer of the blueprints (i.e., the architect transfers blueprints made from existing drawings where no design services are provided to the customer), the sale of the blueprints is taxable because they are not transferred incidentally with nontaxable services.

I hope this information is helpful. If you have any questions, please contact me.

Sincerely,

Vicki L. Gibbons  
Staff Specialist



**STATE BAR  
of WISCONSIN**

5302 Eastpark Blvd.  
P.O. Box 7158  
Madison, WI 53707-7158

**MEMORANDUM**

**TO:** Representative Michael Lehman, Chairman  
*Assembly Ways and Means Committee*  
Representative Wayne Wood, Ranking Member  
*Assembly Ways and Means Committee*

**COPY:** Department of Revenue

**FROM:** Taxation Law Section of the State Bar of Wisconsin

**RE:** AB 390

**DATE:** August 24, 1999

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**INTRODUCTION**

This Memorandum is being submitted by the Taxation Law Section of the State Bar of Wisconsin to explain the Section's opposition to the enactment of Assembly Bill 390.

**BACKGROUND AND SUMMARY OF SECTION'S OBJECTIONS**

AB 390, which has been introduced on behalf of the Department of Revenue, would amend the Wisconsin sales and use tax law to modify the definition of "tangible personal property" in sec. 77.51(20), Wis. Stats. (1997-1998). Specifically, AB 390 would expand that definition to include "data, information or intellectual property transferred in tangible forms..." AB 390 would then provide that this expanded definition "includes" (but, presumably, is not limited to) items such as "books, videotapes, newspapers, magazines, video game cartridges, audiotapes, compact disks, laser disks, photocopies and artwork." Because all sales, leases and licenses of "tangible personal property" in Wisconsin are subject to sales or use tax, unless excluded from tax under some specific statutory exemption,<sup>1</sup> the effect of enacting AB 390 would be to expand the

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<sup>1</sup> Newspapers and some periodicals are exempt from tax under Section 77.54(15) and, even though they are for some reason listed among the "included" items in AB 390, they would presumably continue to be exempt even if AB 390 were enacted into law.



Wisconsin tax to a large variety of data, information and intellectual property transactions; the outer limits of the expanded definition are unclear, however, and would have to be determined ultimately by the courts. It is also important to note that the Analysis of AB 390 by the Legislative Reference Bureau erroneously states (as will be explained below) that the Bill "clarifies" the current law.

The Taxation Law Section of the State Bar of Wisconsin opposes the enactment of AB 390 for the reasons set forth below. It should be made clear at the outset, however, that the Section is not taking any position as to whether the examples specifically listed in AB 390 (such as books and videotapes) should be subject to taxation; that is a policy question which the legislature can resolve without technical input from the State Bar. Similarly, the Taxation Law Section is not taking any position as to whether those specifically listed examples are and have been subject to tax under current law; as discussed below, that is a matter currently in litigation, which will and should ultimately be resolved by the courts. Rather, the Section's principal objections to AB 390 as drafted are as follows:

- That AB 390 as drafted, and its accompanying Analysis, characterizes the changes as a "clarification" of prior law. This characterization is erroneous and there is a concern that this may have the effect of enabling the Department of Revenue to argue that the new statutory language applies to prior as well as future periods. In actuality, as will be discussed below, the enactment of AB 390 would substantially change the approach that the Wisconsin courts have consistently taken for over two decades as to the meaning of Section 77.51(20). In fairness to taxpayers who have relied on this judicially-crafted approach, any such change should be prospective only.
- That AB 390 may constitute an attempt to use the legislature to resolve, in the Department of Revenue's favor, several cases currently in litigation involving the application of Section 77.51(20) to prior tax periods.<sup>2</sup> The Taxation Law Section submits that these disputes should be left for resolution by the Tax Appeals Commission and the courts, and that it is an inappropriate use of the legislative process to attempt to resolve the outcome of pending cases by retroactive legislation.

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<sup>2</sup> It should be noted that one of the authors of this Memorandum is counsel for the taxpayer in one of the pending cases, Toys "R" Us v. Dept. of Revenue, Wisconsin Tax Appeals Commission Docket No. 99-S-51, involving the treatment of computer game cartridges and disks. The Toys "R" Us case relates to periods prior to May 1, 1992, at which time the definition of "tangible personal property" in Section 77.51(20) was amended (prospectively only) to include "computer programs except custom computer programs."

- It appears that AB 390, as drafted, attempts to resolve a highly complex problem in a simplistic manner that (i) appears to make taxable a large number of transactions which unquestionably are non-taxable under current law, and (ii) is in any event highly ambiguous, which will require years of litigation to clarify. Just to take one example of both these points, it would appear that an attorney or other professional sending a written opinion or advice letter to a client is, to use the proposed statutory language, selling "information" that is in a "tangible form," thereby (possibly) making the letter subject to tax.

The Taxation Law Section would withdraw opposition to AB 390 if:

- (i) it were modified to provide that it was to take effect only upon and after its enactment,
- (ii) the legislature took some action to specify that the enactment of the new language was not to be construed as indicating any legislative position as to the meaning of Section 77.51(20) for periods prior to the Bill's enactment, and
- (iii) the language were modified to ensure that the listed examples (that is, "books, videotapes, newspapers, magazines, video game cartridges, audiotapes compact disks, laser disks, photocopies and artwork"), or some subset thereof, were the only items covered thereby, and were not merely illustrations of an amorphous broader class of taxable intangible items which happen to be "transferred in tangible form."

Although the Taxation Section is, as noted, taking no position on the broader fiscal and policy issues reflected in AB 390 as drafted, we would like to raise two additional points that the legislature might want to consider in reviewing these broader issues.

First, it should be noted that the fiscal estimate does not provide nearly enough information of the fiscal impact of the Bill; the estimate concludes that the Bill's enactment would have no revenue impact, but this conclusion (i) ignores the fact that, as drafted, the Bill would subject to tax many transactions that are not currently taxable, even under the Department's interpretation of present law, and (ii) overlooks the fact that, by newly characterizing many new types of intangible properties as "tangible," the Bill would thereby create an exemption for the equipment

used in producing those properties.<sup>3</sup> The net effect of these revenue consequences is unclear and the fiscal estimate provides little guidance on the larger implications that AB 390 will have on the law. The legislature might well decide that it cannot proceed until there is a more complete analysis of the fiscal impact.

Second, the legislature might want to give further thought to whether it is wise to expand Wisconsin's sales taxes to include data, information or intellectual property, at a time when these items are of rapidly increasing importance in what is becoming an "information economy." If the sellers of these types of intangibles are required, solely to avoid Wisconsin tax, to refrain from reducing the intangibles to "tangible form" (whatever that means), Wisconsin could be placed at a serious economic disadvantage as compared to those jurisdictions that do not impose such an impractical and irrelevant pre-condition to non-taxability.

### DISCUSSION

Since its inception, the Wisconsin sales and use tax law has applied only to sales of "tangible personal property" (and a few specifically listed types of services). The law, however, has never contained a comprehensive definition of "tangible personal property"<sup>4</sup>, leaving it to the Tax Appeals Commission and the courts to formulate a distinction between tangible property and intangible property, the latter not being subject to tax. This issue first came to the Wisconsin Supreme Court in Janesville Data Center, Inc. v. Dept. of Revenue,<sup>5</sup> involving magnetic computer tapes and key punch cards; the Court held that such items were not "tangible personal property" (and were therefore non-taxable), based on the Court's reasoning that the "essence of the transaction" to the buyer was obtaining the coded and processed data contained on the cards and tapes, which constituted intangible property (or a non-taxable service), rather than the cards and tapes themselves.

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<sup>3</sup> If intangible items are reclassified as "tangible personal property," any equipment used to produce such items would likely then be classified as tax-exempt manufacturing property under sec. 77.54(6)(a), Wis. Stats. (1997-1998). This relationship is well illustrated by the decision of the Wisconsin Tax Appeals Commission in Health Micro Data Systems, Inc. v. Dept. of Revenue, WTAC (May 23, 1989), CCH Wisconsin Tax Reporter ¶203-062; in that case, the Commission held that computers used in producing "canned" computer programs were themselves exempt from tax because they were being used to manufacture "tangible personal property."

<sup>4</sup> Section 77.51(20) purports to provide such a definition, but it states in a unhelpful, circular manner that the phrase "means all tangible personal property of any kind and description" and then merely provides a few examples of specific items included within the definition.

<sup>5</sup> 84 Wis. 2d 341, 267 N.W.2d 656 (1978).

