

1999 DRAFTING REQUEST

Bill

Received: **03/8/99**

Received By: **jkreye**

Wanted: **As time permits**

Identical to LRB:

For: **Revenue 6-6466**

By/Representing: **Tom Ourada**

This file may be shown to any legislator: **NO**

Drafter: **jkreye**

May Contact:

Alt. Drafters:

Subject: **Tax - sales**

Extra Copies:

Pre Topic:

No specific pre topic given

Topic:

clarify definition of "tangible personal property"

Instructions:

See Attached

*6/3/99
Send jacket to Rep. M. Lehman per Sherri Gates-Hendrix*

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>
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/2	jkreye 05/5/99	gilfokm 05/5/99	ismith 03/31/99	_____	lrb_docadmin 03/31/99	lrb_docadminState 04/30/99	
/3	jkreye 05/20/99	ygeller 05/20/99	martykr 05/6/99	_____	lrb_docadmin 05/6/99	lrb_docadminState 05/6/99	
/4	jkreye	ygeller	jfrantze	_____	lrb_docadmin	lrb_docadminState	

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/5			martykr 06/1/99	_____ _____	lrb_docadmin 06/1/99	lrb_docadmin 06/1/99	

FE Sent For: 6/24/99

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/3	jkreye 05/20/99	ygeller 05/20/99	martykr 05/6/99	_____	lrb_docadmin 05/6/99	lrb_docadminState 05/6/99	
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Page 2

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for Assm
per Sherrie
Gates-Hendrix
04-30-99

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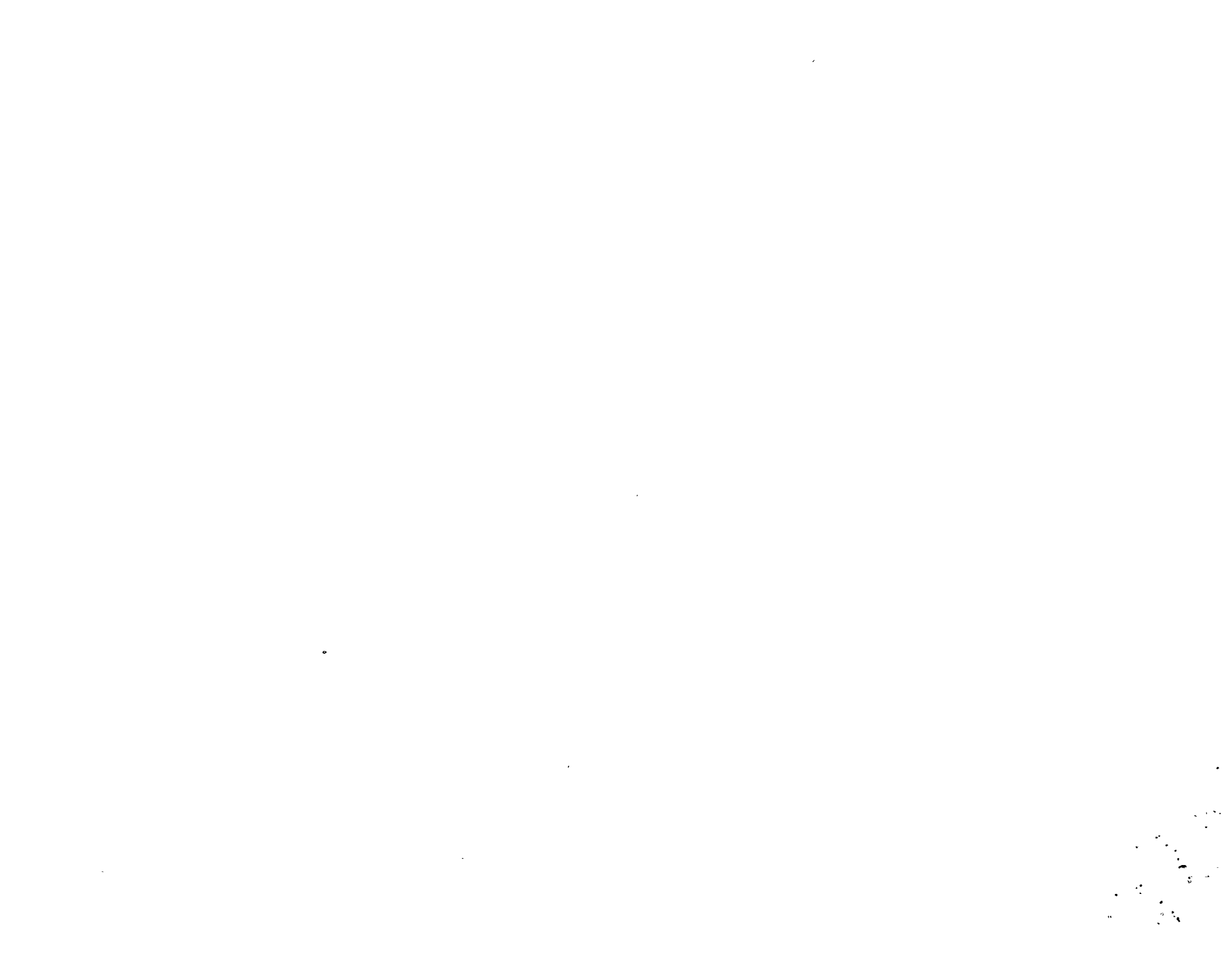
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100

