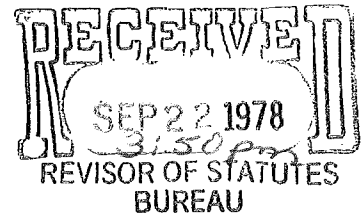


Tax 2, 11

CERTIFICATE OF RULE ADOPTION

STATE OF WISCONSIN)
DEPARTMENT OF REVENUE)



TO ALL WHOM THESE PRESENTS SHALL COME, GREETINGS:


I, Dennis J. Conta, Secretary of the Department of Revenue and custodian of the official records of said Department, do hereby certify that the annexed rules were duly approved and adopted by this Department on September 22, 1978.

These rules relate to the following:

- 1) A claim for refund on behalf of a deceased taxpayer (individual income tax).
- 2) Exemption certificates (sales and use tax).
- 3) Containers and other packaging and shipping materials (sales and use tax).
- 4) Common or contract carriers (sales and use tax).
- 5) Dentists and their suppliers (sales and use tax).
- 6) Construction contractors (sales and use tax).
- 7) Utility transmission and distribution lines (sales and use tax).

I further certify that said copy has been compared by me with the original on file in this Department and that the same is a true copy thereof and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunto set my hand at 201 East Washington Avenue in the city of Madison, this 22nd day of September, 1978.



Dennis J. Conta

ORDER OF THE DEPARTMENT OF REVENUE ADOPTING RULES

Pursuant to the authority vested in the Department of Revenue by ss. 71.11(24)(a) and 227.014(2), Wis. Stats., the Department hereby adopts the following 7 rules as shown on the attached copy:

- 1) Section Tax 2.085(1), relating to a claim for refund on behalf of a deceased taxpayer.
- 2) Section Tax 11.14, "Exemption certificates".
- 3) Section Tax 11.15, "Containers and other packaging and shipping materials".
- 4) Section Tax 11.16, "Common or contract carriers".
- 5) Section Tax 11.18, "Dentists and their suppliers".
- 6) Section Tax 11.68, "Construction contractors".
- 7) Section Tax 11.86, "Utility transmission and distribution lines".

The rules contained herein shall take effect on November 1, 1978.

Dated this 22nd day of September, 1978.

DEPARTMENT OF REVENUE
BY:



Dennis J. Conta
Secretary of Revenue

CLAIM FOR REFUND ON BEHALF OF A DECEASED TAXPAYER

SECTION 1. Tax 2.085(1) of the Wis. Adm. Code is amended to read:

Tax 2.085(1) If a refund of Wisconsin income taxes is due a deceased taxpayer and if the refund exceeds ~~\$50~~ \$100, the claimant shall file, with the income tax return, a completed Form I-804, entitled "Claim for Decedent's Wisconsin Income Tax Refund".

SECTION 2. APPLICABILITY. Section Tax 2.085(1), as affected by this amendment, shall apply to income tax returns filed covering the taxable year 1978 and thereafter.

EXEMPTION CERTIFICATES

Section Tax 11.14 of the Wis. Adm. Code is adopted to read:

Tax 11.14 Exemption certificates (including resale certificates). (Sections 77.52(13) to (16), and 77.53(10) and (11), Wis. Stats.) (1) THE STATUTES. The sales tax status of exemption certificates is contained in sections 77.52(13) to (16), Wis. Stats., and the use tax status of exemption certificates is contained in sections 77.53(10) and (11), Wis. Stats.

(2) GENERAL. (a) Exemption certificates are signed by purchasers or lessees and are given to sellers or lessors to verify that a transaction is exempt. Sellers and lessors can exclude from taxable gross receipts transactions for which they have accepted a valid exemption certificate in good faith from a purchaser. The department has provided retailers with 4 types of exemption certificates, each of which is designed for use in specific types of transactions. These certificates, discussed individually in this rule, are the following:

1. Resale Certificate (Form S-205).
2. Certificate of Exemption (Form S-207).
3. Manufacturer's Exemption Certificate (Form S-207m).
4. Farmer's Exemption Certificate (Form S-206).

(b) Use of an exemption certificate designed by the department is not required by law. A person may use a substitute exemption certificate if it contains all the essential information relating to the transaction and if it is in a form approved by the department. The law requires that the certificate be signed by and bear the name and address of the purchaser and that it indicate the general character of the property or service being purchased and the basis of the claimed exemption.

(3) EFFECT OF OBTAINING CERTIFICATE. (a) A seller is relieved of liability for the tax if the seller takes from the purchaser a valid, written resale or exemption certificate which certifies that the purchaser will use the property or service in a manner or for a purpose entitling the seller to accept the certificate in good faith.

(b) To be valid, a resale or other exemption certificate must upon its face disclose a proper basis for exemption. The use of phrases such as "nontaxable", "exempt" or similar terminology do not provide a proper basis for an exemption. A certificate must be properly executed, dated and contain all the necessary information. Thus, all retailers should be familiar with the instructions contained in the certificate. A certificate claiming an exemption not provided by law is not valid.

(c) If a certificate is valid, a seller or lessor who accepts the certificate in good faith is relieved of any liability for collection or payment of tax upon transactions covered by the certificate. For good faith to be shown, the certificate shall contain no statement or entry which the seller or lessor knows, or has reason to believe, is false or misleading. The question of good faith is one of fact and depends upon a consideration of all the conditions surrounding the transaction. If the seller accepts a certificate with knowledge which gives rise to a reasonable inference that the purchaser does not intend to use the item or service as claimed, the good faith of the seller will be questioned. The seller is presumed to be familiar with the law and rules of the department relating to the business or businesses in which the seller is involved.