Since Janesville Data was decided over two decades ago, this “essence of the transaction” test has been consistently recognized and applied as the governing principle by the courts, by the Tax Appeals Commission, and by the Department of Revenue itself. For example, in B.I. Moyle Associates, Inc. v. Dept. of Revenue<sup>6</sup> and Manpower International, Inc. v. Dept. of Revenue,<sup>7</sup> the Commission and the courts held that even “canned” computer software was non-taxable, because the buyer’s principal motivation was not to acquire the “hard” disks or tapes, but rather the intangible information and data thereon. As to computer software specifically, the B.I. Moyle and Manpower results were legislatively reversed in 1992 for periods after May 1, 1992 but, as to other types of property, the “essence of the transaction” test has continued to exist and to be relied upon by taxpayers and the Department. Thus, in A-K Corp. v. Dept. of Revenue,<sup>8</sup> the Tax Appeals Commission applied this test in holding that mailing lists sold in the form of magnetic tapes were not subject to tax. And, in Rule Sec. Tax 11.67, the Department concludes that the sale of a manuscript is taxable only if “the manuscript itself is of particular value as an item of tangible personal property,” distinguishing this type of item from original manuscripts and musical arrangements transferred by an author or composer to a publisher thereof, the latter being a non-taxable intangible or service.

It can be seen, therefore, that AB 390 would by no means merely “clarify” the current law. Instead, if the Bill as drafted were enacted into law, it would eliminate the “essence of the transaction” test, and would substitute therefor a simplistic test of whether data, information or intellectual property is being “transferred in tangible forms.” Even the Department has conceded, in a Memorandum on AB 390 prepared by the Department for Representatives Lehman and Wood, that the Bill would reverse the results in the A-K Corp. case<sup>9</sup> and, in fact, that concession significantly understates the likely impact of the Bill.

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<sup>6</sup> WTAC (December 12, 1990), CCH Wisconsin Tax Reporter ¶203-208, affirmed Dane County Circuit Court (November 12, 1991), CCH Wisconsin Tax Reporter ¶203-281.

<sup>7</sup> WTAC (August 15, 1994), CCH Wisconsin Tax Reporter ¶400-075. The Manpower case was affirmed by the Dane County Circuit Court on June 15, 1995 (CCH Wisconsin Tax Reporter ¶400-138), and was subsequently affirmed again by the Wisconsin Court of Appeals, in an unpublished decision. The Department of Revenue attempted to obtain a review of the Court of Appeals decision by the Wisconsin Supreme Court, but that Court declined to hear the appeal.

<sup>8</sup> WTAC (January 15, 1987), CCH Wisconsin Tax Reporter ¶202-816.

<sup>9</sup> See the Department’s Memorandum of June 30, 1999, to Representatives Lehman and Wood. It is impossible to reconcile the Department’s acknowledgement that its Bill would reverse the result of an unappealed 1987 Commission decision with its assertion that the Bill is a mere “clarification” of current law.

For example, it would appear that the Bill would also reverse the Department's position as to manuscripts and musical arrangements transferred by authors and composers, since those items certainly constitute "intellectual property" that are transferred in a "tangible form," whether that form be paper or a computer disk. And, mention has already been made of such potentially taxable items as opinion or advice letters provided by attorneys or others.<sup>10</sup> Certainly, it is within the prerogative of the legislature to expand the scope of Wisconsin's sales and use tax by eliminating a judicially-developed tax definition, but it would surely be unfair to Wisconsin's taxpayers, who have presumptively relied on that definition, to treat the modification as a "clarification," thereby providing it with retroactive effect. For this reason, the Section submits, if AB 390 were to be enacted into law, that it should contain a clear statement that the new definition is to be effective only for post-enactment periods.

Moreover, mention has been made of the cases now pending in the tax appeals system, which present the question of how the "essence of the transaction" test is to be applied to such items as computer game cartridges and disks (for periods prior to the 1992 legislation as to computer software) and other intellectual property and informational items. The Department is of course well aware of these cases and, in fact, in the Department's Memorandum referred to above, the authors appear to acknowledge that a major purpose motivating the Department's development and support of AB 390 is to enable the Department to prevail in that litigation, so that it will not have to refund the taxes there in dispute. If this is the case, the Section vigorously objects to the use of the legislative process in this manner.

It is a well accepted principle of tax administration that "a tax cannot be imposed without clear and express language for that purpose" and that, consequently, Wisconsin's taxpayers are entitled to interpret ambiguous statutes in their favor and, if necessary, to litigate the meaning of such statutes in the Tax Appeals Commission and the courts.<sup>11</sup> These principles would be profoundly compromised if, whenever the Department were faced with such litigation, it were able to obtain the assistance of the legislature in retroactively "clarifying" the ambiguity in the Department's favor. Obviously, if that were permitted, the result would be the imposition of a tax for periods prior to the "clarification," which is in direct violation of

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<sup>10</sup> In view of the legislature's past refusal to add such services to the list of taxable services, the Taxation Section submits that it would be inappropriate to accomplish such a result through the "back door" method of expanding the definition of "tangible personal property."

<sup>11</sup> See, for example, National Amusement Co. v. Dept. of Revenue, 41 Wis. 2d 261, 163 N.W.2d 625 (1969), stating that "where ambiguity and doubt exist [in a tax statute], it must be resolved in favor of the person upon whom it is sought to impose the tax."

the precept that taxes are not to be imposed in the absence of "clear and express" imposition language. Therefore, if some version of AB 390 is enacted, the Taxation Section submits that the legislature should state explicitly that the new provision is not intended to affect, in one direction or another, the meaning of Section 77.51(20) for pre-enactment periods. Then, it would be left to the courts to decide whether the statutory language during the pre-enactment periods at issue was sufficiently "clear and express" to support the imposition of the tax for those periods, while the legislation would fulfill its role by clarifying any ambiguity for future periods.

Turning to the proposed statutory language itself, it has already been pointed out that such language would presumably extend the reach of Wisconsin's tax to many types of intangible items not subject to tax. And, although the Department might respond to this comment by contending that the Bill is not intended to have such a broad reach, such a response would only serve to illustrate the inherent ambiguities in the Bill's approach. One easy solution to this problem, of course, would be to limit the Bill only to the specific items now set forth as examples of the items to be taxed, or some subset thereof, and, if this were accompanied by the additional safeguards listed above, the Taxation Section would not object. If, however, the legislature prefers to adopt a broader rule to cover other types of intangibles, it needs to give very careful consideration to the most desirable approach.

In that connection, the Taxation Section recognizes that this is an extremely difficult area, and that it is very hard to formulate any test that will clearly and fairly distinguish between items that should and should not be subject to tax. Furthermore, the legislature could decide that the "essence of the transaction" test is not the best method of making these distinctions (although that test has been adopted by the legislature or the courts in many other states as well, and has appeared to work reasonably well).<sup>12</sup> By reducing the issue to the simplistic question of whether the intangible is being provided in "tangible form," however, AB 390 adopts a test which is ripe with ambiguity and which has no logical relationship to either tax policy or business decision making. If, therefore, the legislature were to decide to adopt a different approach, it should first carefully consider some of the other alternatives that have been adopted elsewhere or suggested for resolving this knotty problem.<sup>13</sup> If it does so, the Taxation Section is confident that the simplistic approach of AB 390 would quickly be discarded.

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<sup>12</sup> See Jerome R. Hellerstein and Walter Hellerstein, State Taxation (3d Edition), ¶12.07[1].

<sup>13</sup> Some such alternatives are discussed in the leading treatise referred to in the previous footnote, at ¶12.07[1].



CORRESPONDENCE/MEMORANDUMSTATE OF WISCONSIN  
Wisconsin Department of Revenue

**Date:** June 30, 1999

**To:** Representative Michael Lehman  
Representative Wayne Wood

**From:** Tom Ourada

**Subject:** AB 390 — Definition of Tangible Personal Property

**Background**

The department's current position is that sales of books, videotapes, newspapers, magazines, video game cartridges, audio tapes, compact disks, laser disks, photocopies, and artwork are tangible personal property when transferred in a tangible form (e.g., on paper, diskette, etc.). Therefore, sales of these items are taxable under sec. 77.52(1), Wis. Stats. (1997-98), unless an exemption applies (e.g., newspapers are exempt under sec. 77.54(15), Wis. Stats. (1997-98)).

In the case of *Janesville Data Center, Inc. v. Wisconsin Department of Revenue* (June 30, 1978, 84 Wis. 2d 341), the Wisconsin Supreme Court held that Janesville Data's transfer of cards, tapes, and printouts to customers was the sale of intangible coded or processed data and not tangible personal property. The Court reasoned that the object of the transaction was to obtain the coded information on the cards, tapes, and printouts.

