tax011_EmR1110.pdf **Revenue – Creates s. Tax 11.10 – EmR1110**

Publication Date: **June 29, 2011**
Effective Dates: **June 29, 2011 through November 25, 2011**

EMR1110

ORDER OF THE DEPARTMENT OF REVENUE ADOPTING AN EMERGENCY RULE

The Wisconsin Department of Revenue hereby adopts an emergency rule interpreting s. 77.54 (56), Stats., creating section Tax 11.10 relating to wind, solar, and certain gas powered products.

The statement of scope for this emergency rule, SS 001-11, was approved by the governor on June 17, 2011, and published in Register 667 on July 14, 2011. This emergency rule was approved by the governor on June 20, 2011

Analysis by the Department of Revenue

Statutes interpreted: s. 77.54 (56), Stats.

Statutory authority: s. 227.24, Stats.

Explanation of agency authority: Section 227.24, Stats., provides an agency may promulgate a rule as an emergency rule without complying with the notice, hearing, and publication requirements of the statutes if preservation of the public peace, health, safety, or welfare necessitates putting the rule into effect prior to the time it would take effect if the agency complied with the procedures.

Related statute or rule: There are no other applicable statutes or rules.

Plain language analysis: This emergency rule defines the term "product" as it applies to the sales and use tax exemption under s. 77.54 (56), Stats., provides examples of items that are and are not considered products, and clarifies the exemption requirements and scope.

Summary of, and comparison with, existing or proposed federal regulation:

There is no existing or proposed federal regulation that is intended to address the activities to be regulated by the emergency rule.

Comparison with rules in adjacent states: Minnesota and Iowa have sales and use tax exemptions relating to equipment involved in converting wind or solar energy into electricity or heat, Michigan and Illinois do not.

Minnesota

M. S. 297A.67. Subd.29, *Solar energy products.* A solar energy system, as defined in section 216C.06, subdivision 17, is exempt.

M. S. 297A.68.Subd.12, *Wind energy conversion systems.* Wind energy conversion systems, as defined in section 216C.06, subdivision 12, that are used as an electric power source are exempt, and the materials used to manufacture, install, construct, repair, or replace them are exempt.

Minnesota has no rules pertaining to these statutes.

Iowa

Iowa Code sec. 423.3.54, The sales price from the sale of wind energy conversion property to be used as an electric power source and the sale of the materials used to manufacture, install, or construct wind energy conversion property used or to be used as an electric power source.

For purposes of this subsection, *"wind energy conversion property"* means any device, including, but not limited to, a wind charger, windmill, wind turbine, tower and electrical equipment, pad mount transformers, power lines, and substation, which converts wind energy to a form of usable energy.

Iowa Code sec. 423.3.90,*The sales price from the sale of solar energy equipment. For purposes of this subsection, "solar energy equipment" means equipment that is primarily used to collect and convert incident solar radiation into thermal, mechanical, or electrical energy or equipment that is primarily used to transform such converted solar energy to a storage point or to a point of use.*

Iowa has a rule (**701—230.7(423)**) relating to the statutory exemption for "wind energy conversion property." However, the rule merely reiterates the statutory language and does not interpret the statute.

Summary of factual data and analytical methodologies: In reviewing the language of s. 77.54 (56), Stats., the department concluded that in order to administer the sales and use tax exemption being created, it needs to promulgate rules interpreting and clarifying the underlying statutory provisions.

Analysis and supporting documents used to determine effect on small business: As explained above, this emergency rule is created to administer changes in Wisconsin's sales and use tax laws. As the rule itself does not impose any significant financial or other compliance burden, the department has determined that it does not have a significant effect on small business.

Anticipated costs incurred by private sector: This emergency rule does not have a significant fiscal effect on the private sector.

Effect on small business: This emergency rule does not have a significant effect on small business.

Agency contact person: Please contact Dale Kleven at (608) 266-8253 or dale.kleven@revenue.wi.gov, if you have any questions regarding this emergency rule.