(4) FAILURE TO OBTAIN CERTIFICATE. If a seller does not obtain a certificate, a seller is not relieved from liability for the tax, nor from the burden of proving the sale was for resale or otherwise exempt. It is not a satisfactory substitute for obtaining an exemption certificate from the purchaser, for the seller to accept payment of the seller's billing with the tax or tax reimbursement deleted, or to accept the purchaser's permit number, or a statement that the transaction is not taxable.

(5) CONTINUOUS CERTIFICATES. (a) Continuous exemption certificates do not expire and need not be renewed at any prescribed interval. However, they should be renewed at reasonable intervals in case of a business change, registration number change or discontinuance of the specific business claiming the exemption. The seller should periodically review exemption certificates on file to ascertain that the person claiming the exemption is the person who furnished the certificate.

(b) Continuous exemption certificates (including continuous resale certificates) approved by the department do not allow a purchaser to issue "this time only" purchase orders canceling the continuous tax exemption certificate for the one transaction only. The notation "taxable" on a purchase order is not sufficient to relieve a purchaser of the responsibility for his or her previously issued continuous certificate, unless it is accompanied by a separate letter explaining the inapplicability of the previously issued certificate to a particular order.

(6) RESALE CERTIFICATE (Form S-205). (a) Effect of obtaining resale certificate. 1. The burden of proving that a sale of property or services is not at retail is upon the seller unless the seller accepts a certificate from the purchaser certifying that the property is purchased for resale. If valid and accepted in good faith from a person who is in the business of selling tangible personal property or taxable services and who holds a seller's permit, the certificate relieves the seller from liability for the sales tax and the duty of collecting the use tax.

2. If a purchaser gives a resale certificate for property acquired and then makes any storage or use of the property other than retention, demonstration or display while holding it for sale in the regular course of business, the storage or use is taxable as of the time the property is first stored or used. The use tax shall be reported and paid by the purchaser with the tax return for the period in which the property is first so stored or used.

(b) Contents of resale certificates. A resale certificate (Form S-205) shall contain the following information: 1. The name and address and the signature of the purchaser.

2. A description of the general character of the tangible personal property or service sold by the purchaser.

3. A general description of the property or service purchased for resale if a "continuous" resale certificate is used, or an itemization of the property or service purchased if a "single purchase" certificate is used.

4. The seller's permit number of the purchaser, except that:
a. A wholesaler who sells only to other sellers for resale may insert "wholesale only" in the space for a seller's permit number; or

b. A person registered as a seller in another state, who makes no retail sales in Wisconsin, may insert the name of the state in which registered and the permit number issued to the person by that state.

5. An indication of the general character of the purchaser's business. This is for the protection of the seller, since it may enable the seller to determine whether a particular type of property or service may be sold without collecting the tax. If the nature of the business described is such that the property or services purchased normally would not be resold, the seller should question the purchaser's reason for issuing the certificate. If a satisfactory answer cannot be provided, the certificate should not be accepted. For example, a "continuous" resale certificate describing a business as a "tavern" normally should not be accepted for the sale of a radio, camera, auto part or other item not regularly sold by taverns. If all of these conditions are met, the seller is relieved from the burden of proving that the sale of property or services was not a taxable sale.

(7) CERTIFICATE OF EXEMPTION (Form S-207). (a) The certificate of exemption (Form S-207) is a multiple purpose form which may be used for purchasing any of the following 6 exempt types of property or services: 1. Containers and other packaging, packing and shipping materials used to transfer merchandise to customers of the purchaser.

2. Tangible personal property becoming an ingredient or component part of an article of tangible personal property in any form destined for sale.

3. Trailers or accessories, attachments, parts, supplies, materials and service on motor trucks, tractors and trailers which are used exclusively in common or contract carriage.

4. Property or services purchased directly by and used by a religious, charitable, educational, scientific or other organization holding a Certificate of Exempt Status (C.E.S.). Sales to organizations holding a C.E.S. also can be shown to be exempt by a retailer's recording the certificate number on its bill of sale.

5. Railway cars, locomotives and other rolling stock used in railroad operations, or accessories, attachments, parts or fuel therefor.

6. Commercial vessels and barges of 50-ton burden or over engaged in interstate or foreign commerce or commercial fishing, and accessories, attachments, parts and fuel therefor.

(b) A certificate of exemption may also be used for any other exemption provided by law, except for resale, or for farmers' or manufacturers' exemption claims. The use of the Form S-207 is explained on the back of the certificate.

(8) MANUFACTURER'S EXEMPTION CERTIFICATE (Form S-207m).

(a) A supplier which accepts a properly completed manufacturer's exemption certificate (Form S-207m) in good faith marked for "continuous" use may make sales to the manufacturer without collecting the tax if the nature of the property or services sold qualifies for one of the exempt uses claimed by the manufacturer on the form. If a Form S-207m is a "continuous" form, each purchase order of the manufacturer shall refer to it. If an individual order contains both exempt and non-exempt purchases, the purchaser must designate which items are taxable.

(b) If the manufacturer uses "single purchase" certificates, it may print these as an integral part of its purchase orders, as long as the essential information on the approved form is retained.

(9) FARMER'S EXEMPTION CERTIFICATE (Form S-206). A retailer shall have a signed farmer's exemption certificate (Form S-206) for every exempt sale made to a farmer. Rule Tax 11.12 describes the types of property which may be sold to farmers without tax, and the use of the farmer's exemption certificate.

(10) DIRECT PAY PERMITS. The law does not provide for use of direct pay permits by manufacturers or other businesses. Such permits are allowed in certain states and authorize a purchaser to report taxes directly to the state, even when making taxable purchases from in-state suppliers. Thus, under Wisconsin law, a purchaser must furnish a supplier with the appropriate exemption certificate when making exempt purchases. Assertions by a purchaser that the purchaser will pay the use tax directly to the state should not be accepted, as they do not relieve the seller of the obligation to report the tax on such sales.

