

Clearinghouse Rule 12-015

PROPOSED ORDER OF THE DEPARTMENT OF REVENUE CREATING RULES

The Wisconsin Department of Revenue proposes an order to: **create** Tax 11.07; **relating to** sales and use tax exemptions for biotechnology.

The scope statement for this rule, SS 040-11, was approved by the Governor on November 14, 2011, published in Register No. 671 on November 30, 2011, and approved by the Secretary of Revenue on December 12, 2011.

Analysis by the Department of Revenue

Statutes interpreted: s. 77.54(57), Stats.

Statutory authority: ss. 77.54(57)(a)1m. and 227.11(2)(a), Stats.

Explanation of agency authority: Section 77.54(57)(a)1m., Stats., provides: “‘Biotechnology business’ means a business, as certified by the department in the manner prescribed by the department, that is primarily engaged in the application of biotechnologies that use a living organism or parts of an organism to produce or modify products to improve plants or animals, develop microorganisms for specific uses, identify targets for small molecule pharmaceutical development, or transform biological systems into useful processes and products.”

Section 227.11(2)(a), Stats., provides “[e]ach agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute...”

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

Plain language analysis: The proposed rule prescribes the manner in which a biotechnology business will be certified. It also prescribes the manner of determining the percent needed to establish if the definition of “primarily,” which is defined as “more than 50%” under s. 77.54(57)(a)4., Stats., is met.

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

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

Comparison with rules in adjacent states: The department is not aware of a similar rule in an adjacent state.

Summary of factual data and analytical methodologies: The department has created this proposed rule order to comply with the statutory requirement to prescribe the manner in which a business will be certified for the sales and use tax exemptions for biotechnology under s. 77.54(57), Stats. No other data was used in the preparation of this proposed rule order or this analysis.

Analysis and supporting documents used to determine effect on small business: As explained above, this rule is created to administer Wisconsin’s sales and use tax laws. As the rule itself does not impose any significant financial or other

compliance burden, the department has determined that it does not have a significant effect on small business.

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

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

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

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

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

SECTION 1. Tax 11.07 is created to read:

Tax 11.07 Property used in qualified research and property used to raise research animals. (1) GENERAL. Section 77.54(57)(b), Stats., provides exemptions for the following:

(a) Machinery and equipment, including attachments, parts, and accessories, that are sold to persons who are engaged primarily in manufacturing or biotechnology in this state and are used exclusively and directly in qualified research.

(b) Tangible personal property or an item or property under s. 77.52 (1) (b) or (c), Stats., that is sold to persons who are engaged primarily in manufacturing or biotechnology in this state, if the tangible personal property or item or property under s. 77.52 (1) (b) or (c), Stats., is consumed or destroyed or loses its identity while being used exclusively and directly in qualified research.

(c) Machines and specific processing equipment, including accessories, attachments, and parts for the machines or equipment, that are used exclusively and directly in raising animals that are sold primarily to a biotechnology business, a public or private institution of higher education, or a governmental unit for exclusive and direct use by any such entity in qualified research or manufacturing.

(d) The items listed in s. 77.54 (3m) (a) to (m), Stats., medicines, semen for artificial insemination, fuel, and electricity that are used exclusively and directly in raising animals that are sold primarily to a biotechnology business, a public or private institution of higher education, or a governmental unit for exclusive and direct use by any such entity in qualified research or manufacturing.

(2) DEFINITIONS. For purposes of the exemptions in s. 77.54 (57) (b), Stats., and sub. (1), the following definitions apply:

- (a) "Animals" has the meaning given in s. 77.54 (57) (a) 1d., Stats.
- (b) "Biotechnology" has the meaning given in s. 77.54 (57) (a) 1f., Stats.
- (c) "Biotechnology business" has the meaning given in s. 77.54 (57) (a) 1m., Stats.
- (d) "In this state" has the meaning given in s. 77.51 (6), Stats.
- (e) "Institution of higher education" means an accredited educational organization providing education after completion of high school, including undergraduate, graduate, and professional education.
- (f) "Machinery" has the meaning given in s. 70.11 (27) (a) 2., Stats.
- (g) "Primarily" has the meaning given in s. 77.54 (57) (a) 4., Stats.
- (h) "Qualified research" has the meaning given in s. 77.54 (57) (a) 5., Stats.
- (i) "Used exclusively" has the meaning given in s. 77.54 (3) (b) 3., Stats.

