



State of Wisconsin
2015 - 2016 LEGISLATURE

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**ASSEMBLY SUBSTITUTE AMENDMENT 1,
TO ASSEMBLY BILL 623**

January 26, 2016 - Offered by Representative MACCO.

1 **AN ACT** *to repeal* 20.566 (1) (hn), 71.10 (1m) (b) 1. and 2., 71.30 (2m) (b) 1. and
2 2., 71.80 (1m) (b) 1. and 2. and 73.03 (28d); *to renumber* 71.80 (9m) (a) and (b)
3 and 77.61 (19) (a) and (b); *to renumber and amend* 71.10 (1m) (b) (intro.),
4 71.30 (2m) (b) (intro.), 71.80 (1m) (b) (intro.), 71.80 (9m) (intro.) (except 71.80
5 (9m) (title)), 77.54 (60) (a) and 77.61 (19) (intro.); *to amend* 77.51 (2), 77.52 (2)
6 (a) 10., 77.52 (2m) (b), 77.54 (60) (b) and 77.54 (60) (c); and *to create* 77.51 (12t),
7 77.54 (60) (bm), 77.54 (60) (c) 2. and 77.54 (60) (d) 2. and 3. of the statutes;
8 **relating to:** a sales and use tax exemption for products sold in connection with
9 real property construction activities; factors that determine whether a
10 transaction has economic substance for income and franchise tax purposes; the
11 imposition of penalties on a taxpayer for failing to produce records and
12 documents; and participation by the Department of Revenue in the Multistate
13 Tax Commission Audit Program.

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

1 **SECTION 1.** 20.566 (1) (hn) of the statutes is repealed.

2 **SECTION 2.** 71.10 (1m) (b) (intro.) of the statutes is renumbered 71.10 (1m) (b)
3 and amended to read:

4 71.10 **(1m)** (b) A transaction has economic substance only if ~~the taxpayer shows~~
5 ~~all of the following:~~ the transaction is treated as having economic substance as
6 determined under section 7701 (o) of the Internal Revenue Code, except that the tax
7 effect shall be determined using federal, state, local, or foreign taxes, rather than
8 only the federal income tax effect.

9 **SECTION 3.** 71.10 (1m) (b) 1. and 2. of the statutes are repealed.

10 **SECTION 4.** 71.30 (2m) (b) (intro.) of the statutes is renumbered 71.30 (2m) (b)
11 and amended to read:

12 71.30 **(2m)** (b) A transaction has economic substance only if ~~the taxpayer shows~~
13 ~~both of the following:~~ the transaction is treated as having economic substance as
14 determined under section 7701 (o) of the Internal Revenue Code, except that the tax
15 effect shall be determined using federal, state, local, or foreign taxes, rather than
16 only the federal income tax effect.

17 **SECTION 5.** 71.30 (2m) (b) 1. and 2. of the statutes are repealed.

18 **SECTION 6.** 71.80 (1m) (b) (intro.) of the statutes is renumbered 71.80 (1m) (b)
19 and amended to read:

20 71.80 **(1m)** (b) A transaction has economic substance only if ~~the taxpayer shows~~
21 ~~both of the following:~~ the transaction is treated as having economic substance as
22 determined under section 7701 (o) of the Internal Revenue Code, except that the tax

1 effect shall be determined using federal, state, local, or foreign taxes, rather than
2 only the federal income tax effect.

3 **SECTION 7.** 71.80 (1m) (b) 1. and 2. of the statutes are repealed.

4 **SECTION 8.** 71.80 (9m) (intro.) (except 71.80 (9m) (title)) of the statutes is
5 renumbered 71.80 (9m) (a) (intro.) and amended to read:

6 71.80 **(9m)** (a) (intro.) A person who fails to produce records or documents, as
7 provided under ~~ss. s.~~ 71.74 (2) and ~~73.03 (9)~~, that support amounts or other
8 information required to be shown on any return required under this chapter and fails
9 to comply in good faith with a summons issued pursuant to s. 73.03 (9) seeking those
10 records and documents may be subject to any of the following penalties, as
11 determined by the department, except that the department may not impose a
12 penalty under this subsection if the person shows that under all facts and
13 circumstances the person's response, or failure to respond, to the department's
14 request was reasonable or justified by factors beyond the person's control:

15 **SECTION 9.** 71.80 (9m) (a) and (b) of the statutes are renumbered 71.80 (9m) (a)
16 1. and 2.