(11) IMPROPER USE OF CERTIFICATES. A purchaser who gives an exemption certificate knowing at the time that the transaction is not exempt may be guilty of a misdemeanor. (Section 77.52(16), Wis. Stats.) Such purchaser may also be liable for other penalties provided by law for filing incorrect returns.

NOTE: The interpretations in this rule are effective under the general sales and use tax law on and after September 1, 1969.

CONTAINERS AND OTHER PACKAGING AND SHIPPING MATERIALS

Section Tax 11.15 of the Wis. Adm. Code is adopted to read:

Tax 11.15 Containers and other packaging and shipping materials.
(Sections 77.54(3m) and (6)(b), Wis. Stats.) (1) ITEMS EXEMPT UNDER SECTION 77.54(6)(b). (a) To be exempt, containers, labels, sacks, cans, boxes, drums, bags or other packaging and shipping materials for use in packing, packaging or shipping tangible personal property shall be "used by the purchaser to transfer merchandise to Whether the containers or other packaging or shipping materials are returnable or nonreturnable is not a factor.

(b) Containers include barrels, bottles, cartons, chemical carboys and kegs. Packaging and shipping materials include property used inside a package to shape, form, preserve, stabilize or protect the contents (such as excelsior, straw, cotton, cardboard fillers, separators, shredded paper, ice, dry ice and batting) and rope, twine, gummed tape, wrapping paper, rubber bands, crates and crating materials, pallets, skids and mailing tubes.

(c) Gross receipts from the sale of the following items are within the exemption:

1. Cans in which canned goods, paints and other commodities are contained; medicine bottles; boxes in which jewelry, candy, suits, dresses and hats are delivered to customers; and ice cream cartons.

2. Bottles and cases used by breweries, wineries or soda water beverage producers to transfer the product to customers.

3. Barrels, half-barrels, kegs and the like, used by a brewery to transfer draft beer to wholesalers or retailers.

4. Caps for milk, beer and soda water bottles.

5. "Fragile", "Handle with Care" or other shipping labels.

6. Paper food dividers used to separate food sections in a container for transfer to a customer.

7. Paper bags purchased by grocery stores, bakeries or other retailers and used by their customers in carrying out their purchases.

8. Feed bags purchased by feed dealers who use such bags to transfer merchandise sold to their customers.

9. Bale ties sold to a hay owner and used to deliver hay to the owner's customers.

10. Ice used by a commercial fisherman inside a box of fish to preserve the fish during shipment to market.

11. LPG tanks used to transfer fuel to customers which are replaced each time the fuel is exhausted.

(2) ITEMS NOT EXEMPT UNDER s. 77.54(6)(b). Gross receipts from the sales of the following items are not within the exemption:

(a) Wrapping equipment such as paper holders, tape dispensers, staplers and string holders.

(b) Coat hangers used on display racks in stores.

(c) Shopping carts or baskets and similar equipment.

(d) Computer produced gummed label mailing lists used to address envelopes. However, labels for envelopes used to transfer tangible personal property to customers are exempt.

(e) Containers or other packaging and shipping materials used merely for storage or to transfer merchandise owned by a person from one location to another, such as bakery delivery carts and containers used in delivering bakery products to retailers.

(f) Lumber or other material used for bracing, blocking, skidding or shoring items while in transit; and cardboard and paper used to line box cars.

(g) "Valuable containers" such as fondue bowls, steins and popcorn poppers which are filled with cheese or other exempt food items and sold as a gift package. A "valuable container" is a container which has some use by virtue of its shape or design such that the purchaser envisions further use of the container after the contents have been removed. If the container's contents are not subject to the tax and the cost to the seller of the container or containers in a particular package is \$1 or more, the seller shall assign a reasonable part of the retail selling price of the total package to the valuable container or containers and pay a sales tax on that part of the selling price. If the contents of the container or containers are taxable items such as candy, the entire gross receipts from the sale of the package are subject to the tax.

(h) Price tags and advertising matter used in connection with the sale of tangible personal property, including counter display cards used for advertising and display purposes.

(i) Tanks on trucks used to deliver merchandise to customers.

(j) From June 1, 1976 to May 19, 1978 only, wrapping materials used in packaging the meat of livestock and poultry supplied by customers, which livestock and poultry have been custom slaughtered and cut to the order of the customers by the user of the wrapping materials. Effective May 20, 1978 and thereafter, packaging and shipping materials for use in packing, packaging or shipping meat or meat products, regardless of whether such items are used to transfer merchandise to customers, are exempt.

(3) FARMER'S CONTAINER EXEMPTION. (a) Gross receipts from the sales of the following items are within the exemption in section 77.54(3m), Wis. Stats.: 1. Fruit baskets used by commercial orchards.

2. Grain storage bins purchased by farmers to store unprocessed corn, wheat, oats or other types of grain.

3. Boxes and crates used by a potato or berry farmer.

4. Animal waste containers or component parts thereof. This includes the usual building materials used to construct an animal waste container.

(b) Gross receipts from sales of the following items are not within this exemption: 1. Silos.

2. Egg cases and crates used by a poultry farm for gathering and storing eggs.

3. Plastic or wooden boxes used by apiaries for the collection and storage of honey.

4. Fruit jars or other containers used for home canning.

5. Gasoline or fertilizer storage tanks used on a farm.

(4) DEPOSITS ON RETURNABLE CONTAINERS. (a) Returnable container deposits received by a retailer at the time of the retail sale of tangible personal property (e.g., soft drink bottles, beer bottles and milk containers) and refunds of such deposits may be excluded from the computation of taxable gross receipts if they are excluded from gross receipts on the retailer's books of account.