(3) EXEMPTIONS FOR PROPERTY USED IN QUALIFIED RESEARCH. (a) In order for a person to claim the exemption described in sub. (1) (a) or (b), that person must be engaged primarily in manufacturing or biotechnology in this state. In addition, the exemption in sub. (1) (a) requires that the property be used exclusively and directly in qualified research and the exemption in sub. (1) (b) requires that the property or item is consumed, destroyed, or loses its identity while being used exclusively and directly in qualified research.

(b) The exemption in sub. (1) (b) includes fuel and electricity that is consumed, destroyed, or loses its identity while being used exclusively and directly in qualified research.

(c) For purposes of determining whether an activity is qualified research, the regulations under Treas. Reg. section 1.41-4 apply.

(d) The same activity may be biotechnology and manufacturing for purposes of determining whether the person is engaged primarily in manufacturing or biotechnology in this state. When a person's activities in this state include one or more activities in addition to manufacturing or biotechnology, the question of which activity, if any, is the primary activity is answered by a consistent application of a reasonable measure of activity.

Examples 1) Company A performs research and product development services at locations in Wisconsin for its customers. This is Company A's sole activity in Wisconsin. Company A, using the sales price of its services as the measure of activity, determines that more than 50% of the total sales price it receives for performing all research and product development services in Wisconsin is derived from biotechnology.

2) Company B performs research and product development services at locations outside of Wisconsin. Company B manufactures tangible personal property at a location in Wisconsin. This is Company B's sole activity in Wisconsin. The products manufactured in Wisconsin are used by Company B in performing its research and product development activities. For purposes of the exemptions in sub. (1) (a) and (b), Company B is engaged primarily in manufacturing in Wisconsin, as manufacturing is its only activity in Wisconsin.

(e) When property or an item purchased exempt under sub. (1) (a) or (b) is used more than 5% of its total use for purposes other than exclusive and direct use in qualified research, the purchaser becomes subject to Wisconsin use tax on the purchase price of the property or item, unless another exemption applies.

Examples 1) Company A is engaged primarily in manufacturing in Wisconsin. Company A purchases a machine that it will use directly in conducting qualified research at its manufacturing plant in Wisconsin, and purchases it exempt from Wisconsin sales tax claiming the exemption in sub. (1) (a). After completing the qualified research and having made no use of the machine other than direct use in qualified research, Company A begins using the machine exclusively and directly in its manufacturing operation, which is an exempt use under s. 77.54 (6) (a), Stats. Company A does not owe Wisconsin use tax on its purchase of the machine.

2) Company B is engaged primarily in manufacturing in Wisconsin. Company B purchases a machine that it will use exclusively and directly at its manufacturing plant in conducting qualified research as well as using the machine for more than 5 % of its total use in conducting research and development projects that do not meet the definition of qualified research. Company B's purchase of the machine is taxable.

3) Company C is engaged primarily in manufacturing in Wisconsin. Company C develops a new product in an activity that is qualified research. During the qualified research, Company C purchased a variety of raw materials that were used exclusively and directly and destroyed in qualified research in determining what raw materials were needed to produce the new product. Once the qualified research is concluded, Company C consumes some of the raw materials in further research and development of the new product that is not qualified research. Company C's purchases of the raw materials used exclusively and directly and destroyed in qualified research are exempt under sub. (1) (b). Company C's purchases of raw materials it uses in further research and development of the new product that is not qualified research are taxable. Research and development are not manufacturing and the raw materials used in further research and development of the new product that is not qualified research do not qualify for exemption under s. 77.54 (2) or (6) (a), Stats.