In the case of *Manpower International, Inc. v. Wisconsin Department of Revenue* (August 22, 1996, CCH 400-240), the Wisconsin Court of Appeals, relying on *Janesville Data*, held that the sale of canned computer software, prior to May 1, 1992, was not taxable because the essence of the transaction was the intangible data embodied in these products. The Department of Revenue's petition for review was denied by the Wisconsin Supreme Court on December 17, 1996.

**Note:** Section 77.51(20), Wis. Stats., defining tangible personal property, was amended effective May 1, 1992, to specifically provide that computer software, except custom computer software, was tangible personal property. The department's position is that computer software is tangible personal property, whether provided electronically or by magnetic media (e.g., tape, diskette.)

Although the *Janesville Data* and *Manpower* decisions dealt with data processing and computer software, there are cases currently pending before the Wisconsin Tax Appeals Commission asserting that *Janesville Data* and *Manpower* decisions also apply to sales of books, videos, video game cartridges, compact disks, etc. The taxpayers are arguing that the essence of the transaction is the purchase of intangible information or data, with the paper, video tape, cartridge, or other tangible media merely containing the information or data.

Representatives Michael Lehman and Wayne Wood  
June 30, 1999  
Page 2

### Summary of Bill

In order to prevent the risk of substantial loss of sales tax revenues and prevent future costly litigation, the Department of Revenue has asked that the definition of tangible personal property be revised to clearly provide that books, videotapes, newspapers, magazines, video game cartridges, audio tapes, compact disks, laser disks, photocopies, and artwork are tangible personal property.

If the department were to lose pending litigation, the department would have to refund sales tax paid on the products in dispute, not only to the taxpayers in question, but to any other person who files a valid claim for refund, for sales prior to the effective date of this bill.

**Note:** This proposal does not affect exemptions that may apply to tangible personal property (e.g., newspapers, periodicals, etc.). However, this bill would reverse the Wisconsin Tax Appeals Commission decision in the case of *A-K Corp and Profile Publishing Co. dba Miles Kimball* (January 15, 1987, CCH 202-816). The Commission held that mailing lists sold in a tangible form (except cheshire labels) were not tangible personal property because the essence of the transaction was to obtain the names and addresses of potential customers.

TDO:VLG

(d) The distribution of property by a corporation to its stockholders as a dividend or in whole or partial liquidation;

(e) The distribution of property by a partnership to its partners in whole or partial liquidation;

(em) The distribution of property by a limited liability company to its members in whole or partial liquidation;

(f) Repossession of property by the seller from the purchaser when the only consideration is cancellation of the purchaser's obligation to pay the remaining balance of the purchase price;

(g) The transfer of property in a reorganization as defined in section 368 of the internal revenue code in which no gain or loss is recognized for franchise or income tax purposes; or

(h) Any transfer of all or substantially all the property held or used by a person in the course of an activity requiring the holding of a seller's permit, if after the transfer the real or ultimate ownership of the property is substantially similar to that which existed before the transfer. For the purposes of this section, stockholders, bondholders, partners, members or other persons holding an interest in a corporation or other entity are regarded as having the real or ultimate ownership of the property of the corporation or other entity. In this paragraph, "substantially similar" means 80% or more of ownership.

(14r) A sale or purchase 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, except that for purposes of this subsection a common carrier or the U.S. postal service shall be deemed the agent of the seller, regardless of any f.o.b. point and regardless of the method by which freight or postage is paid.

(15) (a) Except as provided in par. (cm), "sales price" means the total amount for which tangible personal property is sold, leased or rented, valued in money, whether paid in money or otherwise, without any deduction on account of any of the following:

1. The cost of the property sold;
2. The cost of the materials used, labor or service cost, losses or any other expenses;
3. The cost of transportation of the property prior to its purchase;
4. Any tax included in or added to the purchase price including the taxes imposed by s. 78.01 unless the tax is refunded, ss. 78.40, 139.02, 139.03 and 139.31 and the federal motor fuel tax unless the tax is refunded and including also any manufacturers' or importers' excise tax; but not including any tax imposed by the United States, any other tax imposed by this state, or any tax imposed by any municipality of this state upon or with respect to retail sales whether imposed on the retailer or consumer, if that federal, state or municipal tax is measured by a stated percentage of sales price or gross receipts, and not including the federal communications tax imposed upon the services set forth in s. 77.52 (2)

(a) 5. For the purpose of this subdivision, a tax shall be deemed "imposed upon or with respect to retail sales" only if the retailer is the person who is required to make the payment of the tax to the governmental unit levying the tax.

(b) "Sales price" shall not include any of the following:

1. Cash discounts allowed and taken on sales;
2. The amount charged for property returned by customers when that entire amount is refunded either in cash or credit;
3. Transportation charges separately stated, if the transportation occurs after the purchase of the property is made.
4. In all transactions, except those to which subd. 6. applies, in which an article of tangible personal property is traded toward the purchase of an article of greater value, the sales price shall be only that portion of the purchase price represented by the difference between the full purchase price of the article of greater value and the amount allowed for the article traded.

5. Thirty-five percent of the total amount for which a new mobile home that is a primary housing unit under s. 340.01 (29)

is sold. No credit may be allowed for trade-ins under subd. 4. or sub. (4) (b) 3. This subdivision does not apply to lease or rental.

6. For the sale of a manufactured building, as defined in s. 101.71 (6); at the retailer's option, except that after a retailer chooses an option, the retailer may not use the other option for other sales without the department's written approval; either 35% of the sales price or an amount equal to the sales price minus the cost of the materials that become an ingredient or component part of the building.

(c) "Sales price" includes all of the following:

1. Any services that are a part of the sale of tangible personal property, including any fee, service charge, labor charge or other addition to the price charged a customer by the retailer which represents or is in lieu of a tip or gratuity.

2. The amount charged for labor or services rendered in installing or applying tangible personal property sold, except the price received for installing or applying property which, when installed or applied, will constitute an addition or capital improvement of real property and provided such amount is separately set forth from the amount charged for the tangible personal property.

(cm) "Sales price" means the portion of the sales price attributable to taxable goods if exempt food, food products or beverages are packaged with other goods by a person other than a retailer before a sale to a final consumer and if less than 50% of the sales price of the goods packaged together is attributable to goods that are exempt under s. 77.54 (20).

(16) "Sales tax" means the tax imposed by s. 77.52.

(17) "Seller" includes every person selling, leasing or renting tangible personal property or selling, performing or furnishing services of a kind the gross receipts from the sale, lease, rental, performance or furnishing of which are required to be included in the measure of the sales tax.

(17m) "Service address" means the location of the telecommunications equipment from which telecommunications services are originated or at which telecommunications services are received by a buyer. If this is not a defined location; as in the case of mobile phones, paging systems, maritime systems, air-to-ground systems and the like; "service address" means the location where a buyer makes primary use of the telecommunications equipment as defined by telephone number, authorization code or location where bills are sent.

(17r) "Sign" means write one's signature or, if the department prescribes another method of authenticating, use that other method.

(18) "Storage" includes any keeping or retention in this state of tangible personal property purchased from a retailer for any purpose except sale in the regular course of business.

(20) "Tangible personal property" means all tangible personal property of every kind and description and includes electricity, natural gas, steam and water and also leased property affixed to realty if the lessor has the right to remove the property upon breach or termination of the lease agreement, unless the lessor of the property is also the lessor of the realty to which the property is affixed. "Tangible personal property" also includes coins and stamps of the United States sold or traded as collectors' items above their face value and computer programs except custom computer programs.

(21) "Taxpayer" means the person required to pay, collect, account for or who is otherwise directly interested in the taxes imposed by this subchapter.

(21m) "Telecommunications services" means sending messages and information transmitted through the use of local, toll and wide-area telephone service; channel services; telegraph services; teletypewriter; computer exchange services; cellular mobile telecommunications service; specialized mobile radio; stationary two-way radio; paging service; or any other form of mobile and portable one-way or two-way communications; or any other transmission of messages or information by electronic or similar means between or among points by wire, cable, fiber



**State of Wisconsin • DEPARTMENT OF REVENUE**

125 SOUTH WEBSTER STREET • P.O. BOX 8933 • MADISON, WISCONSIN 53708-8933 • 608-266-6466 • FAX 608-266-5718 • <http://www.dor.state.wi.us>

*Tommy G. Thompson*  
Governor

*Cate Zeuske*  
Secretary of Revenue

September 7, 1999

✓ The Honorable Michael Lehman  
Wisconsin Assembly  
State Capitol – Room 103 West  
Madison, WI 53702

The Honorable Wayne Wood  
Wisconsin Assembly  
State Capitol – Room 104 North  
Madison, WI 53702

Dear Representative Lehman and Representative Wood:

This letter is in response to our discussion with you and representatives of the State Bar of Wisconsin on September 1, 1999, regarding 1999 Assembly Bill 390. As a result of those discussions, four points were raised that require response by the Department of Revenue and are addressed in order below.