(b) If a retailer's books of account include container deposits in gross receipts and if refunds of such deposits are deducted from gross receipts, the retailer shall use this method of reporting taxable gross receipts on a sales tax return. Under this method, the gross receipts from the deposit are subject to the tax and the tax may be collected from the customer. However, when the deposit is refunded to the customer, the applicable sales tax shall also be refunded to the customer.

(5) DISPOSABLE ITEMS USED BY RESTAURANTS. (a) Gross receipts from the sales of disposable items (e.g., paper cups, paper and plastic plates, butter chips, hamburger and frankfurter baskets or buckets, doggie bags, and wrapping materials) used by restaurants, cafeterias, caterers or vending machines, to serve food, food products and beverages to customers are not subject to the tax.

(b) The gross receipts from the sales to retailers of prepared food or eating utensils, napkins, place mats, steak markers, straws and toothpicks are not exempt.

(6) DEMURRAGE, LEASE OR RENTAL OF FUEL STORAGE TANKS. A gas supplier's monthly charge to a customer for the use of an LPG storage tank or other fuel storage tank which remains indefinitely on the customer's premises is taxable. The charge a supplier makes because a gas cylinder is retained by a customer beyond a 30-day period is also taxable. These "demurrage" charges constitute taxable rentals paid for the continuation of possession of the container. If a reasonable charge is made to the customer for the use of the container and the container is used exclusively for such leasing purposes, the gas supplier can issue a resale certificate when such supplier purchases the container. However, if the gas supplier furnishes a container or other storage tank to a customer without making a separately itemized charge for its use or charges only a nominal rental, the supplier shall be deemed the consumer of and shall pay tax on the acquisition of such containers or tanks.

(7) CONTAINERS SOLD. If a separate charge is made by a seller or lessor of tangible personal property to a customer for packaging materials used in connection with the shipment of the property, the charge for packaging materials becomes a part of the selling price or rental charge and is subject to the tax.

(8) GIFT WRAPPING. The amount charged by retailers for gift-wrapping packages purchased at their place of business is taxable.

NOTE: The interpretations in this rule are effective under the general sales and use tax law on and after September 1, 1969 unless otherwise noted in the rule.

In Dernehl-Taylor Co. v. Department of Revenue (Wisconsin Tax Appeals Commission, May 26, 1978), it was held that the gross receipts for doggie bags qualify for the exemption under s. 77.54(6)(b), Wis. Stats., because they are used to transfer merchandise to customers.

COMMON OR CONTRACT CARRIERS

Section Tax 11.16 of the Wis. Adm. Code is adopted to read:

Tax 11.16 Common or contract carriers. (Sections 77.54(5)(b), (12) and (13) and 77.57, Wis. Stats.) (1) MOTOR CARRIERS.
(a) Section 77.54(5)(b), Wis. Stats., provides a sales and use tax exemption for: "Motor trucks, truck tractors, road tractors, busses, trailers and semitrailers, and accessories, attachments, parts, supplies and materials therefor, sold to common or contract carriers who use such motor trucks, truck tractors, road tractors, busses, trailers and semitrailers exclusively as common or contract carriers, including the urban mass transportation of passengers as defined in s. 71.18(2)(a)."

(b) Accessories, attachments and parts for exempt vehicles shall be exempt from the sales and use tax. This includes tire chains, fire extinguishers, flares, bug deflectors, engine block heaters, defroster fans, auxiliary heaters and cooling units, and their fuel, radios, flag kit, including flags and reflectors, items designed to be used with a vehicle which protect the vehicle's load from the weather, such as fitted tarpaulins and tarpaulin straps, and items used to secure a vehicle's load, such as load holding chains, logistic straps and shoring beams.

(c) The sale or furnishing of repair, alteration, cleaning, painting and maintenance service to exempt vehicles shall be exempt.

(d) The exemption shall not apply to the following property used by common or contract carriers: automobiles, station wagons, and self-propelled vehicles for off-highway use such as road machinery, fork lifts and other industrial trucks. If property is used in part for private hauling, it shall not qualify for exemption. Exclusive use of tangible personal property as a common or contract carrier is necessary for exemption.

(e) Items used for repair, service or maintenance of an exempt vehicle and items used to load or unload property being hauled shall not qualify for the exemption. Such non-exempt items include clean towel service, cleaning supplies, wrenches and repair tools, welding torches and welding gas, battery chargers, moving dollies, barrels and boxes, grinding discs, masking tape and shovels, conveyors, chutes, ramps, walk boards or similar equipment used in loading and unloading a truck or trailer.

(f) If a vehicle purchased without tax is converted to private use, a use tax is due. The tax is measured by the sales price of the vehicle to the purchaser, except that if the taxable use first occurs more than 6 months after the sale to the purchaser, the measure of the tax may be, at the purchaser's option, either the sales price or the vehicle's fair market value at the time the taxable use first occurs.

(g) Examples of special situations related to this exemption include: 1. Moving. A truck purchased to transport pads and packing materials to and from moving jobs qualifies for this exemption.

2. Timber cutting and log hauling. Cutting down trees, cutting them into logs and hauling them to a mill as a private business operation voids the exemption, even though the trucker also hauls logs as a common or contract carrier for other persons at the same time.

3. Refuse, garbage or snow hauling. Trucks purchased for hauling refuse, garbage or snow do not qualify for the exemption.

4. Milk hauling. Vehicles of a milk or cheese factory that engages in hauling milk from farms to its plant for processing do not qualify for the exemption.

5. Towing disabled vehicles. Towing of vehicles to the repair facility of a garage-wrecker operator is part of a private repair business which is not exempt.