3-8-99 TOM OURADA DOR

11:30 AM.

definition of tangible personal propy - separate
draft.



Wisconsin Department of Revenue
IS&E Division
September 18, 1998

TITLE: Clarify Definition of Tangible Personal Property

DESCRIPTION OF CURRENT LAW AND PROBLEM

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

In the case of *Manpower International, Inc. v. Wisconsin Department of Revenue* (August 22, 1996, CCH 400-240), the Wisconsin Court of Appeals, relying on *Janesville Data*, held that the sale of canned computer software, prior to May 1, 1992, was not taxable because the essence of the transaction was the intangible data embodied in these products. The Department of Revenue's petition for review was denied by the Wisconsin Supreme Court on December 17, 1996. (Note: The definition of tangible personal property was amended effective May 1, 1992, to specifically provide that computer software, except custom computer software, was tangible personal property. The department takes the position that computer software is tangible personal property whether provided electronically or by magnetic media (e.g., tape, diskette).)

Although the *Janesville Data* and *Manpower* decisions dealt with data processing and computer software, there are cases currently pending before the Wisconsin Tax Appeals Commission asserting that *Janesville Data* and *Manpower* decisions also apply to sales of books, videos, video game cartridges, compact disks, etc. The taxpayers are arguing that that the essence of the transaction is the purchase of intangible information or data with the paper, video tape, cartridge, or other tangible media merely containing the information or data. Regardless of whether or not the department prevails in the pending litigation, the statute should clearly provide that such information or data is tangible personal property.

RECOMMENDATION FOR ACTION

Amend the definition of tangible personal property to include books, video tapes, newspapers, magazines, video game cartridges, audio cassette tapes, compact disks, laser disks, photocopies, artwork, and similar intellectual property, data, or information provided in a tangible form.

Note: This change would reverse the Wisconsin Tax Appeals Commission decision in the case of *A-K Corporation and Profile Publishing Co. dba Miles Kimball v. Wisconsin Department of Revenue* (January 15, 1987, CCH 202-816), with respect to mailing lists on magnetic media. In this case, the Commission held that mailing lists provided on magnetic media were not tangible personal property, while the transfer of the same information on mailing labels was tangible personal property.

Note: In order to raise revenue, this proposal could be expanded to deem books, newspapers, etc., tangible personal property regardless of the form in which they are received by the

~~W~~
leave out no

customer. As a result, books, newspapers, etc., transferred electronically for a consideration would be tangible personal property and subject to Wisconsin sales or use tax when downloaded to a computer or onto a magnetic media, unless an exemption applies (e.g., newspapers, magazines sold by subscription). Currently, the department generally does not tax these items when transferred electronically (i.e., via telephone lines, microwave, satellite, etc).

FISCAL/ADMINISTRATIVE IMPACT

The clarification of current law as interpreted by the department should result in minimal, if any, additional revenues should the department prevail in pending litigation. However, should the department lose the litigation, this proposed change will minimize the risk of future litigation and revenue loss on a prospective basis.

delete If the department expands the definition of tangible personal property to include books, etc., transferred electronically, as described in the note in the Recommendation, additional revenues would result. As more items are transferred electronically rather than in a tangible form, the Wisconsin sales tax base decreases.

DRAFTING INSTRUCTIONS

See Recommendation.

EFFECTIVE DATE OR INITIAL APPLICABILITY

Day after publication

PERSON TO CONTACT: Vicki Gibbons
(608) 266-3873

PREPARED BY: Vicki Gibbons
September 18, 1998



State of Wisconsin
1999 - 2000 LEGISLATURE

LRB-2438

JK:.....