(4) EXEMPTIONS FOR RAISING ANIMALS USED IN QUALIFIED RESEARCH OR MANUFACTURING. (a) This subsection explains how a person qualifies for the exemptions under sub. (1) (c) and (d), the information certain purchasers of the animals are required to furnish to a seller of such animals, and the documentation to be kept by the seller to verify the seller qualifies for the exemptions.

(b) The exemptions in sub. (1) (c) and (d) apply to property purchased and used exclusively and directly in raising animals only when more than 50% of all the animals raised by the seller of the animals are sold to one of the following organizations for exclusive and direct use by such organization in qualified research or manufacturing:

1. A biotechnology business certified by the department as described in sub. (5).

2. A public or private institution of higher education as defined in sub. (2) (e).
3. A government agency.

(c) The person claiming an exemption under sub. (1) (c) or (d), shall obtain and retain information furnished to it by the organizations described in par. (b), attesting to the number of animals purchased and the number of animals used by the organization exclusively and directly in qualified research or manufacturing. Purchaser's Statement to Seller for Animals used in Qualified Research or Manufacturing, Form S-209, may be used by the purchaser for this purpose.

Note: Form S-209 is available on the department's web site at www.revenue.wi.gov.

Examples: 1) Company A raises various animals for sale for use in research. Company A sells more than 50% of its animals to biotechnology businesses for exclusive and direct use in qualified research. 100% of the feed Company A purchases for exclusive and direct use in raising its animals is exempt.

2) Company T raises various animals for sale for use in research. Company A uses cages to raise some of these animals. The cages have a life expectancy of 5 years. Company T's purchases of cages are exempt only if more than 50% of all the animals raised by Company T are sold to organizations described in par. (a) for exclusive and direct use by such an organization in qualified research or manufacturing.

3) Company K raises various animals for sale for use in research. Company K does not sell more than 50% of its animals to organizations described in par. (a) for exclusive and direct use by such an organization in qualified research or manufacturing. Company K does not qualify for the exemptions in sub. (1) (c) and (d).

(5) CERTIFICATION OF BIOTECHNOLOGY BUSINESS BY THE DEPARTMENT (a) For purposes of the exemptions in sub. (1) (c) and (d), the department is required to certify a business as a biotechnology business. This subsection outlines the rules and procedures for a person to be certified as a biotechnology business by the department.

(b) A business is a biotechnology business when all of the following conditions are satisfied:

1. The business is engaged primarily in biotechnology. A business is engaged primarily in biotechnology for the period described in par. (c) when more than 50% of the business' activities during that period are devoted to the application of biotechnologies.

2. The business has received notice from the department that the business has been certified, with respect to a prescribed period determined under par. (c), that the business is a biotechnology business.

(c) The certification period under par. (b) 2. shall correspond to the business' tax year as determined for federal income tax purposes, including short years, subject to the following conditions:

1. If a business is certified by the department with respect to a previous tax year, the certification is valid for the previous tax year.

2. If a business is certified for a current tax year, the certification is valid until the expected end of the tax year unless, during such tax year the business' tax year terminates earlier than expected. When a tax year terminates earlier than expected, the certification is valid until the actual end of the tax year as determined for federal income tax purposes.

(d) A business may apply for certification with a form and in the manner prescribed by the department.

(e) Notwithstanding any other provision in this subsection, the department may:

1. Revoke any certification granted with respect to a period under par. (c) (1) or (2), but only upon information that either the business' application for certification contained a misstatement as to the business' gross income or expenses and deductions or the business no longer qualifies as a biotechnology business.

2. Require any business seeking certification as a biotechnology business to submit additional information, as determined by the department, prior to the department granting or denying the applicant's request for certification.

3. Require any business seeking certification to be certified only with respect to its previous tax years, until the department determines otherwise.

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: _____

By: _____

Richard G. Chandler
Secretary of Revenue

E:Rules/1107 Proposed Order (v3)