17 **SECTION 10.** 73.03 (28d) of the statutes is repealed.

18 **SECTION 11.** 77.51 (2) of the statutes is amended to read:

19 77.51 **(2)** "Contractors" and "subcontractors" are the consumers of tangible
20 personal property or items or goods under s. 77.52 (1) (b) or (d) used by them in real
21 property construction activities and the sales and use tax applies to the sale of
22 tangible personal property or items or goods under s. 77.52 (1) (b) or (d) to them. A
23 contractor engaged primarily in real property construction activities may use resale
24 certificates only with respect to purchases of tangible personal property or items or
25 goods under s. 77.52 (1) (b) or (d) which the contractor has sound reason to believe

1 the contractor will sell to customers for whom the contractor will not perform real
2 property construction activities involving the use of such tangible personal property
3 or items or goods under s. 77.52 (1) (b) or (d). ~~In this subsection, “real property
4 construction activities” means activities that occur at a site where tangible personal
5 property or items or goods under s. 77.52 (1) (b) or (d) that are applied or adapted to
6 the use or purpose to which real property is devoted are affixed to that real property,
7 if the intent of the person who affixes that property is to make a permanent accession
8 to the real property. In this subsection, “real property construction activities” does
9 not include affixing property subject to tax under s. 77.52 (1) (c) to real property or
10 affixing to real property tangible personal property that remains tangible personal
11 property after it is affixed.~~

12 **SECTION 12.** 77.51 (12t) of the statutes is created to read:

13 77.51 (12t) “Real property construction activities” means activities that occur
14 at a site where tangible personal property or items or goods under s. 77.52 (1) (b) or
15 (d) that are applied or adapted to the use or purpose to which real property is devoted
16 are affixed to that real property, if the intent of the person who affixes that property
17 is to make a permanent accession to the real property. “Real property construction
18 activities” does not include affixing property subject to tax under s. 77.52 (1) (c) to
19 real property or affixing to real property tangible personal property that remains
20 tangible personal property after it is affixed.

21 **SECTION 13.** 77.52 (2) (a) 10. of the statutes is amended to read:

22 77.52 (2) (a) 10. Except for the repair, service, alteration, fitting, cleaning,
23 painting, coating, towing, inspection, and maintenance of any aircraft or aircraft
24 parts; except for services provided by veterinarians; and except for installing or
25 applying tangible personal property, or items or goods under sub. (1) (b) or (d), that,

1 subject to par. (ag), when installed or applied, will constitute an addition or capital
2 improvement of real property; the repair, service, alteration, fitting, cleaning,
3 painting, coating, towing, inspection, and maintenance of all items of tangible
4 personal property or items, property, or goods under sub. (1) (b), (c), or (d), unless, at
5 the time of that repair, service, alteration, fitting, cleaning, painting, coating,
6 towing, inspection, or maintenance, a sale in this state of the type of property, item,
7 or good repaired, serviced, altered, fitted, cleaned, painted, coated, towed, inspected,
8 or maintained would have been exempt to the customer from sales taxation under
9 this subchapter, other than the exempt sale of a motor vehicle or truck body to a
10 nonresident under s. 77.54 (5) (a) and other than nontaxable sales under s. 77.522
11 or unless the repair, service, alteration, fitting, cleaning, painting, coating, towing,
12 inspection, or maintenance is provided under a contract that is subject to tax under
13 subd. 13m. The tax imposed under this subsection applies to the repair, service,
14 alteration, fitting, cleaning, painting, coating, towing, inspection, or maintenance of
15 items listed in par. (ag), regardless of whether the installation or application of
16 tangible personal property or items, property, or goods under sub. (1) (b), (c), or (d)
17 related to the items is an addition to or a capital improvement of real property, except
18 that the tax imposed under this subsection does not apply to the original installation
19 or the complete replacement of an item listed in par. (ag), if that installation or
20 replacement is a real property construction activity under s. 77.51 (2).