JK
19

gen

1 AN ACT ...; relating to: the definition of tangible personal property that is subject
2 to a sales or use tax.

clarifies the current law by specifying

which, that is subject to a sales or use tax

Analysis by the Legislative Reference Bureau

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

This bill specifies that tangible personal property includes books, video tapes, newspapers, magazines, video game cartridges, audio cassette tapes, optical disks, photocopies, artwork, and similar tangible forms of data, information or intellectual property.

compact

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

laser disks

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

3 SECTION 1. 77.51 (20) of the statutes is amended to read:

4 77.51 (20) "Tangible personal property" means all tangible personal property
5 of every kind and description and includes electricity, natural gas, steam and water
6 and also leased property affixed to realty if the lessor has the right to remove the

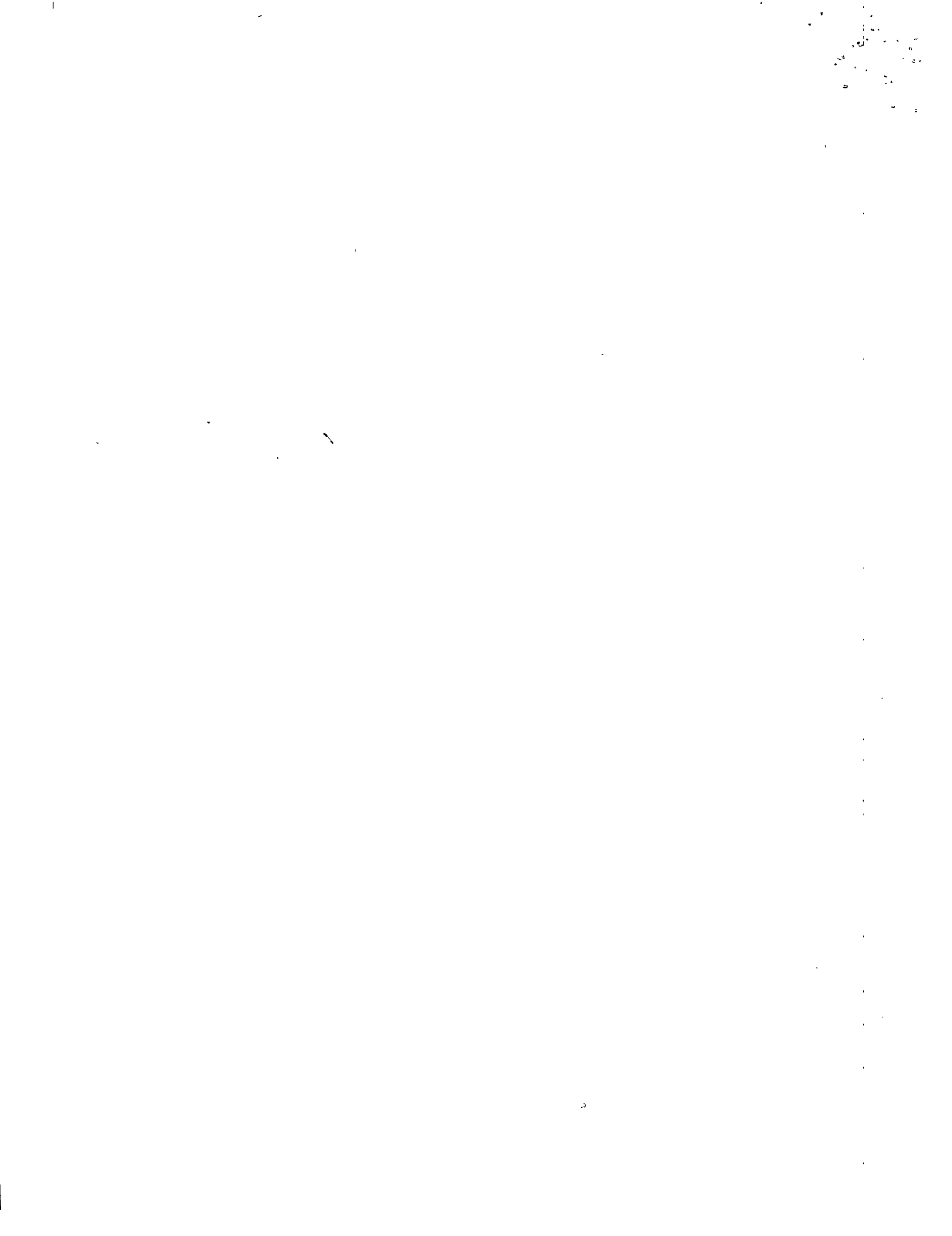
1 property upon breach or termination of the lease agreement, unless the lessor of the
 2 property is also the lessor of the realty to which the property is affixed. "Tangible
 3 personal property" also includes coins and stamps of the United States sold or traded
 4 as collectors' items above their face value and, computer programs except custom
 5 computer programs, books, videotapes, newspapers, magazines, video game
 6 cartridges, audio ~~compact~~ tapes, ^{compact} optical disks, photocopies, artwork, and similar
 7 tangible forms of data, information or intellectual property.

