

2001 DRAFTING REQUEST

Senate Amendment (SA-SSA1-SB55)

Received: 06/15/2001

Received By: jkreye

Wanted: As time permits

Identical to LRB:

For: Senate Democratic Caucus

By/Representing: Keckhaver

This file may be shown to any legislator: NO

Drafter: jkreye

May Contact:

Addl. Drafters:

Subject: Tax - sales

Extra Copies:

Submit via email: NO

Requester's email:

Pre Topic:

SDC:.....Keckhaver - CN1013,

Topic:

Sales tax imposed on boats purchased in a contiguous state

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/1	jkreye 06/16/2001	jdyer 06/16/2001	jfrantze 06/16/2001	_____	lrb_docadmin 06/16/2001		

FE Sent For:

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1?	jkreye	11/6/16 jld	10/6/16	Self 6/16			

FE Sent For:

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JK

~~CN103~~
CN 1013

Create s. 77.53 (17m) to read, "This section does not apply to a boat purchased by a person domiciled in a state contiguous to this state if the boat is berthed in this state's boundary waters adjacent to the state of the domicile of the purchaser and if the transaction was an exempt occasional sale under the laws of the state where the purchaser is domiciled.

Martin Schreiber & Associates, Inc.

TO: Senator Chuck Chvala, Majority Leader
Wisconsin State Senate

FR: Martin Schreiber

DA: June 5, 2001

RE: Sales tax on out-of-state boat owners

As Governor back in the late 70s, I fought hard for the development of Barkers Island Marina in Superior, Wisconsin. Our goal was to strengthen the economy of Superior by attracting Minnesota boat owners to dock and winter store their boats. Since that time, other major marinas have been built, for example, in Racine, Kenosha, Sheboygan, Manitowoc. There are a goodly number of Illinois and Minnesota residents that use these facilities. When they do that, Wisconsin gains boat storage revenues, entertainment dollars, boat equipment sales, and the jobs required for installation and repairs. The sales tax dollars and the jobs generated are helpful to the economy of those communities.

City of Superior businesses, particularly Barker's Island Marina, are gravely concerned about the economic threat to Barker's Island should Minnesota boaters decide not to store their boats at Barker's Island. Because of an interpretation of tax laws, which arbitrarily excludes some boat owners from the use tax exemption, Wisconsin is forcing Minnesota boat owners out of Barker's Island to Minnesota marinas.

The issue is a section in Wisconsin's Statutes [Sec. 77.53(17m)] intended to assure boaters and vacationers from neighboring states that they will not be subject to any greater taxation on their boat should they decide to use it in Wisconsin than if they kept it in their home state. This exemplifies Wisconsin's commitment to its tourism industry, which is essential to those communities whose economies rely on that tourism. Unfortunately, the law, as interpreted, disturbs the legislation's original intent. I ask that the wording be adjusted to accurately reflect Wisconsin's intention to welcome those boaters in the state.

The specified tax law which was interpreted in a 1997 Wisconsin Tax Appeals Commission Decision and Order (Wehrs v. Wisconsin Department of Revenue, Docket No. 94-S-1013) was described by former Tax Appeals Commissioner David Prosser as "a disturbing mishmash," and he stated that the arbitrary terms of the exemption pose very troubling constitutional questions.

Enclosed please find information further detailing this matter, including a proposed statutory change to Sec. 77.53. I ask for your support to clarify the law so Wisconsin does not lose the jobs and sales tax revenues that out-of-state boaters generate. Please do not let the development efforts float back to Illinois and Minnesota. I am grateful for your consideration.

Proposed Change in Use Tax Exemption for Boaters and Background Information

CURRENT LANGUAGE

§77.53 Imposition of use tax. (1) Except as provided in sub. (1m), an excise tax is levied and imposed...on the storage, use or other consumption in this state of tangible personal property purchased from any retailer, at the rate of 5% of the sales price of that property....

* * *

(17m) This section does not apply to a boat purchased in a state contiguous to this state by a person domiciled in that state if the boat is berthed in this state's boundary waters adjacent to the state of the domicile of the purchaser and if the transaction was an exempt occasional sale under the laws of the state in which the purchase was made.

PROPOSED LANGUAGE

§77.53 Imposition of use tax.

(17m) This section does not apply to a boat purchased by a person domiciled in a state contiguous to this state if the boat is berthed in this state's boundary waters adjacent to the state of the domicile of the purchaser and if the transaction was an exempt occasional sale under the laws of the state where the purchaser is domiciled.