Place where comments are to be submitted and deadline for submission: Comments may be submitted to the contact person shown below no later than one week after the public hearing on this emergency rule is conducted. Information as to the place, date, and time of the public hearing will be published in the Wisconsin Administrative Register.

Dale Kleven
Department of Revenue
Mail Stop 6-40
2135 Rimrock Road
P.O. Box 8933
Madison, WI 53708-8933

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FINDING OF EMERGENCY

The Department of Revenue finds that an emergency exists and that the attached rule order is necessary for the immediate preservation of the public peace, health, safety or welfare. A statement of the facts constituting the emergency is:

The emergency rule is to reflect changes in Wisconsin's tax laws due to the creation of a sales and use tax exemption for certain energy-producing wind, solar, and gas powered products and the electricity or energy they produce.

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It is necessary to promulgate this rule order so that this exemption, which is effective July 1, 2011, may be administered in a fair and consistent manner.

This rule is therefore promulgated as an emergency rule and shall take effect upon publication in the official state newspaper. Certified copies of this rule have been filed with the Legislative Reference Bureau, as provided in s. 227.24, Stats.

SECTION 1. Tax 11.10 is created to read:

Tax 11.10 Wind, solar, and certain gas powered products. (1) GENERAL. Section 77.54 (56), Stats., provides a sales and use tax exemption for the following:

(a) The sales price from the sale of and the storage, use, or other consumption of a product whose power source is wind energy, direct radiant energy received from the sun, or gas generated from anaerobic digestion of animal manure and other agricultural waste, if the product produces at least 200 watts of alternating current or 600 British thermal units per day, except that the exemption does not apply to an uninterruptible power source that is designed primarily for computers.

(b) Except for the sale of electricity or energy that is exempt from taxation under s. 77.54 (30), Stats., the sales price from the sale of and the storage, use, or other consumption of electricity or energy produced by a product described in par. (a).

(2) DEFINITION. In this section and in s. 77.54 (56), Stats., "product" means tangible personal property that converts wind energy, direct radiant energy received from the sun, or gas generated from the anaerobic digestion of animal manure and other agricultural waste into alternating current electricity or heat.

(3) ITEMS WHICH ARE PRODUCTS. Products include the following items described in sub. (2):

(a) Wind turbine generators, including blade assembly and tower.

(b) Gas turbine generators, including the gas turbine.

(c) Gas fueled furnaces, space heaters, and water heaters.

(d) Photovoltaic cells, modules, and arrays, including tracking equipment that maintains optimal orientation to the sun.

(e) Solar thermal collectors.

(f) Hardware required for installation of an item described in sub. (2).

(g) Inverters used to transform direct current produced by an item described in sub. (2) into alternating current, including property used to convey the direct current from the product to the inverter.

(4) ITEMS WHICH ARE NOT PRODUCTS. Items which are not products include the following:

(a) Tangible personal property that stores or consumes electricity or heat produced by an item described in sub. (2).

Examples: A refrigerator that consumes electricity produced by a wind turbine generator is not itself a product whose power source is wind energy, and a battery that is used to store electricity produced by a wind turbine generator is not itself a product whose power source is wind energy.

(b) A foundation for an item described in sub. (2).

(c) Except as provided in sub. (3) (g), property necessary to convey, alter, or transfer electricity or heat generated by an item described in sub. (2).

(d) Tangible personal property used to transfer or store liquids or gases heated by an item described in sub. (2).

Example: A tank that stores hot water heated by a solar collector is not itself a product whose power source is direct radiant energy received from the sun.

(5) EXEMPTION FOR PRODUCTS. (a) For purposes of the exemption under sub. (1) (a), a product that produces direct current shall be considered to produce alternating current if the direct current is modified to alternating current prior to the direct current being stored, used, consumed, or sold by the producer.