8 SECTION 2. Effective date.

9 (1) This act takes effect on the first day of the 2nd month [✓] after publication. ^{beginning}

10 (END)

laser disks



**SUBMITTAL
FORM**

**LEGISLATIVE REFERENCE BUREAU
Legal Section Telephone: 266-3561
5th Floor, 100 N. Hamilton Street**

The attached draft is submitted for your inspection. Please check each part carefully, proofread each word, and **sign** on the appropriate line(s) below.

Date: 3/12/99

To: Revenue

Relating to LRB drafting number: LRB-2438

Topic

clarify definition of "tangible personal property"

Subject(s)

Tax - sales

1. **JACKET** the draft for introduction _____

in the **Senate** ____ or the **Assembly** ____ (check only one). Only the requester under whose name the drafting request is entered in the LRB's drafting records may authorize the draft to be submitted. Please allow one day for the preparation of the required copies.

2. **REDRAFT**. See the changes indicated or attached _____.

A revised draft will be submitted for your approval with changes incorporated.

3. Obtain **FISCAL ESTIMATE NOW**, prior to introduction _____.

If the analysis indicates that a fiscal estimate is required because the proposal makes an appropriation or increases or decreases existing appropriations or state or general local government fiscal liability or revenues, you have the option to request the fiscal estimate prior to introduction. If you choose to introduce the proposal without the fiscal estimate, the fiscal estimate will be requested automatically upon introduction. It takes about 10 days to obtain a fiscal estimate. Requesting the fiscal estimate prior to introduction retains your flexibility for possible redrafting of the proposal.

If you have any questions regarding the above procedures, please call 266-3561. If you have any questions relating to the attached draft, please feel free to call me.

Joseph T. Kreye, Legislative Attorney
Telephone: (608) 266-2263



1999 BILL

*redraft
with changes*

1 AN ACT to amend 77.51 (20) of the statutes; relating to: the definition of tangible
2 personal property that is subject to a sales or use tax.

Analysis by the Legislative Reference Bureau

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

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

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

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

3 SECTION 1. 77.51 (20) of the statutes is amended to read:

4 77.51 (20) "Tangible personal property" means all tangible personal property
5 of every kind and description and includes electricity, natural gas, steam and water

BILL

1 and also leased property affixed to realty if the lessor has the right to remove the
2 property upon breach or termination of the lease agreement, unless the lessor of the
3 property is also the lessor of the realty to which the property is affixed. "Tangible
4 personal property" also includes coins and stamps of the United States sold or traded
5 as collectors' items above their face value and, computer programs except custom
6 computer programs, books, videotapes, newspapers, magazines, video game
7 cartridges, audiotapes, compact disks, laser disks, photocopies, artwork, and similar
8 tangible forms of data, information or intellectual property.

SECTION 2. Effective date.

9
10 (1) This ~~act~~ takes effect on the first day of the 2nd month beginning after
11 publication. *day after publication because it is clarification*

12 (END)



2

1999 BILL

Regen

1 AN ACT *to amend* 77.51 (20) of the statutes; **relating to:** the definition of tangible
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generally

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generally

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BILL

SECTION 1

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Section 2. Effective date.

9
 10 (1) This act takes effect on the first day of the 2nd month beginning after
 11 publication.

(END) ✓

Kreye, Joseph

From: Gates-Hendrix, Sherrie
Sent: Monday, May 03, 1999 11:01 AM
To: Kreye, Joseph
Subject: LRB 2438 - Definition of Tangible Personal Property

Hi Joe --

We have one more small change we'd like on LRB 2438 --

Page 2, lines 3-8 should be modified as follows:

The phrase beginning with "books and records" and ending with "intellectual property" should be moved to precede "computer programs." Semicolons should separate the three types of property (coins; books and other intellectual property; and computer software). "Tangible" should be removed before "forms" and the phrase "transferred in a tangible form" inserted after "intellectual property."

The reason for these changes are to make it absolutely clear that the department's current position and future position is as follows:

- Computer software, except custom software, is tangible personal property regardless of the form received (e.g., via the Internet).
- Books, records, etc., are tangible personal property only when transferred in a tangible form. Books and records transferred by some other means (e.g., via the Internet) are not tangible personal property.