***Point 1 — Effective Date and Possible Retroactivity by “Clarifying” Current Law***

The use of the term “clarify” in both the department’s proposal that was sent to the Legislative Reference Bureau for drafting and the Analysis of AB 390 means only that it is the department’s current position that the items added, with the exception of certain mailing lists, are tangible personal property when transferred in a tangible form.

The department does not intend to use enactment of AB 390 as an argument in pending litigation regarding the sale of video game cartridges, videocassettes, audiocassettes, etc. Specifically, the department does not intend to argue that since the Legislature enacted the definition of tangible personal property in AB 390 as a clarification, such enactment proves the Legislature’s intent that data, information, and other intellectual property transferred in a tangible form was tangible personal property both prior to and after the effective date of AB 390. **It is understood between all parties that the petitioners will also not use the attempt to enact AB 390 and the subsequent enactment of AB 390 as any proof of legislative intent in pending litigation regarding video game cartridges, videocassettes, audiocassettes, etc.**

The pending litigation will be handled exclusive of AB 390. Should the Courts rule adversely to the department’s current treatment, the revised definition of tangible personal property would only apply to sales and purchases on or after the effective date of AB 390 (i.e., day after publication).

***Point 2 — Expansion of Imposition on Nontaxable Services***

While the definition of tangible personal property is "clarified" in AB 390 to include data, information, and other intellectual property transferred in a tangible form, statutory language relating to the transfer of such property in conjunction with services still applies for purposes of determining whether the person making the transfer is selling tangible personal property or selling a service with the property being incidentally transferred with the property. Simply put, prior to and after enactment of AB 390, if a person provides a nontaxable service and, with that service transfers data, information, and other intellectual property in a tangible form, the charge by that person to its customer is not subject to Wisconsin sales or use tax if the tangible personal property is transferred incidentally with the furnishing of the service.

See Attachment 1 for a copy of a letter that was sent to the Wisconsin association that represents architects regarding its concern that AB 390 might result in the imposition of tax on architectural services. Following are other examples of nontaxable services which involve the incidental transfer of tangible personal property. Such services will continue to be nontaxable after enactment of AB 390.

**Example 1:** A person performing business advisory, record keeping, payroll, and tax services for small businesses is providing a service. Even though this person may provide a report that might be argued is intellectual property provided in a tangible form, the charge for the service and property is not subject to sales tax both prior to and after enactment of AB 390. The report is transferred incidentally in conjunction with the nontaxable service.

**Example 2:** The transfer to a publisher of an original manuscript or musical arrangement for publication is not a sale of tangible personal property that is subject to sales or use tax. The original manuscript, although tangible personal property, is considered transferred incidentally in conjunction with a nontaxable service both prior to and after enactment of AB 390. However, the subsequent sale of copies of an author's or composer's work is a sale of tangible personal property and is taxable. The sale of manuscripts is taxable if the manuscript itself is of particular value as an item of tangible personal property (e.g., collector's item) and the purchaser is buying the property, not the service that went into it.

**Example 3:** The development of information pursuant to a research and development contract, where the primary objective of the customer is to obtain the results of the technical skill and the experimental and research work of the engineers and other technicians of the researcher, is a service that is not subject to Wisconsin sales or use tax both prior to or after enactment of AB 390. The intellectual property, in the form of a report, is transferred incidentally in conjunction with the service.

**Example 4:** An attorney performs due diligence services for a client. As a result of its research and investigations, it prepares a report for the client. In addition to the original report, 10 copies are provided for use by the client's management team. Although tangible personal property is transferred (the report and 10 copies), the transfer is incidental to the legal services provided. The charge to the client for the property and service is not subject to Wisconsin sales or use tax.

**Example 5:** The sale of transcripts on computer disks by a court reporter to parties present or participating in the legal proceedings from which the transcript was prepared are not subject to Wisconsin sales or use tax both prior to and after enactment of AB 390. The computer disks are transferred incidentally in conjunction with the court reporting service. However, sales of the computer disks to other persons not associated with the proceedings (e.g., numerous copies of the proceedings are made because the case has attracted wide attention), are subject to Wisconsin sales or use tax as the sale of tangible personal property.

**Point 3 — Provide for Same Tax Treatment for Mailing Lists**

AB 390, prior to amendments suggested, reverses the Wisconsin Tax Appeals Commission decision in the case of *A-K Corp and Profile Publishing Co. d/b/a Miles Kimball* (January 15, 1987, CCH 202-816). There, the Commission held that mailing lists sold in a tangible form (except cheshire labels) were not tangible personal property because the essence of the transaction was to obtain the names and addresses of potential customers.

Under AB 390, such mailing lists transferred in a tangible form are tangible personal property. However, the State Bar has requested that mail order companies not be harmed as a result of enactment of AB 390. Rather than revising the definition of tangible personal property for a single item, the department recommends that an exemption be created that would exempt from sales or use tax mailing lists, except those provided in the form of a label. Therefore, both prior to and after enactment of AB 390, mailing lists, except those provided in a label form, are not subject to sales or use tax. See Attachment 2.

**Point 4 — Change Language With Respect to Artwork**

The department has had a longstanding policy that "works of art" such as sculptures and paintings, and "finished art," such as camera copy and color separations, are tangible personal property when sold. Because finished art is tangible personal property, its consumption in manufacturing tangible personal property destined for sale is exempt from sales or use tax. The State Bar recommends, and the department agrees, that it is beneficial to use the phrases "works of art" and "finished art," rather than the word "artwork" that is used in AB 390, since such phrases have long been used in the rules of the Department of Revenue in the Administrative Code. See Attachment 2.

I believe the department has adequately addressed all concerns expressed by the State Bar so that this bill may go forward. I have forwarded to the State Bar (1) drafting instructions that were provided to the Legislative Reference Bureau on September 3, 1999, and (2) a copy of this letter.

I look forward to the Committee's support of the AB 390 with the amendments suggested. If you have any questions, please contact me.

Sincerely,



Tom Ourada  
Executive Assistant

cc: J. Boese, State Bar of Wisconsin  
Attachment



**State of Wisconsin • DEPARTMENT OF REVENUE ATTACHMENT 1**

125 SOUTH WEBSTER STREET • P.O. BOX 8933 • MADISON, WISCONSIN 53708-8933  
PHONE (608) 266-3873 • FAX (608) 261-6240 • [vgibbons@dor.state.wi.us](mailto:vgibbons@dor.state.wi.us)

July 9, 1999

William M Babcock  
AIA Wisconsin  
321 S. Hamilton Street  
Madison, WI 53703

Dear Mr. Babcock:

This letter is in response to our conversation on July 7, 1999, regarding the effect of 1999 Assembly Bill 390 (AB 390) on the transfer of blueprints or plans with an architect's services.

The current sales and use tax treatment of architectural blueprints and plans will not change if AB 390 is enacted. Under AB 390, the blueprints will clearly be tangible personal property, which is the department's current position. Other provisions of the sales and use tax law and rules, relating to the incidental transfer of tangible personal property with nontaxable services, are not changed by AB 390 and will still apply (e.g., sec. 77.51(5) and (13)(e), Wis. Stats. (1997-98) and sec. Tax 11.67(1), (2)(a), and (3)(g), Wis. Adm. Code (November 1993 Register).

In summary, both before and after enactment of AB 390, blueprints transferred with architectural services are tangible personal property and are considered transferred incidentally with the nontaxable architectural services. If no architectural services are provided with the transfer of the blueprints (i.e., the architect transfers blueprints made from existing drawings where no design services are provided to the customer), the sale of the blueprints is taxable because they are not transferred incidentally with nontaxable services.

I hope this information is helpful. If you have any questions, please contact me.

Sincerely,

Vicki L. Gibbons  
Staff Specialist

## ATTACHMENT 2

1997 Assembly Bill 390 clarifies that data, information, and other intellectual property transferred in a tangible form is tangible personal property under sec. 77.51(20), Wis. Stats. (1997-98). Two amendments need to be drafted to accomplish the following:

1. Maintain the current nontaxability for certain mailing lists (i.e., sales of mailing lists, except those provided in the form of a label, are not taxable).

