

1997-98 SESSION  
COMMITTEE HEARING  
RECORDS

Committee Name:

*Joint Committee for  
Review of  
Administrative Rules  
(JCR-AR)*

Sample:

- Record of Comm. Proceedings
- 97hrAC-EdR\_RCP\_pt01a
- 97hrAC-EdR\_RCP\_pt01b
- 97hrAC-EdR\_RCP\_pt02

- Appointments ... Appt
- 
- Clearinghouse Rules ... CRule
- 97hr\_JCR-AR\_CRule\_98-171
- 
- Committee Hearings ... CH
- 
- Committee Reports ... CR
- 
- Executive Sessions ... ES
- 
- Hearing Records ... HR
- 
- Miscellaneous ... Misc
- 
- Record of Comm. Proceedings ... RCP
-

TAX 11 - CONSTRUCTION CONTRACTORS  
98-171 - TAX on MATERIALS

WISCONSIN LEGISLATIVE COUNCIL STAFF

LCRC  
FORM 2

***RULES CLEARINGHOUSE***

**Ronald Sklansky**  
Director  
(608) 266-1946

**Richard Sweet**  
Assistant Director  
(608) 266-2982



**David J. Stute, Director**  
Legislative Council Staff  
(608) 266-1304

One E. Main St., Ste. 401  
P.O. Box 2536  
Madison, WI 53701-2536  
FAX: (608) 266-3830

---

**CLEARINGHOUSE REPORT TO AGENCY**

---

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

**CLEARINGHOUSE RULE 98-171**

AN ORDER to repeal Tax 11.68 (2) (c); to renumber Tax 11.68 (1) (title), (a), (b) (intro.) and 2. to 4. and (c), (2) (title), (a) and (b), (3) (title), (a), (b) and (c) to (e), (4) , (5), (6) (title) and (a) (intro.), 1. to 5., 7., 8. and 10. to 15., (7), (8) (title) and (a), (9), (10) (title), (a), (b) and (d), (11) and (12) (b); to renumber and amend Tax 11.68 (1) (b) 1., (3) (f), (6) (a) 6. and 9. and (b), (8) (b), (10) (c) and (12) (title), (a) and (c) to (e); and to create Tax 11.68 (1) and (4) (b) 2. , relating to construction contractors.

Submitted by **DEPARTMENT OF REVENUE**

11-02-98 RECEIVED BY LEGISLATIVE COUNCIL.  
11-30-98 REPORT SENT TO AGENCY.

RS:WF:jal

**LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT**

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

Comment Attached      YES       NO

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

Comment Attached      YES       NO

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

Comment Attached      YES       NO

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS  
[s. 227.15 (2) (e)]

Comment Attached      YES       NO

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

Comment Attached      YES       NO

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL  
REGULATIONS [s. 227.15 (2) (g)]

Comment Attached      YES       NO

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

Comment Attached      YES       NO

PROPOSED ORDER OF THE DEPARTMENT OF REVENUE  
REPEALING, RENUMBERING, RENUMBERING AND  
AMENDING AND CREATING RULES

The Wisconsin Department of Revenue proposes an order to: repeal Tax 11.68(2)(c); renumber Tax 11.68(1)(title), (a), (b)(intro.) and 2. to 4. and (c), (2)(title), (a) and (b), (3)(title), (a), (b) and (c) to (e), (4), (5), (6) (title) and (a)(intro.), 1. to 5., 7., 8. and 10. to 15., (7), (8)(title) and (a), (9), (10)(title), (a), (b) and (d), (11) and (12)(b); renumber and amend Tax 11.68(1)(b)1., (3)(f), (6)(a) 6. and 9. and (b), (8)(b), (10)(c) and (12)(title), (a) and (c) to (e); and create Tax 11.68(1) and (4)(b)2., relating to construction contractors.

---

Analysis by the Department of Revenue

Statutory authority: s. 227.11(2)(a), Stats.

Statutes interpreted: s. 77.51(2), Stats.

SECTIONS 1 AND 2. Tax 11.68(1) and (2)(title), (a) and (b) are renumbered Tax 11.68(2) and (3)(title), (a) and (b) and new sub. (1) is created, to provide a definition of "real property construction activities," to reflect the amendment of s. 77.51(2), Stats., by 1997 Wis. Act 27. As a result of that amendment, only those activities that take place at a site where tangible personal property is affixed to real property are included in the definition.

Tax 11.68(2)(b)1. as renumbered is amended, to clarify that a contractor is a retailer of certain property that it installs.

SECTION 3. Tax 11.68(2)(c) is repealed, to reflect the amendment of s. 77.51(2), Stats., by 1997 Wis. Act 27.

SECTIONS 4 AND 5. Tax 11.68(3) to (12) are renumbered Tax 11.68(4) to (13), due to the creation of new sub. (1) as explained in SECTION 2.

Tax 11.68 (4)(f) as renumbered is amended, to restore dropped text and to conform punctuation to Legislative Council Rules Clearinghouse standards.