Let me know if you need anything else from us. If you'd like more detail on this, feel free to contact Vicki Gibbons here at DOR. She's the analyst that's been working on this issue.

Thanks.

Sherrie Gates-Hendrix

what if it isn't transferred = ?

is the method of transfer really necessary for the definition?

I assume a book or a record is T.P.P.

— the "downloaded copy", however, is not T.P.P.?

— or do we need a definition of "transfer" = ?

King

1999 BILL

D-N

Sen. Cat.

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2 personal property that is subject to a sales or use tax.

Analysis by the Legislative Reference Bureau

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

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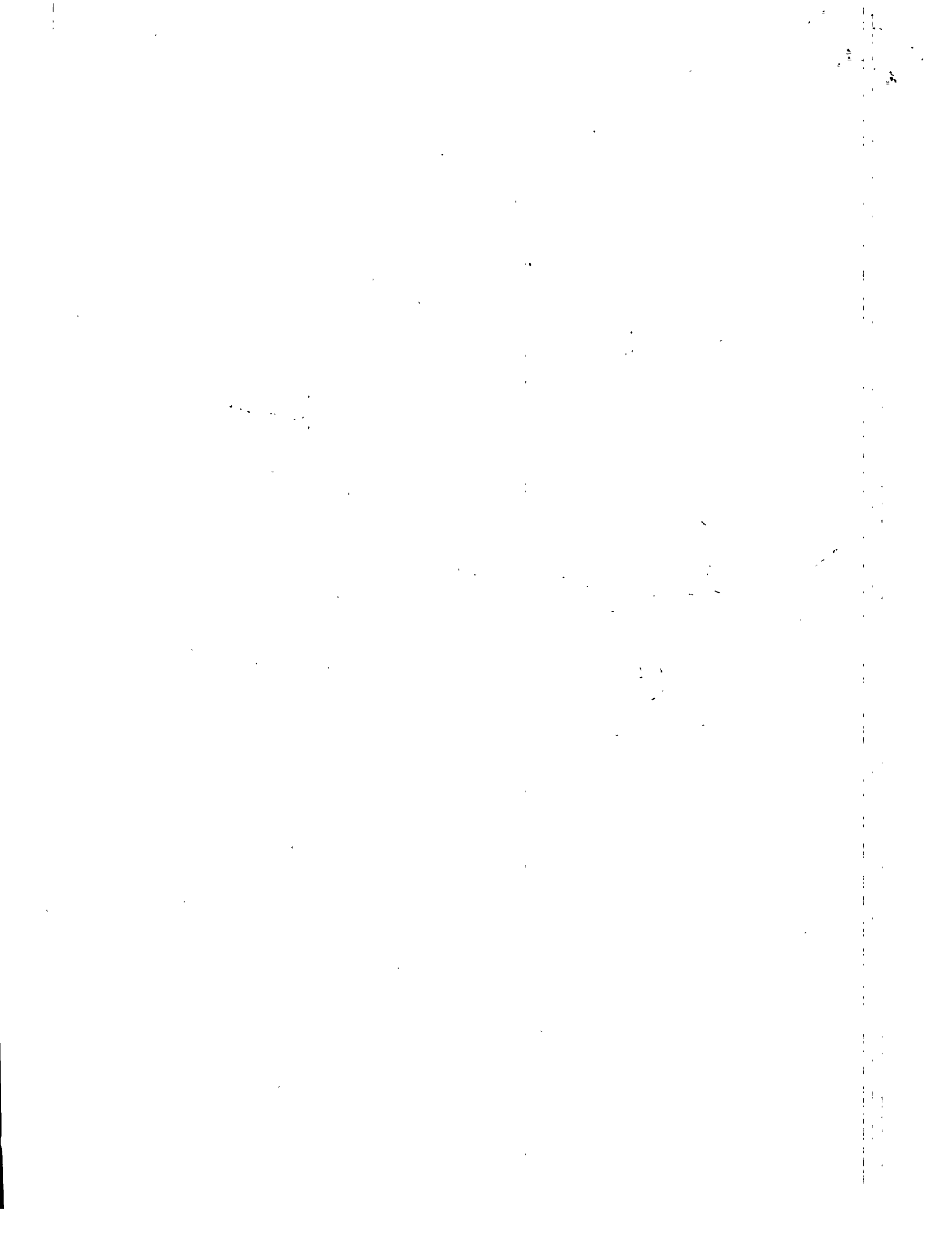
6 computer programs, books, videotapes, newspapers, magazines, video game
7 cartridges, audiotapes, compact disks, laser disks, photocopies, artwork, and similar
8 tangible forms of data, information or intellectual property *ev*

(END)

i

two:

add a plain period after "programs".