As drafted, AB 390 would reverse the Wisconsin Tax Appeals Commission decision in the case of *A-K Corp and Profile Publishing Co. dba Miles Kimball* (January 15, 1987, CCH 202-816). There, the Commission held that mailing lists sold in a tangible form (except cheshire labels) were not tangible personal property because the essence of the transaction was to obtain the names and addresses of potential customers.

In order to preserve that tax treatment (i.e., all mailing lists are not taxable except in the form of a label) but still reverse that part of the decision that provided the mailing lists sold in a tangible form were not tangible personal property, an exemption should be created as part of AB 390 to state as follows:

**77.54(44)** The gross receipts from the sale of and the storage, use, or other consumption of mailing lists, except those provided in the form of a label.

2. Make it clear the department's intention that although data, information, and other intellectual property transferred in a tangible form is tangible personal property, it does not mean that when such property is transferred in conjunction with a nontaxable service, the charge for the property and service becomes taxable (i.e., the incidental provisions provided in the current statute would apply after enactment).

Amend as follows:

**77.51(5)** For purposes of subs. (13) (e) and (f) and (14) (L) and s. 77.52 (2m) "incidental" means 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, including data, information, and other intellectual property transferred in a tangible form, 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.

(13)(e) A person selling tangible personal property, including data, information, and other intellectual property transferred in a tangible form, to a service provider who transfers the property in conjunction with the selling, performing or furnishing of any service and the property is incidental to the service, unless the service provider is selling, performing or furnishing services under s. 77.52 (2) (a) 7., 10., 11. and 20. This subsection does not apply to sub. (2).



(f) A service provider who transfers tangible personal property, including data, information, and other intellectual property transferred in a tangible form, in conjunction with but not incidental to the selling, performing or furnishing of any service and a service provider selling, performing or furnishing services under s. 77.52 (2) (a) 7., 10., 11. and 20. This subsection does not apply to sub. (2).

(14)(L) Transfers by a service provider of tangible personal property, including data, information, and other intellectual property transferred in a tangible form, in conjunction with but not incidental to the selling, performing or furnishing of any service, and transfers by a service provider selling, performing or furnishing services under s. 77.52 (2) (a) 7., 10., 11. and 20. This subsection does not apply to sub. (2).

77.52(2m)(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 including data, information, and other intellectual property transferred in a tangible form, 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).

3. Use terms currently defined or addressed in the Administrative Code instead of artwork. Section Tax 11.67(3)(c), as it relates to the transfer of paintings and sculptures, uses the phrase "works of art." Section Tax 11.70(1)(a), as it relates to illustrative materials that are created by advertising agencies and are reproduced by others, such as printers, uses a defined phrase of "finished art." To assure that current policy with respect to these two items remain the same, amend AB 390 as follows:

Section 1, page 2, lines 7 and 8: Insert after "photocopies" the phrase ", works of art" and replace the word "artwork" on line 8 with the phrase "finished art."



**STATE BAR  
of WISCONSIN**

5302 Eastpark Blvd.  
P.O. Box 7158  
Madison, WI 53707-7158

**MEMORANDUM**

**To:** Representative Michael Lehman  
Representative Wayne Wood

**From:** Taxation Law Section  
State Bar of Wisconsin

**Copy:** Tom Ourada, Department of Revenue

**Date:** September 8, 1999

**Re:** AB 390 - Response to September 7 DOR Letter

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The Taxation Section has received the Department of Revenue's letter, dated September 7, 1999, regarding Assembly Bill 390. Due to the ongoing discussions on AB 390, it appears premature for us to spend additional time with the Department of Revenue regarding the Taxation Law Section's technical concerns with that letter. Regardless of the Taxation Law Section's concerns with the Department of Revenue letter and AB 390 as it is currently drafted, the Section must specifically go on record against one particular statement in the letter.

The Department states that it will not use any enactment of AB 390 as an argument in litigation regarding the sale of video game cartridges, videocassettes, audiocassettes, etc. prior to the effective date of AB 390, but then goes on to state that it is "understood" between "all parties" that the "the petitioners" will also not use "the attempt to enact AB 390 and the subsequent enactment of AB 390 as any proof of legislative intent ...."

While the Department of Revenue has the ability to state its intentions and make commitments with respect to its conduct, the State Bar Taxation Section obviously cannot state the intentions of or make any commitment with respect to any "petitioner" in any contested matter and, therefore, must oppose it. We trust that the committee and the DOR understand why the Taxation Law Section cannot agree with this statement.

The Taxation Law Section appreciates your willingness to work with us, and we are willing to continue working with the Department on resolving further concerns. However, we hope you understand that as the bill currently stands the Taxation Law Section still remains in opposition to AB 390.

*For more information contact Jenny Boese at the State Bar at 608-250-6045 or [jboese@wisbar.org](mailto:jboese@wisbar.org).*





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## WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

One East Main Street, Suite 401; P.O. Box 2536; Madison, WI 53701-2536

Telephone: (608) 266-1304

Fax: (608) 266-3830

Email: leg.council@legis.state.wi.us

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DATE: September 20, 1999

TO: REPRESENTATIVE MICHAEL LEHMAN

FROM: William Ford, Senior Staff Attorney

SUBJECT: LRBa0576/1, An Unintroduced Amendment to 1999 Assembly Bill 390,  
Relating to the Definition of Personal Property That is Subject to the Sales  
Tax

This memorandum is in response to your request for an explanation of why the language in SECTIONS 1, 2, 3, 4 and 7 of LRBa0576/1, an unIntroduced amendment to 1999 Assembly Bill 390 ("the Amendment"), is unnecessary.

1999 Assembly Bill 390 ("the Bill") amends s. 77.51 (20), Stats., to include within the definition of "tangible personal property" for purposes of the sales and use tax "data, information or intellectual property transferred in tangible forms, including books, videotapes, newspapers, magazines, video game cartridges, audio tapes, compact discs, laser discs, photocopies and artwork."

SECTIONS 1, 2, 3, 4 and 7 of the Amendment would amend statutes relating to how the sales and use tax applies when a provider of services transfers tangible personal property in conjunction with providing a service. In each of the statutory sections affected by SECTIONS 1, 2, 3, 4 and 7 of the Amendment, the term "tangible personal property" is included. SECTIONS 1, 2, 3, 4 and 7 of the Amendment would add the term "including data, information and other intellectual property transferred in tangible form" following the term "tangible personal property." Because the Bill *defines* tangible personal property to *include* data, information or intellectual property transferred in tangible form, it is redundant to add language to each of these sections to modify the term "tangible personal property" to include data, information and other intellectual property transferred in a tangible form."

Please contact me at the Legislative Council Staff offices if I can be of further assistance.

WF:tlu:ksm;jal



**STATE BAR  
of WISCONSIN**

5302 Eastpark Blvd.  
P.O. Box 7158  
Madison, WI 53707-7158

**MEMORANDUM**

**To:** Rep. Michael Lehman, Chair  
Assembly Ways and Means Committee

**From:** Jenny Boese, Government Relations Coordinator

**Date:** September 22, 1999

**Re:** AB 390 - Tangible Personal Property

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Per your request on possible language addressing the potential retroactive problem in Assembly Bill 390.

The following language is characteristic of how the retroactive issue is addressed in federal tax legislation. A typical statement would be:

*No inference is intended with respect to the effect of this legislation on transactions occurring prior to the effective date.*

For federal tax legislation this statement is usually found in the legislative committee report, however, Wisconsin does not have similar reports. Therefore, the easiest way to incorporate this statement into AB 390 would be to include it in the statutory effective date provision of the bill. In this way the *Legislature's* intent with respect to this issue is perfectly clear.

Please contact me at 608-250-6045 if you have any questions or comments. Thank you again for asking for our thoughts on this legislation.





**STATE BAR  
of WISCONSIN**

5302 Eastpark Blvd.  
P.O. Box 7158  
Madison, WI 53707-7158

September 23, 1999

Representative Michael Lehman  
Wisconsin State Assembly  
State Capitol – Room 103 West  
Madison, WI 53702  
**HAND-DELIVERED**

Dear Representative Lehman:

Let me begin this letter by apologizing for any misunderstanding that may have happened with regard to Assembly Bill 390. Neither the Taxation Law Section nor Len Sosnowski and I had any intentions of meeting with you, the Department of Revenue and Representative Wood as a means of delaying a vote on AB 390. We know you did not have to agree to any meeting or agree to work with us on any changes but you did so to try and bring about a suitable resolution of the Taxation Section's concerns. As we stated before, we are very appreciative of your willingness to work with us and we certainly remain willing to work with your Committee.