Example: A wind turbine generator produces direct current. The current is used to charge batteries. When needed, the batteries supply direct current to an inverter, producing alternating current used to power various devices. The direct current generator does not qualify for exemption since the direct current is being stored by the producer prior to changing it to alternating current.

(b) In order to qualify for the exemption under sub. (1) (a), a product using gas as a power source shall use gas from the anaerobic digestion of animal manure and other agricultural waste exclusively as its power source. A product that uses other fuels such as natural gas, propane, or gas generated from a landfill does not qualify for exemption.

(c) Products that qualify for the exemption under sub. (1) (a) include the following:

1. An alternating current wind turbine generator rated by the manufacturer to produce at least 200 watts of alternating current with a wind speed of 25 miles per hour.

2. A direct current wind turbine generator that is rated by the manufacturer to produce at least 250 watts of direct current at a wind speed of 25 miles per hour and produces alternating current as described in par. (a).

Example: A direct current wind turbine generator is rated by the manufacturer to produce at least 250 watts of direct current with a wind speed of 25 miles per hour. The generator is connected to an inverter that modifies the direct current to alternating current prior to the direct current being stored, used, consumed, or sold by the producer. The generator, inverter, and the property used to convey the direct current from the generator to the inverter qualify for exemption.

3. A direct current wind turbine generator that produces alternating current as described in par. (a) of at least 200 watts as measured at the inverter under normal operating conditions with a wind speed of no more than 25 miles per hour.

4. A solar thermal collector with an output rating of at least 600 British thermal units per day, as determined by the Solar Rating and Certification Corporation.

5. A photovoltaic cell, module, or array with a standard test condition output rating of at least 250 watts of direct current that produces alternating current as described in par. (a).

6. A direct current gas turbine generator that meets the requirement in par. (b) and produces alternating current as described in par. (a) of at least 200 watts as measured at the inverter when producing direct current under its normal operating conditions.

7. A gas fueled furnace, space heater, or water heater that meets the requirement in par. (b) and can be expected to consume gas in an amount equivalent to at least 600 British thermal units per day throughout the year.

Example: Gas generated by the anaerobic digestion of animal manure or agricultural waste is used solely as the power source for a space heater and a water heater. Both products, when in use, produce over 600 British thermal units per day. The water heater is used every day of the year while the space heater is used only during the months of October through April. The water heater qualifies for exemption, the space heater does not.

(d) The exemption under sub. (1) (a) may be claimed by the consumer of the product who purchases the product as tangible personal property. A contractor who will purchase, furnish, and install a product which will become real property when installed is the consumer of the product, and may provide its supplier with a properly completed exemption certificate, claiming the product is exempt under s. 77.54 (56), Stats. A contractor who will furnish and install a product

that will remain tangible personal property when installed may purchase a product without tax for resale. The purchaser may then issue the contractor an exemption certificate, claiming the product is exempt under s. 77.54 (56) (a), Stats.

(6) EXEMPTION FOR ENERGY PRODUCED BY A PRODUCT. (a) The exemption under sub. (1) (b) applies to a direct sale from the producer of electricity or energy to the consumer of the same electricity or energy where all of the following apply:

1. The electricity or energy is produced by a product that qualifies for exemption under sub. (1) (a).

2. The sale does not qualify for exemption under s. 77.54 (30), Stats.

Note: Section 77.54 (30) (a), Stats., provides an exemption, in part, for electricity sold during November through April for residential use, fuel and electricity sold for use in farming, and fuel and electricity consumed in manufacturing tangible personal property in Wisconsin.

(b) The exemption under sub. (1) (b) does not apply to electricity or energy which is first purchased for resale from the producer and is then sold in a subsequent retail sale, unless the person making the retail sale is able to account for the quantity of electricity or energy that qualifies for exemption under s. 77.54 (56) (b), Stats., and is able to identify the person to whom such electricity or heat is sold.