Tax 11.68(7)(a)6. as renumbered is amended, to change a department policy, so that underground storage tanks of a service station used to carry on a trade or business are tangible personal property when installed.

Tax 11.68(7)(a)9. as renumbered is amended, to clarify language per Legislative Council Rules Clearinghouse standards.

Tax 11.68(7)(b) and (9)(b) as renumbered are amended, and Tax 11.68(4)(b)2. is created, to reflect the department's position that taxable services may be resold by a construction contractor, such as a landscaper.

Tax 11.68(11)(c) as renumbered is amended, to correct a direct quote of statutory language.

Tax 11.68(13)(title), (a) and (c) to (e) as renumbered are amended, to reflect the creation of the stadium tax by 1995 Wis. Act 56.

---

SECTION 1. Tax 11.68(1) and (2)(title), (a) and (b) are renumbered Tax 11.68(2) and (3)(title), (a) and (b), and as renumbered Tax 11.68(2)(b)1. is amended to read:

Tax 11.68(2)(b)1. Property it installs which retains its character as personal property after sale and installation.

Note to Revisor: In the notes at the end of sub. (2)(b)1., 2. and 3., change the references from subs. (4), (6) and (10) to subs. (5), (7) and (11), respectively.

SECTION 2. Tax 11.68(1) is created to read:

Tax 11.68(1) DEFINITION. In this section, "real property construction activities" means activities that occur at a site where tangible personal property that is applied or adapted to the use or purpose to which real property is devoted is affixed to that real property, if the intent of the person who affixes that property is to make a permanent accession to the real property. "Real property construction activities" do not include affixing to real property tangible personal property that remains tangible personal property after it is affixed.

Note: The definition of real property construction activities was revised effective for sales of property pursuant to contracts entered into on or after December 1, 1997, to:

(a) Reverse the effect of the Wisconsin Supreme Court decision in the case of Wisconsin Department of Revenue vs. Sterling Custom Homes (283 N.W. 2d 573 (1979)) prospectively from the effective date of this revision, and

(b) Provide by statute those criteria that were used by the Supreme Court in the case of Dept. of Revenue vs. A.O. Smith Harvestore Products, Inc. (72 Wis. 2d 60, (1976)), for purposes of determining whether tangible personal property becomes real property. The meaning of each of the criteria is explained in the Supreme Court's decision.

SECTION 3. Tax 11.68(2)(c) is repealed.

SECTION 4. Tax 11.68(3)(title), (a), (b) and (c) to (f) and (4) to (12) are renumbered Tax 11.68(4)(title), (a), (b)1. and (c) to (f) and (5) to (13), and as renumbered Tax 11.68(4)(f), (7)(a)6. and 9. and (b), (9)(b), (11)(c) and (13)(title), (a) and (c) to (e) are amended to read:

Tax 11.68(4)(f) Under s. 77.54(41), Stats., contractors, subcontractors or builders may purchase without sales or use tax building materials, supplies and equipment acquired solely for

② →

or used solely in the construction, renovation or development of property that would be exempt under s. 70.11(36), Stats. Section 70.11(36), Stats., exempts property consisting of or contained in a sports and entertainment home stadium, including but not limited to parking lots, garages, restaurants, parks, concession facilities, transportation facilities, and functionally related or auxiliary facilities and structures; including those facilities and structures while they are being built; constructed by, leased to or primarily used by a professional athletic team that is a member of a league that includes teams that have home stadiums in other states, and the land on which that stadium and those structures and facilities are located.

(7)(a)6. Personal property used to carry on a trade or business, including fixtures and equipment installed in stores, taverns, night clubs, restaurants, ice arenas, bowling alleys centers, hotels and motels, barber and beauty shops, figure salons, theaters and gasoline service stations. ~~Underground storage tanks at gasoline service stations are real property.~~

Note to Revisor: Insert the following example at the end of subd. 6.:

Example: An underground storage tank installed at a gasoline service station and used in the sale of gasoline remains personal property after installation.

9. Except as provided in ss. 77.51(4)(b)6. and (15)(b)5. and 77.54(31), Stats., mobile homes located in a mobile home park on land owned by a person other than the mobile home owner. Exemptions are provided by ss. 77.51(4)(b)6. and (15)(b)5. and 77.54(31), Stats., for 35% of the total amount for which a new mobile home ~~that~~ is sold; provided it is a primary housing unit, or ~~that~~ it is transported in 2 unattached sections if and the total size of the combined sections, not including additions and attachments, is at least 984 square feet measured when the sections are ready for transportation, ~~is sold~~; and the full amount for which a used mobile home that is a primary housing unit is sold or purchased. No credit may be allowed for trade-ins and the exemption does not apply to a lease or rental.

(b) If a few items of tangible personal property or taxable services, 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 the personal

property or taxable services, the cost of the property or taxable services to the construction contractor shall be used as the measure of gross receipts subject to sales tax. If a separate charge is made for any of the items, they are subject to the tax, ~~but not less than on their cost.~~

Note to Revisor: Replace the example at the end of sub. (7)(b) with the following:

Examples: 1) A refrigerator and drapes are included in the contract to construct a new house. The cost of the refrigerator and drapes to the construction contractor is included in the construction contractor's measure of gross receipts subject to sales tax.