We also wish to acknowledge — to eliminate any confusion that may exist — that you *did* during our meeting state your view that neither the Department of Revenue nor taxpayers be allowed to argue that enactment of AB 390 provides any indication of legislative intent with regard to pre-effective date transactions. The Taxation Section is not objecting to your statement, which obviously is a policy matter within your province. Rather, we are objecting strongly to the language used by the Department in its attempt to memorialize your statement as it applies to *taxpayers* (that is, the bold-type language in the Department's September 7, 1999 letter saying that it is understood between "all parties" that the "petitioners" shall not use the "attempt to enact" and "subsequent enactment" as any proof of legislative intent with respect to pre-effective date transactions).

As stated in our memo of September 8, 1999, the Taxation Section does not have authority to bind anyone, and we must eliminate any implication to the contrary. We assume, moreover, that a court in any pending litigation would recognize that the Taxation Section has no such authority and ignore the bold-type language in the Department's letter — in which event the Department's letter would not achieve your stated objective. We also note that the Department's bold-type language goes on to deal with arguments that might be made by



**Lehman Letter**  
**Page 2**

petitioners based on an “*attempt to enact*” AB 390 (presumably meaning an attempt that fails), a subject that we did not discuss at all during our meeting.

A ready solution, if the legislature wants no inference to be drawn from any enactment of AB 390 on pending matters, is for the directive to come *from the legislature*. We pointed out during our meeting that, in federal tax legislation, it is common that such a directive appears in reports prepared by the pertinent legislative committees. A statement we mentioned as typical (tailored to our situation) would be as follows:

*No inference is intended with respect to the effect of this legislation on transactions occurring prior to the effective date.*

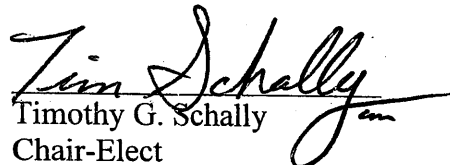
With regard to AB 390, this statement would, ideally, appear in a statutory effective date provision, thus ensuring clarity and wide public availability.

Obviously, it is your prerogative – as it should be – to proceed without further input from us. But we do want you to know that the Taxation Law Section appreciates the time and effort you have already spent to address our concerns. We apologize again for any recent events that would lead you to believe otherwise, and, as noted above, we remain willing to work with your Committee on AB 390, if you wish.

Very truly yours,

**TAXATION LAW SECTION**

By:

  
Timothy G. Schally  
Chair-Elect



Michael (Mickey)  
**Lehman**

State Representative

58th Assembly District

Committee Chair: Ways and Means

---

October 7, 1999

Joseph Kreye  
Legislative Reference Bureau  
100 North Hamilton, Atrium  
Madison, WI 53701

Dear Joe:

Below please find proposed language for an amendment to AB 390. This language comes at the request of the State Bar of Wisconsin to address their concerns regarding the retroactivity of the legislation. The State Bar suggests adding this statement in the statutory effective date provision:

*No inference is intended with respect to the effect of this legislation on transactions occurring prior to the effective date.*

Also attached to this memo, please find a copy of a letter from the Wisconsin Department of Revenue dated September 7<sup>th</sup>, 1999. This letter, on page 1 "*Point I*" presents the Department's position regarding retroactivity of the legislation.

If you have any questions, please do not hesitate to give me a call.

Respectfully,

MICHAEL "Mickey" LEHMAN  
State Representative  
58th Assembly District

ML:amn

Attachment

---

Office: P.O. Box 8952 • Madison, WI 53708-8952 • (608) 267-2367 • Toll-free: (888) 534-0058 • Fax: (608) 282-3658 • Rep.Lehman@legis.state.wi.us  
Home: 1317 Honeysuckle Road, Hartford, WI 53027 • (262) 673-3967

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STEPHEN R. MILLER  
CHIEF

# State of Wisconsin

## LEGISLATIVE REFERENCE BUREAU

100 NORTH HAMILTON STREET  
P. O. BOX 2037  
MADISON, WI 53701-2037

LEGAL SECTION: (608) 266-3561  
LEGAL FAX: (608) 264-8522  
REFERENCE SECTION: (608) 266-0341  
REFERENCE FAX: (608) 266-5648

October 11, 1999

## MEMORANDUM

**To:** Representative Michael Lehman

**From:** Joe Kreye, LRB attorney

**Subject:** Recommended language from State Bar regarding AB390 and retroactive application

---

I received your letter dated October 7, 1999, regarding the recommended amendment to 1999 Assembly Bill 390 from the State Bar of Wisconsin. It is my understanding from your letter and from the department of revenue's letter dated September 7, 1999, that the State Bar is concerned about a retroactive application of 1999 Assembly Bill 390.

First, the State Bar's recommended language is, in essence, a legislative intent statement. It is not the policy of the Legislative Reference Bureau to draft legislative intent statements. Because each bill should include all provisions that are necessary to carry out legislative intent in the substantive text of the bill, a statement of intent is thus redundant and unnecessary.

Second, a substantive statute is presumed to operate prospectively unless the statute clearly expresses an intent that it apply retroactively. See *State v. ILHR Department*, 101 Wis. 2d 396, 403 (1981) and *Employers Ins. of Wausau v. Smith*, 154 Wis. 2d 199, 220-26 (1990). The language of 1999 Assembly Bill 390 expresses no intent that it apply retroactively. As drafted, the bill takes effect on the day after publication. If the intent of the bill is to apply retroactively, the effective date of the bill must be changed to reflect that intent.

If you have any questions, please do not hesitate to contact me.





## **BILL SUMMARY**

**AB 390: Definition of Tangible Personal Property**

Caucus

Date: November 3, 1999

### **BACKGROUND**

It is the position of the Wisconsin Department of Revenue (DOR) that "sales of books, videotapes, newspapers, magazines, video game cartridges, audio tapes, compact disks, photocopies and artwork are tangible personal property when transferred in a tangible form (e.g., on paper, diskette, etc.). Therefore, sales of these items are taxable under sec. 77.52(1), Wis. Stats. (1997-98), unless an exemption applies (e.g., newspapers)."

Currently, several cases are pending before the Wisconsin Tax Appeals Commission involving the sales of books, videos, video game cartridges, compact disks, etc. The taxpayers are arguing that the essence of the transaction is the purchase of intangible information or data, with the paper, videotape, cartridge, or other tangible media merely containing the information or data, and therefore exempt from sales tax.

### **SUMMARY OF AB 390 (AS AMENDED BY COMMITTEE)**

AB 390 was introduced on behalf of DOR in order to "prevent the risk of substantial loss of sales tax revenues and prevent future costly litigation" by revising the definition of tangible personal property to provide that books, videotapes, newspapers, magazines, video game cartridges, audio tapes, compact disks, laser disks, photocopies, and artwork are tangible personal property.

DOR asserts that "if the department were to lose pending litigation, the department would have to refund sales tax paid on the products in dispute, not only to the taxpayers in question, but to any other person who files a valid claim for refund, for sales prior to the effective date of this bill."

It should be noted that this bill does not affect exemptions that apply to tangible personal property such as newspapers and periodicals. Also, items that are produced incidentally to a service will not be taxable (e.g., legal documents, architectural documents, musical drafts, etc.).

The State Bar of Wisconsin was concerned with a possible retroactive application of AB 390 by DOR. To alleviate the State Bar's concerns, an amendment was requested that would incorporate language recommended by the State Bar which stipulated that AB 390 would have no impact on transactions occurring prior to the effective date. It was the opinion of the Legislative Reference Bureau that in order for the legislation to apply retroactively, the effective date of the bill must be changed to reflect that intent, otherwise, the legislation takes effect the day after publication, such as would be the case with AB 390. This documentation will remain in the drafting file to exhibit clearly the intent of the Legislature and DOR regarding the possible retroactive application of AB 390.

## AMENDMENTS

**Assembly Amendment 1** is a technical language change recommended by the State Bar of Wisconsin and agreed to by DOR that relates to the term "artwork." The amendment uses the phrases "works of art" and "finished art," rather than the word "artwork" which appeared in the original bill. This reflects long-standing use of such phrases by DOR in administrative rule [adopted 15-0-1, Rep. Ainsworth absent].

## FISCAL EFFECT

A fiscal estimate prepared by DOR indicates that state and local revenues would increase as a result of the sale of mailing lists through a tangible medium (e.g., magnetic tape, diskette, etc.) becoming taxable. DOR estimates that state sales tax revenues will increase \$750,000 and local revenues will increase \$47,000 through the county sales tax and the Southeastern Wisconsin Professional Baseball Park District sales tax.