(2) RAILWAY ROLLING STOCK. (a) Section 77.54(12), Wis. Stats., provides a sales and use tax exemption for: "The gross receipts from the sales of and the storage, use or other consumption in this state of rail freight or passenger cars, locomotives or other rolling stock used in railroad operations, or accessories, attachments, parts, lubricants or fuel therefor."

(b) The exemption for rolling stock includes: 1. The sale or furnishing of repair, alteration, cleaning, painting and maintenance service to exempt rolling stock.

2. Purchases of any equipment which is operated on railroad rails, except vehicles which may also be used on a highway.

3. Fuel used to heat a caboose, or run a compressor which cools a railway car.

4. A utility's coal cars used to haul coal from mines to the utility.

(c) The exemption does not apply to: 1. Rails, ties and other road building and maintenance materials.

2. Bracing materials, rough lumber and dunnage materials.

3. Ice to refrigerate a railway car.

(3) COMMERCIAL VESSELS. (a) Section 77.54(13), Wis. Stats., provides a sales and use tax exemption for: "The gross receipts from the sales of and the storage, use or other consumption in this state of commercial vessels and barges of 50-ton burden or over primarily engaged in interstate or foreign commerce or commercial fishing, and the accessories, attachments, parts and fuel therefor."

(b) The exemption for commercial vessels applies to: 1. Vessels and barges primarily engaged in interstate or foreign commerce or commercial fishing. Vessels and barges must also have a document issued by the U.S. Customs Service showing a gross tonnage of 50 tons or more.

2. Items that become a component part of the exempt commercial vessel.

3. The sale or furnishing of repair, alteration, cleaning, painting and maintenance of exempt commercial vessels.

(c) The exemption does not apply to consumable supplies or furnishings that are not attached to the vessel, such as bedding, linen, table and kitchenware, tables, chairs, lubricants, work clothes, acetylene gas, nets, fishing tackle, lumber for dry docking, bracing, blocking and dunnage materials and other materials not incorporated into the vessel.

NOTE: The interpretations in this rule are effective under the general sales and use tax law on and after September 1, 1969.

DENTISTS AND THEIR SUPPLIERS

Section Tax 11.18 of the Wis. Adm. Code is adopted to read:

Tax 11.18 Dentists and their suppliers. (Sections 77.52(1) and 77.54(14) and (22)(c), Wis. Stats.) (1) DENTISTS. Charges by dentists for dental services are not subject to the sales tax. In addition, charges by dentists for artificial teeth, fillings, bridges, crowns or inlays are not subject to the tax.

(2) EXEMPT SALES TO DENTISTS. The gross receipts from the following sales to dentists are not taxable: medicines (such as nitrous oxide, oxygen or novocain), gold, silver, other alloys used to fill teeth, cement, crowns, inlays, fillings and other items of tangible personal property sold to dentists which are installed in a patient's mouth and are intended to remain there. The labor charge of a dental supplier to fabricate such items also is not taxable.

(3) TAXABLE SALES TO DENTISTS. Equipment, materials and supplies sold to dentists which are used to conduct their business provided these items are not included in the list of exempt sales in part (2) above.

NOTE: The interpretations in this rule are effective under the general sales and use tax law effective September 1, 1969. In Dept. of Revenue v. Milwaukee Refining Corp., 80 Wis. 2d 44 (1977), the Wisconsin Supreme Court held that gold bars sold to dentists who use the gold in the course of rendering their professional services are not subject to the sales and use tax.

CONSTRUCTION CONTRACTORS

Section Tax 11.68 of the Wis. Adm. Code is adopted to read:

Tax 11.68 Construction Contractors (Sections 77.51(4)(intro), (g), and (i); (11)(intro) and (c)4; (12)(intro) and (c)2 and (18); and 77.52(2)(a)10, Wis. Stats.) (1) GENERAL. (a) Construction contractors may be retailers with respect to some activities and consumers with respect to others. When a construction contractor acts as a retailer, the contractor shall obtain a seller's permit and pay the tax on gross receipts from retail sales of tangible personal property or taxable services. When the contractor acts as a consumer, the contractor shall pay the tax on its purchases of property consumed.

(b) Contractors are retailers of: 1. Property which retains its character as personal property after sale and installation. (See subs. (4) and (6).)

2. Labor or services furnished in installing tangible property which retains its character as personal property after installation. (See subs. (4) and (6).)

3. Labor and material furnished in the repair, service, alteration, fitting, cleaning, painting, coating, towing, inspection and maintenance of items of real property which retain their character as tangible personal property for repair purposes. (See sub. (10) for a description of such property.)

4. Tangible personal property sold.

(c) Contractors are consumers of tangible personal property they use when engaged in real property construction activities, such as altering, repairing or improving real property.

(2) REAL PROPERTY CONSTRUCTION CONTRACTORS. (a) Generally, real property construction contractors are persons who perform real property construction activities and include persons engaged in such activities as building, electrical work, plumbing, heating, painting, steel work, ventilating, paper hanging, sheet metal work, bridge or road construction, well drilling, excavating, wrecking, house moving, landscaping, roofing, carpentry, masonry and cement work, plastering and tile and terrazzo work.

(b) A retailer may also be a real property contractor, such as a department store which sells and installs tangible personal property which becomes a part of real property after installation (e.g., a hot water heater or water softener sold and installed in a purchaser's residence).

(3) PURCHASES BY CONTRACTORS. (a) Under section 77.51(18), Wis. Stats., contractors who perform real property construction activities are the consumers of building materials which they use in altering, repairing or improving real property. Therefore, suppliers' sales of building materials to contractors who incorporate the materials into real property in performing construction activities are subject to the tax.