2) Landscaping services, minor in amount, are included in the contract to construct a new house. An amount equal to the charge by the landscaping subcontractor to the general contractor for landscaping services is included in the general contractor's measure of gross receipts subject to sales tax.

(9)(b) A contractor may purchase without tax ~~as property~~ for resale tangible personal property which retains its character as personal property after installation as described in sub. ~~(6)~~ (7) and taxable services, even though the resale of the property or taxable services 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. This 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. Taxable services include landscaping services. This exemption does not apply to property or taxable services which becomes a part of real property as described in sub. ~~(5)~~ (6) and par. (a).

(11)(c) Section 77.52(2)(a)10., 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, dishwashers, garbage disposal units, radios and radio antennas, incinerators, television receivers and antennas, record players, tape players, jukeboxes, 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 ~~illustrations~~, 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.”

(13)(title) COUNTY AND STADIUM TAXES ON BUILDING MATERIALS.

(a) Section 77.71(3), Stats., imposes ~~an excise tax~~ taxes upon a contractor engaged in construction activities, which includes constructing, altering, repairing or improving real property within a county or special district which has adopted the county or stadium tax. The ~~tax is~~ taxes are measured by the sales price of the tangible personal property used in constructing, altering, repairing or improving real property which becomes a component part of real property in that county or special district, unless the contractor has paid the county or stadium tax of a county or special district in this state or a similar local sales tax in another state on the purchase of that property.

(c) In providing repair services to real property subject to taxation under s. 77.52(2)(a)10., Stats., a contractor may purchase without county or stadium tax for resale the building materials used in providing the taxable services, and the county ~~excise tax~~ and stadium taxes imposed under s. 77.71(3), Stats., ~~does~~ do not apply to those purchases.

(d) Section 77.77(3), Stats., provides that the sales tax under s. 77.71(1), Stats., and the ~~excise tax~~ county and stadium taxes under s. 77.71(3), Stats., on the sale of building materials to contractors engaged in the business of constructing, altering, repairing or improving real estate for others ~~is~~ are not imposed, if the materials are affixed and made a structural part of

real estate and the amount payable to the contractor is fixed without regard to the costs incurred in performing a written contract that was irrevocably entered into prior to the effective date of the county ordinance or special district resolution, or that resulted from the acceptance of a formal written bid accompanied by a bond or other performance guaranty that was irrevocably submitted before that date.

(e) The ~~excise tax~~ county and stadium taxes under s. 77.71(3), Stats., on building materials used in real property construction activities ~~is~~ are not imposed if the contractor purchased the building materials before the effective date of the county or stadium tax of that county or special district or has paid the sales tax of another county or special district in this state in purchasing the building materials.

SECTION 5. Tax 11.68(4)(b)2. is created to read:

Tax 11.68(4)(b)2. Taxable services which a construction contractor will resell may be purchased without tax for resale.

Note to Revisor: 1) In the note at the end of sub. (4)(b), change the reference from subs. (4) and (6) to subs. (5) and (7), respectively.

2) Replace example 2 at the end of sub. (9)(a) with the following:

2) A contractor shall pay tax on its purchases of equipment for use at a municipal well or pumping station that becomes a part of realty after installation.

3) In the note at the end of sub. (10)(c), change the reference from sub. (9) to sub. (10).

4) In the first note at the end of Tax 11.68, insert periods after subds. 11. and 20. in the reference to s. 77.52(2)(a), Stats.

5) In the second note at the end of Tax 11.68, make the following changes:

a) at the beginning of part (i), replace "Thirty-five percent" with "The exemption of 35%";

b) remove the word "and" before part (n); and

c) add the following at the end of the note:

;(o) The stadium tax on building materials became effective January 1, 1996, pursuant to 1995 Wis. Act 56; and (p) The change to the definition of "real property construction activities" to include only those activities that take place at a site where tangible personal property is affixed to real property became effective for sales of property pursuant to contracts entered into on or after December 1, 1997, pursuant to 1997 Wis. Act 27.

---

The rules contained in this order shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22(2)(intro.), Stats.

Initial Regulatory Flexibility Analysis

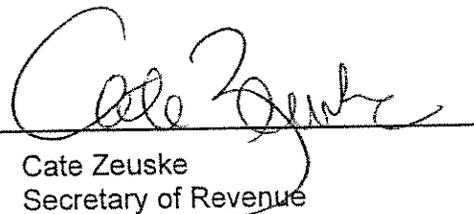
This proposed rule order does not have a significant economic impact on a substantial number of small businesses.

DEPARTMENT OF REVENUE

Dated: \_\_\_\_\_

October 29 '98

By: \_\_\_\_\_

  
Cate Zeuske  
Secretary of Revenue

Proposed Order 1168