## PROS

1. The bill would clearly provide what is included in the definition of tangible personal property.
2. The bill would protect the State of Wisconsin from the potential loss of sales tax revenue.
3. AB 390 would protect the State from potential excessive litigation costs concerning the defense of the definition of tangible personal property.

## CONS

1. The sale of mailing lists through a tangible medium would become taxable.

## SUPPORTERS

Rep. Michael Lehman, author; Wisconsin Department of Revenue

## OPPOSITION

No one registered or testified against AB 390.

## HISTORY

Assembly Bill 390 was introduced on June 24, 1999, and referred to the Assembly Committee on Ways & Means. A public hearing was held on July 7, 1999. On October 13, 1999, the Committee voted 15-0-1 [Rep. Ainsworth absent] to recommend passage of AB 390 as amended.

**CONTACT:** Andrew Nowlan, Office of Rep. Michael Lehman



## **BILL SUMMARY**

**AB390: DEFINITION OF TANGIBLE PERSONAL PROPERTY**

*Date: November 3<sup>rd</sup>, 1999*

### **BACKGROUND**

It is the position of the Wisconsin Department of Revenue (DOR) that "sales of books, videotapes, newspapers, magazines, video game cartridges, audio tapes, compact disks, photocopies and artwork are tangible personal property when transferred in a tangible form (e.g., on paper, diskette, etc.). Therefore, sales of these items are taxable under sec. 77.52(1), Wis. Stats. (1997-98), unless an exemption applies (e.g., newspapers)."

Currently, several cases are pending before the Wisconsin Tax Appeals Commission involving the sales of books, videos, video game cartridges, compact disks, etc. The taxpayers are arguing that the essence of the transaction is the purchase of intangible information or data, with the paper, videotape, cartridge, or other tangible media merely containing the information or data, and therefore exempt from sales tax.

### **SUMMARY OF AB 390**

AB 390 was introduced on behalf of DOR in order to "prevent the risk of substantial loss of sales tax revenues and prevent future costly litigation" by revising the definition of tangible personal property to provide that books, videotapes, newspapers, magazines, video game cartridges, audio tapes, compact disks, laser disks, photocopies, and artwork are tangible personal property.

DOR asserts that "if the department were to lose pending litigation, the department would have to refund sales tax paid on the products in dispute, not only to the taxpayers in question, but to any other person who files a valid claim for refund, for sales prior to the effective date of this bill."

It should be noted that this bill does not affect exemptions that apply to tangible personal property such as newspapers and periodicals. Also, items that are produced incidentally to a service will not be taxable (e.g., legal documents, architectural documents, musical drafts, etc.).

The State Bar of Wisconsin was concerned with a possible retroactive application of AB 390 by DOR. To alleviate the State Bar's concerns, an amendment was requested that would incorporate language recommended by the State Bar which stipulated that AB 390 would have no impact on transactions occurring prior to the effective date. It was the opinion of the Legislative Reference Bureau that in order for the legislation to apply retroactively, the effective date of the bill must be changed to reflect that intent, otherwise, the legislation takes effect the day after publication, such as would be the case with AB 390. This documentation will remain in the drafting file to exhibit clearly the intent of the Legislature and DOR regarding the possible retroactive application of AB 390.

## AMENDMENTS

Assembly Amendment 1 is a technical language change recommended by the State Bar of Wisconsin and agreed to by DOR that relates to the term "artwork." The amendment uses the phrases "works of art" and "finished art," rather than the word "artwork" which appeared in the original bill. This reflects long-standing use of such phrases by DOR in administrative rule.

## FISCAL EFFECT

A fiscal estimate prepared by DOR indicates that state and local revenues would increase as a result of the sale of mailing lists through a tangible medium (e.g., magnetic tape, diskette, etc.) becoming taxable. DOR estimates that state sales tax revenues will increase \$750,000 and local revenues will increase \$47,000 through the county sales tax and the Southeastern Wisconsin Professional Baseball Park District sales tax.

## PROS

1. Would clearly provide what is included in the definition of tangible personal property.
2. Would protect the State of Wisconsin from the potential loss of sales tax revenue.
3. Would protect the State from potential excessive litigation costs concerning the defense of the definition of tangible personal property.

## CONS

1. The sale of mailing lists through a tangible medium becomes taxable.

## SUPPORTERS

Rep. Michael Lehman, author; Wisconsin Department of Revenue.

## OPPOSITION

None.

## HISTORY

Assembly Bill 390 was introduced on 6-24-1999, and referred to the Assembly Committee on Ways & Means. A public hearing was held on 7-7-1999. On 10-13-1999, the Committee voted 15-0 [Representative Ainsworth absent] to recommend passage of AB 390 as amended.

**CONTACT:** Andrew Nowlan, Office of Rep. Michael Lehman



>> DOR estimates that this change will have a fiscal effect of \$67,000  
>> annually.  
>>  
>>  
>> Create an exemption in section 77.54 that provides that the following:  
>>  
>> The gross receipts from the sale of and the storage, use, or other  
>> consumption of water slides, including the structures supporting those  
>> slides, above ground pumps and piping necessary to circulate water within  
>> the slides, and adornments to such property, but not including below  
>> ground piping, foundations, and pools partially or wholly underground,  
>> sold to persons furnishing rooms or lodging of the nature defined in s.  
>> 77.52(2)(a)1, Stats.  
>>  
>>  
>>  
>> Prepared by: Vicki Gibbons  
>> Wisconsin Department of Revenue  
>> July 13, 1999  
>>  
>>  
>

WISCONSIN STATE LEGISLATURE

REPRESENTATIVE MICHAEL "Mickey" LEHMAN  
STATE CAPITOL, 103 WEST  
P. O. BOX 8952  
MADISON, WI 53708

Telephone: (608) 267-2367  
Fax: (608) 282-3658

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DATE: 11-5-99

NUMBER OF PAGES ATTACHED, INCLUDING COVER PAGE 8

IF PAGES ARE NOT ALL RECEIVED OR ARE ILLEGIBLE, PLEASE CALL:  
REPRESENTATIVE LEHMAN'S OFFICE (608) 267-2367.

PLEASE DELIVER TO:

Nancy Ford

FAX NUMBER OF ADDRESSEE: 800-890-6901

FROM: Andrew Nowlan - State Rep. M. Lehman

MESSAGE: Materials for 1999 AB 390. The amendment has not been introduced but was drafted at request of WMC. You can see that the amendment is really not necessary.



## WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

One East Main Street, Suite 401; P.O. Box 2536; Madison, WI 53701-2536

Telephone: (608) 266-1304

Fax: (608) 266-3830

Email: leg.council@legis.state.wi.us

DATE: November 9, 1999

TO: REPRESENTATIVE MICHAEL LEHMAN, CHAIRPERSON, ASSEMBLY  
COMMITTEE ON WAYS AND MEANS

FROM: William Ford, Senior Staff Attorney

SUBJECT: Talking Points on Assembly Substitute Amendment 1 to 1999 Assembly  
Bill 390

This memorandum provides talking points on Assembly Substitute Amendment 1 to 1999 Assembly Bill 390.

1. Assembly Bill 390 is a bill that the DOR requested me to introduce. I introduced the *substitute amendment* to respond to concerns expressed by WMC and others that the original bill was too broad in scope. (WMC and others who expressed concerns about the original bill are in support of the substitute amendment?)

2. The substitute amendment provides a list of items that are considered to be tangible personal property that are subject to the sales tax unless they are otherwise exempted. The substitute amendment does *not* change the current sales tax law as the law is interpreted by the DOR.

3. What the substitute amendment does do is plug a future possible revenue loss, if the DOR loses certain court cases currently before the Tax Appeals Commission. This potential revenue loss can be traced to a 1978 decision of the Wisconsin Supreme Court, which held that the sale of certain computer software was not subject to the sales tax. The court's reasoning was that computer software was *intangible* personal property not subject to the tax because the objective of the person buying the software was to obtain the intangible data.

4. After this court decision, we passed a new statute stating that computer software *is tangible personal property* subject to the sales tax. However, the DOR says that some taxpayers are using the reasoning of this court decision and arguing that sales of items such as books,



videotapes, videocassettes and compact discs are not subject to the sales tax because the objective of the customer is to obtain the information or music contained in them rather than the items themselves.

5. Essentially, what the substitute amendment does is to state that items such as books, videotapes, video game cartridges, compact discs and other similar items are tangible personal property subject to the tax unless they are otherwise exempted from the tax. The substitute amendment does *not* contain language that was in the original bill that some felt might lead to the taxation of certain types of *services*.