2438/3
JK

D-N
Sherrice Gater-Hendrix:

I did not make the recommended change regarding data, information and intellectual properties that are "transferred" in tangible forms.

Books, videotapes, etc., are already tangible forms of personal property. Books and videotapes

are not "transferred" ^{via} the internet, but, rather, words and images are "transferred" via the internet.

I assume from your e-mail that the department of revenue does not consider downloaded copies of words and images to be tangible personal property.

If my assumption is correct, the recommended language does not clarify the department of

revenue's ^{posi} position. Do you, instead, wish to

exclude from the definition of tangible personal property material that ^{is} downloaded from

the internet? If you have any questions, please contact me.

JK

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-2438/3dn
JK:kmg:km

May 6, 1999

Sherrie Gates-Hendrix:

I did not make the recommended change regarding data, information and intellectual properties that are "transferred" in tangible forms. Books, videotapes, etc., are already tangible forms of personal property. Books and videotapes are not "transferred" via the internet, but, rather, words and images are "transferred" via the internet. I assume from your e-mail that the department of revenue does not consider downloaded copies of words and images to be tangible personal property. If my assumption is correct, the recommended language does not clarify the department of revenue's position. Do you, instead, wish to exclude from the definition of tangible personal property material that is downloaded from the internet? If you have any questions, please contact me.

Joseph T. Kreye
Legislative Attorney
Phone: (608) 266-2263
E-mail: Joseph.Kreye@legis.state.wi.us

m 5-20-99

4
Kmg

1999 ASSEMBLY BILL

Regen

1 AN ACT to amend 77.51 (20) of the statutes; relating to: the definition of tangible
2 personal property that is subject to a sales or use tax.

Analysis by the Legislative Reference Bureau

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

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

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

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

3 SECTION 1. 77.51 (20) of the statutes is amended to read:
4 77.51 (20) "Tangible personal property" means all tangible personal property
5 of every kind and description and includes electricity, natural gas, steam and water

ASSEMBLY BILL

and

1 and also leased property affixed to realty if the lessor has the right to remove the
 2 property upon breach or termination of the lease agreement, unless the lessor of the
 3 property is also the lessor of the realty to which the property is affixed. "Tangible
 4 personal property" also includes coins and stamps of the United States sold or traded
 5 as collectors' items above their face value; books, videotapes, newspapers,
 6 magazines, video game cartridges, audiotapes, compact disks, laser disks,
 7 photocopies, artwork, ~~and similar tangible forms of~~ data, information or intellectual
 8 property (and computer programs except custom computer programs.

(END)

transferred in a tangible form

FACSIMILE COVER SHEET

State of Wisconsin
Department of Revenue
125 South Webster St.
P.O Box 8933
Madison, WI 53708-8933

FAX Number: 608-266-5718
* * * * *
FAX Operator: 608-266-8085

Number of pages attached, including this cover sheet: 2

If all pages are not received or are illegible, please call:


DELIVER TO: Joe Kroye 6-2263
Addressee Addressee's Phone Number

FROM: Sherrie Gates-Hendua 7-1262
Sender Sender's Phone Number

Additional Information:

*Joe -
One more time?
Call if you need to - 7-1262
Sherrie*

ASSEMBLY BILL

1 and also leased property affixed to realty if the lessor has the right to remove the
 2 property upon breach or termination of the lease agreement, unless the lessor of the
 3 property is also the lessor of the realty to which the property is affixed. "Tangible
 4 personal property" also includes coins and stamps of the United States sold or traded
 5 as collectors' items above their face value; data, information or intellectual property
 6 transferred in a tangible form and books, videotapes, newspapers, magazines, video
 7 game cartridges, audiotapes, compact disks, laser disks, photocopies, artwork and
 8 computer programs except custom computer programs. 