INTENT OF PROPOSED LANGUAGE

The intent of this proposed language is to make the exemption from the use tax under §77.53(17m) less arbitrary. For example, under the current language, a resident of Illinois who purchases a boat in Illinois in an exempt occasional sale under Illinois law and who otherwise qualifies for the exemption under the terms of §77.53(17m) is exempt from the use tax imposed under §77.53(1). However, a resident of Illinois who purchases a boat in Florida in an exempt occasional sale under Illinois law and who otherwise qualifies for the exemption under the terms of §77.53(17m) is **not** exempt from the use tax imposed under §77.53(1). (See State of Wisconsin Tax Appeals Commission Decision and Order in Wehrs v. Wisconsin Department of Revenue, Docket No. 94-S-1013, June 2, 1997.) The proposed language would provide an exemption for each of these hypothetical purchasers under §77.53(17m).

BACKGROUND-INTRODUCTION

As written, §77.53(17m) is a disturbing mishmash....The arbitrary terms of the exemption pose very troubling constitutional questions.

Wehrs v. Wisconsin Department of Revenue, Docket No. 94-S-1013, CCH ¶ 400-304, June 2, 1997 (emphasis added). These words were penned by current Supreme Court Justice, then Tax Appeals Commissioner, David Prosser, who recognized the inequitable outcomes resulting from the exemption as currently worded. Those constitutional questions could be resolved by eliminating any reference to where the boat was purchased and instead basing the exemption on the law of our surrounding states. (See Appendix.) First, some background.

APPLICABLE LAW

State law currently imposes a use tax on boats stored or used in this state:

§77.53 Imposition of use tax. (1) Except as provided in sub. (1m), an excise tax is levied and imposed...on the storage, use or other consumption in this state of tangible personal property purchased from any retailer, at the rate of 5% of the sales price of that property....

Section 77.53(17m) provides an exemption for some out-of-state boaters:

§77.53 Imposition of use tax. (17m) This section does not apply to a boat purchased in a state contiguous to this state by a person domiciled in that state if the boat is berthed in this state's boundary waters adjacent to the state of the domicile of the purchaser and if the transaction was an exempt occasional sale under the laws of the state in which the purchase was made.

Additional exemptions for out-of-state boaters are provided in the Wisconsin Administrative Code.

Tax §11.85 Boats, vessels and barges. (2) EXEMPT SALES.... (d) A boat purchased outside Wisconsin by a nonresident and used by the nonresident while temporarily in Wisconsin shall be exempt from the tax if the boat is not used in Wisconsin in the conduct of a trade, occupation, business or profession or in the performance of personal services for wages or fees....

As a general rule then, the use or storage of boats in Wisconsin is subject to a use tax. However, the legislature has clearly taken steps to include exceptions in the law for non-resident boat owners. The intent of §77.53(17m) was clearly to assure those who live just across the Wisconsin border that they will not be subject to any greater taxation on their boat should they decide to use it in Wisconsin than they would if they kept their boat in their home state. The intent of Tax §11.85(2)(d) was clearly to assure vacationers from all states, that their use of a recreational boat in Wisconsin will not subject them to any taxation. Taken together, these laws clearly demonstrate an intent that the use tax on boats should not make it more difficult for Wisconsin marinas and other tourist destinations to compete with neighboring states.

The Department of Revenue however has interpreted these laws so that not all out-of-state boaters are enjoying the exemptions apparently contemplated by the legislature. This problem is particularly acute for out-of-state boat owners who have purchased boats outside their home state. Such a case was raised in Wehrs v. Wisconsin Department of Revenue Docket No. 94-S-1013, CCH ¶ 400-304, June 2, 1997.

In Wehrs, the taxpayers, who were residents of Illinois, purchased a boat physically located in Florida and stored it at Reefpoint Marina in Racine, Wisconsin. The Department of Revenue assessed the taxpayers for use tax based on their use and storage of the boat in Wisconsin. Taxpayers claimed an exemption from the use tax under §77.53(17m) and Tax §11.85(2)(d). The Department of Revenue denied the exemptions and taxpayers petitioned the Wisconsin Tax Appeals Commission (TAC) for review.

The TAC concluded the taxpayers did not qualify for the exemption from the use tax under §77.53(17m). While apparently meeting all of the other conditions of §77.53(17m) (although the TAC did not reach that issue), because the taxpayers did not clearly prove that the boat at issue was purchased in Illinois, they could not claim that exemption.