WF:tl;rv



**State of Wisconsin • DEPARTMENT OF REVENUE**

125 SOUTH WEBSTER STREET • P.O. BOX 8933 • MADISON, WISCONSIN 53708-8933 • 608-266-6466 • FAX 608-266-5718 • <http://www.dor.state.wi.us>

*Tommy G. Thompson*  
Governor

*Cate Zeuske*  
Secretary of Revenue

November 15, 1999

Representative Michael Lehman  
State Capitol, Room 103 West  
P.O. Box 8952  
Madison, WI 53708-8952

Representative Wayne Wood  
State Capitol, Room 104 North  
P.O. Box 8953  
Madison, WI 53708-8953

Dear Representative Wood:

I want to thank you for your assistance in the approval of Assembly Bill 390 in the State Assembly last week.

The passage of AB 390 is a top priority for the Department of Revenue this session. As you know, litigation is underway that seeks refunds of sales taxes collected on phonograph records, compact discs, video and audio tapes claiming that the sale of such items is not subject to the sales tax. For many years, these and similar items have been taxed as the sale of tangible personal property under sec. 77.52(1) of the statutes.

Assembly Bill 390 clarifies state law in this regard by expressly stating the types of items that are included in the definition of tangible personal property thereby preserving the current sales tax base. Without legislation such as this, an adverse decision in the courts could mean a significant revenue loss to the state.

Again, the department appreciates the support of Representative Lehman and you in moving this important legislation through the Ways & Means Committee and successful action in the State Assembly. We look forward to passage in the Senate early next year.

Sincerely,

Cate Zeuske  
Secretary of Revenue

*Thank you!*

10am  
Monday

meeting  
1pm 103 West

U Revenue has agreed to return FE to zero  
- create transfer of ALL mailing  
lists tax-exempt

WMC is concerned about services that  
appear to be indistinguishable from the  
incidentally produced item of tangible  
personal property

\* { Statement to the fact that any services  
currently not taxable will remain  
non-taxable.

"Nothing in this TP would affect the service  
status under other sections of the stats."  
77.51657  
Tax 11.67

1997 Assembly Bill 390 clarifies that data, information, and other intellectual property transferred in a tangible form is tangible personal property under sec. 77.51(20), Wis. Stats. (1997-98). Two amendments need to be drafted to accomplish the following:

1. Maintain the current nontaxability for certain mailing lists (i.e., sales of mailing lists, except those provided in the form of a label, are not taxable).

As drafted, AB 390 would reverse the Wisconsin Tax Appeals Commission decision in the case of *A-K Corp and Profile Publishing Co. dba Miles Kimball* (January 15, 1987, CCH 202-816). There, the Commission held that mailing lists sold in a tangible form (except cheshire labels) were not tangible personal property because the essence of the transaction was to obtain the names and addresses of potential customers.

In order to preserve that tax treatment (i.e., all mailing lists are not taxable except in the form of a label) but still reverse that part of the decision that provided the mailing lists sold in a tangible form were not tangible personal property, an exemption should be created as part of AB 390 to state as follows:

77.54(44) The gross receipts from the sale of and the storage, use, or other consumption of mailing lists, except those provided in the form of a label.

2. Make it clear the department's intention that although data, information, and other intellectual property transferred in a tangible form is tangible personal property, it does not mean that when such property is transferred in conjunction with a nontaxable service, the charge for the property and service becomes taxable (i.e., the incidental provisions provided in the current statute would apply after enactment).

Amend as follows:

**77.51(5)** For purposes of subs. (13) (e) and (f) and (14) (L) and s. 77.52 (2m) "incidental" means 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, including data, information, and other intellectual property transferred in a tangible form, 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.

(13)(e) A person selling tangible personal property, including data, information, and other intellectual property transferred in a tangible form, to a service provider who transfers the property in conjunction with the selling, performing or furnishing of any service and the property is incidental to the service, unless the service provider is selling, performing or furnishing services under s. 77.52 (2) (a) 7., 10., 11. and 20. This subsection does not apply to sub. (2).

(f) A service provider who transfers tangible personal property, including data, information, and other intellectual property transferred in a tangible form, in conjunction with but not incidental to the selling, performing or furnishing of any service and a

service provider selling, performing or furnishing services under s. 77.52 (2) (a) 7., 10., 11. and 20. This subsection does not apply to sub. (2).

(14)(L) Transfers by a service provider of tangible personal property, including data, information, and other intellectual property transferred in a tangible form, in conjunction with but not incidental to the selling, performing or furnishing of any service, and transfers by a service provider selling, performing or furnishing services under s. 77.52 (2) (a) 7., 10., 11. and 20. This subsection does not apply to sub. (2).

77.52(2m)(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, including data, information, and other intellectual property transferred in a tangible form, 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).

3. Use terms currently defined or addressed in the Administrative Code instead of artwork. Section Tax 11.67(3)(c), as it relates to the transfer of paintings and sculptures, uses the phrase "works of art." Section Tax 11.70(1)(a), as it relates to illustrative materials that are created by advertising agencies and are reproduced by others, such as printers, uses a defined phrase of "finished art." To assure that current policy with respect to these two items remain the same, amend AB 390 as follows:

Section 1, page 2, lines 7 and 8: Insert after "photocopies" the phrase ", works of art" and replace the word "artwork" on line 8 with the phrase "finished art."

77.51(20)

(20) "Tangible personal property" means all tangible personal property of every kind and description and includes electricity, natural gas, steam and water and also leased property affixed to realty if the lessor has the right to remove the property upon breach or termination of the lease agreement, unless the lessor of the property is also the lessor of the realty to which the property is affixed. "Tangible personal property" also includes coins and stamps of the United States sold or traded as collectors' items above their face value; tangible forms of books, booklets, pamphlets, flyers, labels, tags, tickets, and other printed material, newspapers, periodicals, shoppers guides, controlled circulation publications, videotapes, video game cartridges, audio tapes, phonographic records, compact discs, laser discs, digital video discs, digital versatile disc and other data or information storage devices, photographic prints and negatives, photocopies, printed or embossed advertising specialties, works of art and finished art; and computer programs except custom computer programs.



Stenger Government Relations

Scott Stenger

122 W. Washington Avenue  
Suite #808  
Madison, WI 53703

Phone 608-287-0403  
Fax 608-287-0414

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**OFFICE MEMO AD-2**

To	Date	Time
From	<input type="checkbox"/> Please Call <input type="checkbox"/> Returning Call <input type="checkbox"/> Will Call	
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<input type="checkbox"/> Comment	<input type="checkbox"/> For Your Inf.	<input type="checkbox"/> Prepare Reply
<input type="checkbox"/> Route	<input type="checkbox"/> Approve/Sign	<input type="checkbox"/> Take Action
	<input type="checkbox"/> Return	<input type="checkbox"/> File

Architectural Plans -

Will plans & specs be taxed.

In state contracts, plans are owned by state. Is this then taxable.

Bill Babcock  
 WE Soc of Arch 257-8477

No. of Copies:	<input type="checkbox"/> Typing	<input type="checkbox"/> Photocopy	<input type="checkbox"/> Copy Center	<input type="checkbox"/> Copy from Microfilm
Date Need	Time Need	<input type="checkbox"/> Rough	<input type="checkbox"/> Double	<input type="checkbox"/> Original Document
		<input type="checkbox"/> Final	<input type="checkbox"/> Single	<input type="checkbox"/> Revised Document





Items produced incidentally to a service will not be taxable.

Legal Docs

Arch Docs

Musical Drafts etc.

"Incidental Materials"

What about pending legislation?

Position of Dept cannot be affected retroactively.

Would not be retroactive.

- Amendment -> To specifically make the clarification prospective, but leave it as a clarification.

- Memo-legisl was passed to clarify their intent and not intended to affect pending legislation.

✓ -> Clarification of DOR's intent, not necessarily clarification of the legislature's intent.

-> Mail distribution lists ~~increase~~ subj

- Those not transferred electronically will become taxable.

✓ give an exemption?

Go ahead and specify  
that books, tapes, etc are  
tangible personal property  
and should be taxed.

The legislature does  
not care how it  
affects pending cases.

W

Incidentally produced materials -> make  
it clear that these items will  
remain non-taxable.

Letter from Dept with history on  
incidental materials.

Definition of intellectual property transferred.

Works of Art vs Artwork.

① Letter of intent DOR pos

② Exempt of mailing lists

③ cross ref services

④ artwork vs. work of art.