(END)

Joe -
 I thought I'd fax
 this so you can see
 what we'd like. Call
 if you have
 questions. Thanks
 Sherrie Guts-Hendrix

5

1999 ASSEMBLY BILL

in 5-27-99

D-11

Regen

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Analysis by the Legislative Reference Bureau

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ASSEMBLY BILL

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 8 computer programs except custom computer programs.

and i

(END)

f
~~forms including~~



State of Wisconsin

LEGISLATIVE REFERENCE BUREAU

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

STEPHEN R. MILLER
CHIEF

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

REFERENCE SECTION: (608) 266-0341
REFERENCE FAX: (608) 266-5648

October 11, 1999

MEMORANDUM

To: Representative Michael Lehman

From: Joe Kreye, LRB attorney

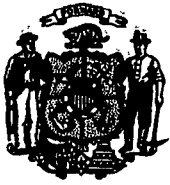
Subject: Recommended language from State Bar regarding AB390 and retroactive application

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

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

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

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



State of Wisconsin

LEGISLATIVE REFERENCE BUREAU

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

STEPHEN R. MILLER
CHIEF

LEGAL SECTION: (608) 266-3561
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October 11, 1999

MEMORANDUM

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



State of Wisconsin • DEPARTMENT OF REVENUE

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

Tommy G. Thompson
Governor

Cate Zeuske
Secretary of Revenue

September 7, 1999

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

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

Dear Representative Lehman and Representative Wood:

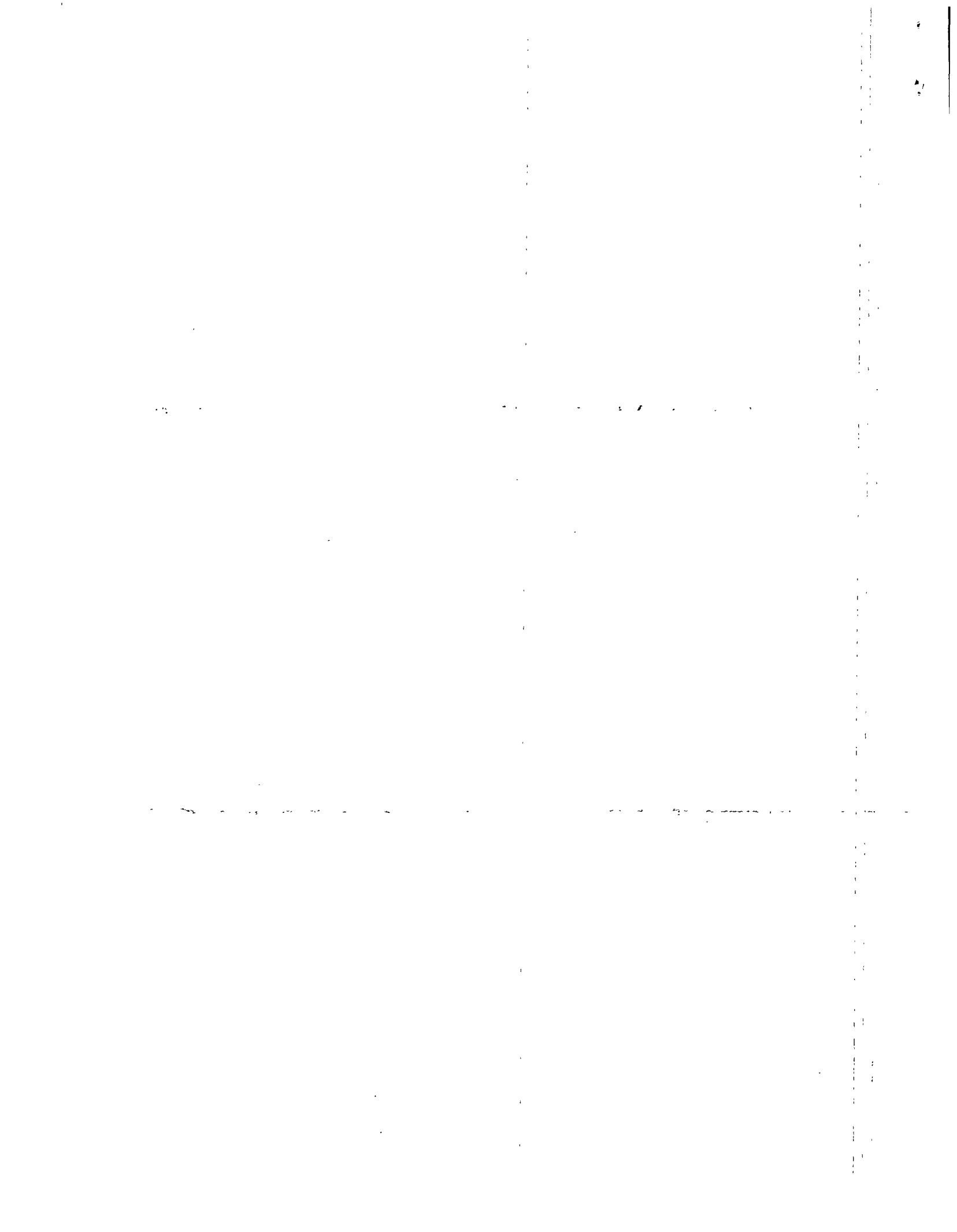
This letter is in response to our discussion with you and representatives of the State Bar of Wisconsin on September 1, 1999, regarding 1999 Assembly Bill 390. As a result of those discussions, four points were raised that require response by the Department of Revenue and are addressed in order below.