The TAC further concluded that the boat at issue was not exempt from the use tax under Tax §11.85(2)(d) because that exemption only applied to the *use* of a boat in Wisconsin, not to *storage*.

One of three commissioners, Commissioner Prosser, concurred with these conclusions but raised two issues not considered by the TAC because the taxpayers (proceeding without the assistance of an attorney) did not raise them.

Prosser noted that §77.51(14r) might have helped the taxpayers' attempts to show that the sale of the boat actually took place in Illinois.

§77.51 Definitions. (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.

Prosser noted that:

As written, §77.53(17m) is a disturbing mishmash....[A]s this case demonstrates, a resident of a contiguous state who purchases a boat in any state except the purchaser's domiciliary state is not exempt. For instance, a resident of Schaumburg who purchases a boat in Menominee, Michigan, is not exempt, even though the boat is berthed in Racine.

Prosser wrote that "[t]he arbitrary terms of the exemption pose very troubling constitutional questions." The TAC did not make a record of these constitutional questions however because the taxpayers did not raise them.

The taxpayers in Wehrs appealed the Order of the TAC to the Wisconsin Circuit Court for Dane County. Wehrs v. Wisconsin Department of Revenue, Docket No. 97-CV-1971, CCH ¶ 400-341, January 22, 1998. The circuit court vacated the TAC order and remanded the case to the TAC for further proceedings on several grounds. The court took issue with the TAC's application of Tax §11.85(2)(d). The court wrote that:

The purpose of [Tax §11.85(2)(d)] is obvious - to encourage non-residents to bring their new boats into Wisconsin in order to enjoy our state's recreational opportunities while, not coincidentally, filling Wisconsin's cash registers in the process.

The court criticized the TAC's lack of findings of historical fact on which to base their conclusions of law and ultimate fact. Merely determining, as the TAC did, that the Wehrs' boat was "stored" and therefore, that Tax §11.85(2)(d) did not apply was not adequate. The court found that the TAC did not make adequate factual findings to determine what exactly happened to the boat while in Wisconsin. Moreover, the court stated that the TAC was incorrect in assuming that all non-activity constituted "storage" and that "storage" and "use" are mutually exclusive. In other words, the conclusion by the TAC that the boat was "stored" was meaningless, because that does not eliminate the possibility that the boat was also "used". The court wrote:

As mentioned, the clear purpose of sec. Tax. 11.85(2)(d), Wis. Adm. Code, is to permit non-resident vacationers to enjoy Wisconsin's boating opportunities without the specter of a tax lurking over them. While tax exemptions are to be strictly construed, they are not to be given readings that are so cramped as to be divorced from any semblance of common sense or their underlying purpose.

The court also stated that the TAC should consider the impact of §77.51(14r) and take evidence as to whether the sale was exempt under Illinois law on remand. Moreover, the court stated that if the TAC continues to regard the boat as taxable, or if the Department of Revenue seeks review of a favorable determination for the taxpayers, the Wehrs should be allowed to make a record on the constitutional questions raised in connection with §77.53(17m) (as the TAC itself has no jurisdiction to rule on questions of constitutionality.) (Note: The TAC has not yet issued a decision in this case on remand from the circuit court.)

CONSTITUTIONAL QUESTIONS

Neither Commissioner Prosser, nor Circuit Court Judge Callaway discussed the constitutional issues surrounding §77.53(17m) in great detail, but the issue is fairly obvious: Whether the classification created by §77.53(17m) violates the equal protection clauses of either Article I, Section I of the Wisconsin Constitution or the Fourteenth Amendment, Section I of the United States Constitution.

The equal protection clause of Article I, Section I of the Wisconsin Constitution reads as follows:

Equality; inherent rights. SECTION I. All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.

Section I of the Fourteenth Amendment of the United States Constitution reads:

[No State shall] deny to any person within its jurisdiction the equal protection of the laws.

The Wisconsin Supreme Court has held that these clauses, being substantially equal, are to be interpreted to afford substantially the same protections. Treiber v. Knoll, 135 Wis. 2d 58, 64, 398 N.W.2d 756 (1987).

At its most basic level, equal protection guarantees that those similarly situated will be treated the same. Treiber, 135 Wis. 2d at 68-69. A law violates equal protection when the legislature has made an irrational or arbitrary classification. Milwaukee Brewers v. DH&SS, 130 Wis. 2d 79, 99, 387 N.W.2d 254 (1986). The basis for any classification must bear a fair and substantial relationship to the purpose of the enactment. Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 881 (1985).