Example: Electricity that would otherwise qualify for exemption under s. 77.54 (56) (b), Stats., is commingled in a distribution network with electricity that is not produced by a product whose power source is wind energy, direct radiant energy received from the sun, or gas generated from anaerobic digestion of animal manure and other agricultural wastes. It is not possible to determine to whom, or in what amount, the electricity that qualifies for exemption is sold. A purchaser of this electricity will not be able to provide an exemption certificate to a utility and properly claim what portion of the electricity it has purchased is exempt pursuant to s. 77.54 (56) (b), Stats., nor is it possible for a utility to know what portion of the electricity purchased by the consumer was from eligible sources.

(c) The exemption under sub. (1) (b) does not apply to the sale of, or the storage, use or other consumption of gas produced by the anaerobic digestion of animal manure or other agricultural wastes unless such gas is produced by a product described in sub. (1) (a).

The rules contained in this order shall take effect upon publication in the official state newspaper as provided in s. 227.22 (2) (c), Stats.

DEPARTMENT OF REVENUE

Dated: _____ By: _____

Richard G. Chandler
Secretary of Revenue

E:Rules/1110 Proposed Order (emergency – v3)

FISCAL ESTIMATE FORM **2011 Session**

☒ ORIGINAL ☐ UPDATED

☐ CORRECTED ☐ SUPPLEMENTAL

LRB #

INTRODUCTION #

Admin rule # Chapter Tax 11.10 Emergency Rule

Fiscal Effect

State: ☒ No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation

☐ Increase Existing Appropriation ☐ Increase Existing Revenues

☐ Decrease Existing Appropriation ☐ Decrease Existing Revenues

☐ Create New Appropriation

Increase Costs - May be Possible to Absorb Within Agency's Budget ☐ Yes ☐ No

☐ Decrease Costs

Local: ☒ No Local Government Costs

1. ☐ Increase Costs ☐ Permissive ☐ Mandatory
2. ☐ Decrease Costs ☐ Permissive ☐ Mandatory
3. ☐ Increase Revenues ☐ Permissive ☐ Mandatory
4. ☐ Decrease Revenues ☐ Permissive ☐ Mandatory
5. Types of Local Governmental Units Affected:
   ☐ Towns ☐ Villages ☐ Cities
   ☐ Counties ☐ _____ Others
   ☐ School Districts ☐ WTCS Districts

Fund Sources Affected

☐ GPR ☐ FED ☐ PRO ☐ PRS ☐ SEG ☐ SEG-S

Affected Ch. 20 Appropriations

Assumptions Used in Arriving at Fiscal Estimate:

2007 Wisconsin Act 20 adopted an exemption (under s.77.54 (56)) for certain products whose power source is wind energy, direct radiant energy from the sun, or gas generated from the digestion of animal manure and other agricultural waste. The exemption also applies to electricity and energy produced by the exempt products.

2009 Wisconsin Act 28 changed the effective date of the exemption from July 1, 2009 to July 1, 2011.

The proposed emergency rule modifies TAX 11 to reflect the law changes, improve clarity, and add examples to illustrate the tax treatment of certain items under the exemptions under s.77.54 (56).

The proposed emergency rule includes:

- A definition for "product" as described in the exemption under s.77.54 (56);
- Examples of items that are considered "products" under the exemption; and
- Clarification that the exemption does not apply to electricity or energy which is purchased for resale and is then sold in a retail sale unless the retailer is able to account for the quantity of electricity or energy that qualifies for the exemption and is able to identify the person to whom the electricity or energy is sold.

As specified in the emergency rule, examples of products that become exempt from sales and use tax effective July 1, 2011 under the statutory change include certain wind turbine generators, photovoltaic cells, anaerobic gas powered turbines, and certain other products.

The fiscal effect of the exemptions under s.77.54 (56) have already been reflected under general fund condition statements subsequent to 2007 Act 20 and 2009 Act 29 (where, under both acts, the annual sales tax loss of the exemptions was estimated at $1.3 million annually). Since the fiscal impact of the statutory change has already been reflected, the proposed rule has no fiscal effect.