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

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

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

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



Point 2 — Expansion of Imposition on Nontaxable Services

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

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

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

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

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

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

.....

.....

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

Point 3 — Provide for Same Tax Treatment for Mailing Lists

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

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

Point 4 — Change Language With Respect to Artwork

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

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

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

Sincerely,



Tom Ourada
Executive Assistant

cc: J. Boese, State Bar of Wisconsin
Attachment



State of Wisconsin • DEPARTMENT OF REVENUE ATTACHMENT 1

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

July 9, 1999

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

Dear Mr. Babcock:

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

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

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

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

Sincerely,

Vicki L. Gibbons
Staff Specialist

ATTACHMENT 2

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

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

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

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

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

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

Amend as follows:

77.51(5) For purposes of subs. (13) (e) and (f) and (14) (L) and s. 77.52 (2m) "incidental" means depending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal; something incidental to the main purpose of the service. Tangible personal property, including data, information, and other intellectual property transferred in a tangible form, transferred by a service provider is incidental to the service if the purchaser's main purpose or objective is to obtain the service rather than the property, even though the property may be necessary or essential to providing the service.

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

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

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

77.52(2m)(a) With respect to the services subject to tax under sub. (2), no part of the charge for the service may be deemed a sale or rental of tangible personal property including data, information, and other intellectual property transferred in a tangible form, if the property transferred by the service provider is incidental to the selling, performing or furnishing of the service, except as provided in par. (b).

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

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



**STATE BAR
of WISCONSIN**

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

SECRETARY OF REVENUE
SEP 29 1999
RECEIVED
STATE BAR OF WISCONSIN

September 23, 1999

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

Be Kreye

Dear Representative Lehman:

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

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

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



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

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

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

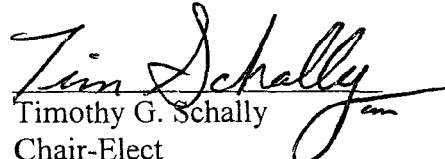
With regard to AB 390, this statement would, ideally, appear in a statutory effective date provision, thus ensuring clarity and wide public availability.

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

Very truly yours,

TAXATION LAW SECTION

By:


Timothy G. Schally
Chair-Elect



Michael (Mickey)
Lehman

State Representative

58th Assembly District

Committee Chair: Ways and Means

October 7, 1999

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

Dear Joe:


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

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

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

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

Respectfully,


MICHAEL "Mickey" LEHMAN
State Representative
58th Assembly District

ML:amn

Attachment

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

58th District Includes - CITIES: Cedarburg, Hartford and West Bend (Wards 23-29, 34-38, 40, 41, 43-47, 49, 51-53), VILLAGES: Jackson, Neosho and Slinger:
TOWNS: Addison, Cedarburg (Wards 1,2,3,6, and 7), Hartford, Jackson, Polk (Wards 1, 2, 3, 4, 5 and 8), Rubicon, Trenton and West Bend


Printed on recycled paper with a soy base ink.



Jennifer Boese
Government Relations
Coordinator

RE: Tax Law Section / AB390

Rep. Mickey Lehman's office was kind enough to forward me their drafting instructions on AB390, which tried to address our retroactive concerns. As the drafting instructions referenced CUS and a Sept. 7, 1999 Dept. of Revenue letter, I thought I would provide you a copy of our response to that DOR letter for your files and to give additional background / fill in any gaps.

(608) 250-6045
(800) 444-9404, ext. 6045
jboese@wisbar.org

Jenny
Boese



**STATE BAR
of WISCONSIN**

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

COPY

MEMORANDUM

To: Representative Michael Lehman
Representative Wayne Wood

From: Taxation Law Section
State Bar of Wisconsin

Copy: Tom Ourada, Department of Revenue

Date: September 8, 1999

Re: AB 390 - Response to September 7 DOR Letter

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

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

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

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

For more information contact Jenny Boese at the State Bar at 608-250-6045 or 'jboese@wisbar.org'.



COPY

October 12, 1999

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

Dear Joe:

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

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

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

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

Respectfully,

MICHAEL "Mickey" LEHMAN
State Representative
58th Assembly District

ML:amn

Attachment

Y9103