(b) Property which a construction contractor will resell as personal property may be purchased without tax for resale. Such property includes personal property furnished as part of a real property construction activity when the personal property retains its character as personal property after installation. (See subs. (4) and (6).)

(c) Machinery and equipment (such as road building equipment, tunnel shields, construction machines, cement mixers and trucks), tools (such as power saws and hand tools), and supplies (such as machine lubricating and fuel oils, form lumber and industrial gases) purchased by a construction contractor for the contractor's use are generally either consumed in the process of construction or are removed when the project is completed. The contractor is the consumer of such personal property and shall pay the tax on its purchases of such property.

(4) CLASSIFICATION OF PROPERTY AFTER INSTALLATION. (a) Contractors shall determine whether a particular contract or transaction results in an improvement to real property or in the sale and installation of personal property. In determining whether personal property becomes a part of real property, the following criteria shall be considered (See Dept. of Revenue vs. A. O. Smith Harvestore Products, Inc. (1976), 72 Wis. 2d60): 1. Actual physical annexation to the real property.

2. Application or adaptation to the use or purpose to which the real property is devoted; and

3. An intention on the part of the person making the annexation to make a permanent accession to the real property.

(b) Certain types of property that have a variety of functions may be personal property in some instances and additions to real property in others. Examples are boilers, furnaces, stand-by generators, pumps, substations and transformers. When such property is installed primarily to provide service to a building or structure and is essential to the use of the building or structure, it is a real property improvement. However, when similar property is installed in a manufacturing plant to perform a processing function, it may, as machinery, retain its status as personal property.

(5) PERSONAL PROPERTY WHICH BECOMES A PART OF REALTY. A construction contractor is the consumer of personal property, such as building materials, which is incorporated into or becomes a part of real property, and sales of such personal property to a contractor are subject to the tax. Personal property which becomes a part of real property includes the following:

(a) Boilers and furnaces for space heating.

(b) Built-in household items such as kitchen cabinets, dish washers, fans, garbage disposals and incinerators.

(c) Cemetery monuments.

(d) Buildings, and structural and other improvements to buildings, including awnings, canopies, carpeting, foundations for machinery, floors (including computer room floors), partitions and movable walls, general wiring and lighting facilities, roofs, stairways, stair lifts, sprinkler systems, storm doors and windows, door controls, air curtains, loading platforms, central air conditioning units, building elevators, sanitation and plumbing systems, and heating, cooling and ventilation systems.

(e) Fixed (year-around) wharves and docks.

(f) Improvements to land including retaining walls, roads, walks, bridges, fencing, railway switch tracks, ponds, dams, ditches, wells, underground irrigation systems, drainage, storm and sanitary sewers, and water supply lines for drinking water, sanitary purposes and fire protection.

(g) Planted nursery stock.

(h) Residential water heaters, water softeners, intercoms, incinerators and garage door opening equipment (except portable equipment).

(i) Silos and grain elevators.

(j) Swimming pools (wholly or partially underground).

(k) Storage tanks constructed on the site.

(l) Traffic signals, and street and parking lot lighting.

(m) Truck platform scale foundations.

(n) Walk-in cold storage units becoming a component part of a building.

(6) PROPERTY PROVIDED UNDER A CONSTRUCTION CONTRACT WHICH REMAINS PERSONAL PROPERTY. (a) Contractors shall obtain a seller's permit and report for taxation gross receipts from the sale and installation of personal property, furnished under a construction contract, which retains its character as personal property after installation. Examples of such property are:

1. Furniture, radio and television sets and antennas, washers and dryers, portable lamps, home freezers, portable appliances and window air conditioning units.

2. Communication equipment (such as intercoms, pneumatic tube systems, and music and sound equipment) in business, industrial or commercial buildings, schools and hospitals, but not in apartment buildings, convalescent homes or other residential buildings. Prior to August 1, 1975 such property was either personal property or real property, depending upon the degree it was attached to real property.

3. Casework, tables, counters, cabinets, lockers, sinks, athletic and gymnasium equipment, and related easily movable property attached to the structure in schools, laboratories and hospitals, but not in apartment buildings, convalescent homes or other residential buildings.

4. Machinery, equipment, tools, appliances, process piping and wiring used exclusively as such by manufacturers, industrial processors and others performing a processing function with the items.

5. Office, bank and savings and loan association furniture and equipment, including office machines, safe deposit boxes, drive-up and walk-up windows, night depository equipment, remote TV auto teller systems, camera security equipment and vault doors (vault doors were not considered personal property until August 1, 1975).

6. Personal property used to carry on a trade or business (e.g., fixtures and equipment installed in stores, taverns, night clubs, restaurants, ice arenas, bowling alleys, hotels and motels, barber and beauty shops, figure salons, theaters and gasoline service stations). Prior to August 1, 1975 service station equipment such as underground tanks, gasoline pumps and hoists installed in or securely attached to their owner's land was real property, but such property was personal property if the personal property and land were owned by different persons. After that date underground tanks are real property regardless of the ownership of the land to which they are attached.

7. Shades, curtains, drapes, venetian blinds and associated hardware.

8. Radio, television and cable television station equipment, but not broadcasting towers installed on their owner's land.

9. Mobile homes located in a mobile home park on land owned by a person other than the mobile home owner.

10. Advertising signs, except their underground concrete foundations. However, prior to August 1, 1975 advertising signs were real property if erected on and securely attached to the owner's land.

11. Buildings and standing timber sold for removal.

12. Utility transmission and distribution lines installed on land owned by others (see rule Tax 11.86), and oil and gas pipeline pumping station equipment.