The Wisconsin Supreme Court has set forth five factors (though not dispositive) to be considered in determining whether there exists a rational basis justifying a legislative classification:

...first, the classification must be based upon substantial distinctions which make one class really different from another; second, the classification must be germane to the purpose of the law; third, the classification must not be based upon existing circumstances only and must not be so constituted as to preclude addition to the numbers included within a class; fourth, to whatever class a law may apply, it must apply equally to each member thereof; and fifth, the characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation. Harris v. Kelley, 70 Wis. 2d 242, 252, 234 N.W.2d 628 (1975).

The classifications made in §77.53(17m) appear to run afoul of several of these factors. Regarding the first factor, could an Illinois resident who purchases a boat *in Illinois* in an exempt occasional sale under Illinois law and who docks it in Racine really be said to be "substantially" different from an Illinois resident who purchases a boat *in Indiana* in an exempt occasional sale under Illinois law and who docks it in Racine? Are the characteristics of these individuals "so far different" from one another?

The classification made in §77.53(17m) also seems to clearly fail the test of the second factor. Clearly, the purpose of the exemption is to encourage boaters from neighboring states to use our waters (generating tourism and consequent sales tax revenues for the state) without fear of a tax liability that they would not face had they kept their boat in their home state. If that is the purpose of §77.53(17m), classifying boaters based on the location of their purchase is in no way "germane" to the purpose of the exemption.

The fifth factor really gets to the heart of the equal protection clause which generally permits the states to impose sales and use taxes on specific classes of persons, property, or services (or alternatively, to exclude or exempt specific classes) provided the legislature has a rational basis for the disparate treatment. In evaluating a taxing scheme under equal protection principals, it must first be determined whether the tax results in differing treatment of similarly situated taxpayers, and if it does, it must then be determined whether there is any legitimate state purpose justifying the difference. There is certainly no legitimate state goal to be achieved by treating two taxpayers differently solely for the location where they purchased their boat.

Clearly, as Commissioner Prosser wrote, "The arbitrary terms of the exemption pose very troubling constitutional questions." The effect of §77.53(17m), as currently written and interpreted, is to treat similarly situated persons disparately without a rational basis for so doing. Section 77.53(17m) is troubling because it discriminates between identical boats used in Wisconsin depending upon *where* the boat was purchased. This classification bears no relationship whatsoever to the clear purpose of §77.53(17m) - allowing boaters from neighboring states to use our water, and in turn, generating tourist dollars. An amendment to §77.53(17m) would maintain the intent of the legislature in enacting that section and eliminate a possible constitutional challenge to this exemption.



Jed RMR

SDC:.....Keckhaver – CN1013, Sales tax imposed on boats purchased in a contiguous state

FOR 2001-03 BUDGET — NOT READY FOR INTRODUCTION

CAUCUS SENATE AMENDMENT

TO SENATE SUBSTITUTE AMENDMENT 1,

TO 2001 SENATE BILL 55

m 6-16-01

1 At the locations indicated, amend the substitute amendment as follows:

2 1. Page 847, line 2: after that line insert:

3 "SECTION 2245g. 77.53 (17m) of the statutes is amended to read:

4 77.53 (17m) This section does not apply to a boat purchased by a person
5 domiciled in a state contiguous to this state ~~by a person domiciled in that state~~ if the
6 boat is berthed in this state's boundary waters adjacent to the state of the domicile
7 of the purchaser and if the transaction was an exempt occasional sale under the laws
8 of the state in which the purchase was made the purchaser is domiciled."

History: 1971 c. 125, 211; 1977 c. 29, 418; 1979 c. 1, 174; 1981 c. 317; 1983 a. 2; 1985 a. 29; 1987 a. 27, 268, 399; 1991 a. 39, 316; 1993 a. 16, 112; 1995 a. 27, 209; 1997 a. 27, 41, 237; 1999 a. 31.

9 2. Page 1423, line 15: after that line insert:

1 *eff* *date* "~~1m~~^c USE TAX ON BOATS. The treatment of section 77.53 (17m) of the statutes
2 takes effect on the first day of the 2nd month beginning after publication."
3

(END)

SDC:.....Keckhaver – CN1013, Sales tax imposed on boats purchased in a contiguous state

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