13. Commercial and industrial incinerators which do not become an integral part of the building.

14. Seating in auditoriums and theaters, and theater stage lights and projection equipment.

(b) If a few items of tangible personal property (minor in cost in relation to the total amount of a contract) are sold as part of a contract which includes construction of a building or

other structure and no separate charge is made for such personal property, the cost of such property to the construction contractor shall be used as the measure (e.g., gross receipts) subject to sales tax. If a separate charge is made for any such item, it is subject to the tax, but not less than on its cost. For example, a refrigerator or drapes may be included in the contract to construct a new house.

(7) PROPERTY PURCHASED BY A PERSON WHO PERFORMS BOTH CONSTRUCTION CONTRACTING AND RETAIL SELLING, WHEN DESTINATION OF PROPERTY PURCHASED IS UNKNOWN AT TIME OF PURCHASE. Section 77.51(18), Wis. Stats., provides in part that "A contractor engaged primarily in real property construction activities may use resale certificates only with respect to purchases of property which he has sound reason to believe he will sell to customers for whom he will not perform real property construction activities involving the use of such property." However, some construction contractors who also sell construction supplies at retail do not know when they purchase such supplies whether they will be consumed in construction contracts or resold to others. In such instances, a construction contractor may do one of the following at the time of making purchases:

(a) Give a resale certificate to suppliers and thereby purchase the property without tax. If the contractor later resells the property, the contractor shall report the sales and pay the tax on the sales price to customers. If the property is used in fulfillment of a construction contract, the contractor shall pay a use tax on its purchase price.

(b) Pay sales tax to suppliers on all property purchased. If such property is later consumed in fulfilling a construction contract, the tax obligation is taken care of. If the property is resold at retail, the contractor shall remit sales tax on such retail sales, but may take as a credit against the sales tax any tax paid to suppliers at purchase.

(8) PROPERTY PURCHASED TO FULFILL A CONTRACT WITH AN EXEMPT ENTITY. (a) The sales tax exemption provided to governmental units and other exempt entities (such as churches and nonprofit hospitals) does not apply to building materials purchased by a contractor for use under a construction contract to alter, repair or improve real property for the exempt entity. Gross receipts from sales of such building materials to a contractor are subject to the tax if the building materials become part of real property after construction or installation. For example, a contractor shall pay the tax to

its supplier of tangible personal property purchased to construct a bridge, road or government building. A contractor also shall pay the tax on its purchases of pumps and other equipment for use at a municipal well or at a water or sewerage lift or pumping station, since such property becomes a part of realty after installation.

(b) A contractor may purchase without tax for resale tangible personal property which retains its character as personal property after installation (as described in sub. (6)), even though the resale of such property by the contractor is exempt when the property is sold to a governmental unit or other exempt entity having a Wisconsin certificate of exempt status. Such property includes furniture; processing machinery or equipment used in a municipal sewerage or water treatment plant; classroom laboratory sinks, tables and other equipment; and seating for an auditorium. This exemption does not apply to property which becomes a part of real property as described in sub. (5) and par. (a).

(9) USE OF PROPERTY PURCHASED OUTSIDE WISCONSIN. (a) If a construction contractor, when the contractor acts as a consumer, purchases property outside this state for use in Wisconsin, the contractor shall pay the Wisconsin use tax, but may claim a credit against this use tax for any sales or use tax paid in the state where the purchase was made.

(b) If Wisconsin has jurisdiction over the out-of-state supplier, the supplier shall collect the use tax and remit it to the department. If the supplier fails to do so, the contractor shall report and pay the tax to Wisconsin.

(10) CONSTRUCTION AND REPAIR SERVICES. (a) A contractor who performs real property construction activities shall not add tax to any charge for labor or material, since gross receipts from such activities are not taxable. The tax which a contractor pays on its purchases of materials consumed in real property construction increases its cost of such materials, thereby becoming a cost of doing business.

(b) A contractor's charges for the repair, service, alteration, fitting, cleaning, painting, coating, towing, inspection and maintenance of all tangible personal property are taxable. Solely for the purpose of imposing the tax on such service, numerous items that in other circumstances and for other purposes are deemed part of real property are deemed to retain their character as tangible personal property. Accordingly, any construction contractor who is engaged in the repair, service, alteration, fitting, cleaning, painting, coating, towing, inspection and maintenance of any items listed in par. (c) or other items of tangible personal property shall register as a retailer and pay the tax on gross receipts from the performance of such services.

(c) Section 77.52(2)(a)10, Wis. Stats. provides in part that ". . . the following items shall be deemed to have retained their character as tangible personal property, regardless of the extent to which any such item is fastened to, connected with or built into real property: furnaces, boilers, stoves, ovens, including associated hoods and exhaust systems, heaters, air conditioners, humidifiers, dehumidifiers, refrigerators, coolers, freezers, water pumps, water heaters, water conditioners and softeners, clothes washers, clothes dryers, dish washers, garbage disposal units, radios and radio antennas, incinerators, television receivers and antennas, record players, tape players, juke boxes, vacuum cleaners, furniture and furnishings, carpeting and rugs, bathroom fixtures, sinks, awnings, blinds, gas and electric logs, heat lamps, electronic dust collectors, grills and rotisseries, bar equipment, intercoms, recreational, sporting, gymnasium and athletic goods and equipment including by way of illustration but not of limitation bowling alleys, golf practice equipment, pool tables, punching bags, ski tows and swimming pools; office, restaurant and tavern type equipment including by way of illustration but not of limitation lamps, chandeliers, and fans, venetian blinds, canvas awnings, office and business machines, ice and milk dispensers, beverage-making equipment, vending machines, soda fountains, steam warmers and tables, compressors, condensing units and evaporative condensers, pneumatic conveying systems; laundry, dry cleaning, and pressing machines, power tools, burglar alarm and fire alarm fixtures, electric clocks and electric signs."

(d) Charges for tangible personal property (such as a repair part) incorporated into property listed in par. (c) being repaired are taxable. Because the item repaired is deemed personal property, any tangible personal property incorporated into it is deemed purchased by the contractor for resale and therefore may be purchased without tax. For example, if a contractor is engaged to repair a refrigerator (whether free-standing personal property or built-in so as to be a part of real property) in a home, the repair service and any charge for parts are taxable.

(11) REPAIR SERVICES CONTRASTED WITH REPLACEMENT SERVICES. Section 77.51(11)(c)4, Wis. Stats., provides that taxable gross receipts do not include the price received for labor or services used in installing property which constitutes a capital improvement of real property. On the other hand, section 77.52(2)(a)10, Wis. Stats., provides that the price received for labor or services in repairing, servicing, altering, fitting, cleaning, painting, coating, towing, inspection and maintenance of tangible personal property is taxable and many specifically named items retain their character as personal property regardless of the extent to which fastened to, connected with or built into real property. Among such items are furnaces and boilers used for space heating. In view of

these statutes, charges for services and repair parts for repair of tangible personal property covered by both statutes (such as a furnace boiler) are taxable, but charges for services in totally replacing such property are not taxable. In the no-tax situation, the replacement personal property is taxable when sold to the contractor installing it, but the contractor's charge for the replacement service is not taxable.

NOTE: The interpretations in this rule are effective under the general sales and use tax law on and after September 1, 1969 unless otherwise noted in the rule.

UTILITY TRANSMISSION AND DISTRIBUTION LINES

Section Tax 11.86 of the Wis. Adm. Code is adopted to read:

Tax 11.86 Utility transmission and distribution lines. (Sections 77.51(5), 77.52(2)(a)10 and 77.52(2)(a)11, Wis. Stats.) (1) PERSONAL PROPERTY. "Tangible personal property", as defined in section 77.51(5), Wis. Stats., includes overhead telephone and telegraph lines, electrical, water and gas transmission and distribution lines, and the poles, transformers, towers (but not foundations), pipes, conduits, sleeves or other overhead property by which such lines are supported or in which they are contained or connected, if erected or installed under easement or license (including authorizations under sections 86.16 and 182.017, Wis. Stats.) on land owned by a person other than the utility (such lines and facilities located above ground level being herein collectively referred to as "overhead utility facilities"). The term "tangible personal property", as defined in section 77.51(5), Wis. Stats., does not include underground telephone and telegraph lines, electrical, water and gas transmission and distribution lines, and the foundations, pipes, conduits, sleeves or other underground property by which such lines are supported or in which they are contained or connected (such lines and facilities being herein sometimes collectively referred to as "underground utility facilities").

(2) REAL PROPERTY. (a) The lines, poles, foundations, towers, gravel and any buildings of a substation located on a utility's own land are part of the realty. However, transformers, circuit breakers and other equipment installed to control the flow of electricity remain personal property after installation.

(b) Concrete foundations (including anchors), crushed rock and backfill whether or not on land owned by the utility, are deemed part of the realty, and materials used in construction or forming the same are taxable when purchased by the contractor.

(3) TAXABLE AND NONTAXABLE TRANSACTIONS. (a) Gross receipts from the installation, sale, lease, rental, repair, service or maintenance of overhead utility facilities which are personal property as described in subs. (1) and (2) are subject to the sales and use tax. For example, the gross receipts of a contractor from the construction and installation of an overhead utility facility, or a portion thereof, and from a sale "in place" of such a facility, if installed under easement on land owned by a person other than the utility, are taxable. Materials used in the construction or installation of such property may be purchased without tax for resale. Gross receipts from the installation, sale, lease, rental, repair, service or maintenance and removal of underground utility facilities are not subject to the sales and use tax; however, the materials used in the construction or installation of such underground facilities cannot be purchased for resale and are subject to tax at the time of purchase unless otherwise exempt.

(b) A contractor performing a "lump sum contract" for the construction of an overhead utility facility, which is personal property as described in subs. (1) and (2), may not reduce gross receipts by the amount of related expenses, such as payments for crop damage, site preparation, restoration work, tree trimming, line clearing, relocating existing lines, engineering and design work, surveying, purchasing a right-of-way and unloading and hauling materials. These payments are costs of performing the contract and do not affect the amount of taxable gross receipts.

(c) When a contractor enters into an agreement to construct or repair an overhead utility facility, which is personal property as described in subs. (1) and (2), the total charge for such construction or repair is taxable even though a portion of the total charge consists of hourly charges for the use of equipment.

(d) When equipment for the construction or repair of a utility line is rented to a utility, the rental charge is taxable. If an operator is included with such equipment and it is customary or mandatory that the utility accept the operator with the equipment, the entire charge for the equipment and operator is taxable. A rental agreement exists only if the utility employs the crew other than the equipment operator and provides on-the-job supervision; otherwise, the entire charge for the repair, service, maintenance or installation of the utility line is subject to the tax if so indicated in par. (c).

(4) NONTAXABLE SERVICES. (a) Gross receipts from a separate contract for tree trimming and line clearing in connection with the construction of a new utility line or in the maintenance of an existing line are not taxable.

(b) A separate charge for removing an existing utility line is not taxable.

NOTE: The interpretations in this rule are effective under the general sales and use tax law on and after September 1, 1970. Therefore, a contractor's gross receipts from the installation of utility transmission and distribution lines in fulfillment of contracts entered into (or formal written bids made) on or after September 1, 1970 are subject to this rule. If the contractor became obligated to perform the contract on or after September 1, 1969 and before September 1, 1970, a retailer's sales of materials to the contractor or utility on or after September 1, 1969 for use in the job are taxable.