21 **SECTION 14.** 77.52 (2m) (b) of the statutes is amended to read:

22 77.52 (2m) (b) With respect to the services subject to tax under sub. (2) (a) 7.,
23 10., 11., and 20. and except as provided in s. 77.54 (60) (b) and (bm) 2., all tangible
24 personal property or items, property, or goods under s. 77.52 (1) (b), (c), or (d)
25 physically transferred, or transferred electronically, to the customer in conjunction

1 with the selling, performing, or furnishing of the service is a sale of tangible personal
2 property or items, property, or goods under s. 77.52 (1) (b), (c), or (d) separate from
3 the selling, performing, or furnishing of the service.

4 **SECTION 15.** 77.54 (60) (a) of the statutes is renumbered 77.54 (60) (d) and
5 amended to read:

6 77.54 (60) (d) In this subsection, ~~“lump sum:~~

7 1. “Construction contract” means a contract to perform real property
8 construction activities and to provide ~~tangible personal property, items or property~~
9 ~~under s. 77.52 (1) (b) or (c), or taxable services and for which the contractor quotes~~
10 ~~the charge for labor, services of subcontractors, tangible personal property, items and~~
11 ~~property under s. 77.52 (1) (b) and (c), and taxable services as one price, including~~
12 ~~a contract for which the contractor itemizes the charges for labor, services of~~
13 ~~subcontractors, tangible personal property, items and property under s. 77.52 (1) (b)~~
14 ~~and (c), and taxable services as part of a schedule of values or similar document~~
15 products.

16 **SECTION 16.** 77.54 (60) (b) of the statutes is amended to read:

17 77.54 (60) (b) The sales price from the sale of and the storage, use, or other
18 consumption of ~~tangible personal property, items and property under s. 77.52 (1) (b)~~
19 ~~and (c), and taxable services~~ products that are sold by a prime contractor as part of
20 a ~~lump sum~~ construction contract, if the total sales price of all such taxable products
21 is less than 10 percent of the total amount of the ~~lump sum~~ construction contract.
22 Except as provided in par. (c), the prime contractor is the consumer of ~~such taxable~~
23 ~~the~~ products and shall pay the tax imposed under this subchapter on the ~~taxable~~
24 products.

25 **SECTION 17.** 77.54 (60) (bm) of the statutes is created to read:

1 77.54 (60) (bm) 1. The sales price from the sale of and the storage, use, or other
2 consumption of products that are sold by a subcontractor to a prime contractor or
3 another subcontractor as part of a construction contract, if any of the following
4 applies:

5 a. The sales price is exempted under par. (b) for the products resold by the prime
6 contractor.

7 b. The sales price is less than 10 percent of the total amount of the construction
8 contract.

9 2. Except as provided in par. (c), the subcontractor is the consumer of the
10 products exempted under this paragraph and shall pay the tax imposed under this
11 subchapter on the products.

12 **SECTION 18.** 77.54 (60) (c) of the statutes is amended to read:

13 77.54 (60) (c) If the ~~lump-sum construction~~ construction contract under par. (b) is entered
14 ~~into with~~ between a prime contractor and an entity that is exempt from taxation
15 under sub. (9a), ~~the~~ all of the following apply:

16 1. The prime contractor is the consumer of all ~~taxable~~ products used by the
17 prime contractor in real property construction activities, but the prime contractor
18 may purchase without tax, for resale, ~~tangible personal property, items and property~~
19 ~~under s. 77.52 (1) (b) and (c), and taxable services~~ products that are sold by the prime
20 contractor to the entity as part of the ~~lump-sum construction~~ construction contract ~~with the entity~~
21 and that are not consumed by the prime contractor in real property construction
22 activities.

23 **SECTION 19.** 77.54 (60) (c) 2. of the statutes is created to read:

24 77.54 (60) (c) 2. A subcontractor of the prime contractor is the consumer of all
25 products used by the subcontractor in real property construction activities, but the

1 subcontractor may purchase without tax, for resale, products that are sold by the
2 subcontractor to the prime contractor or another subcontractor, as part of the
3 subcontractor's construction contract under par. (bm), for resale to the entity and
4 that are not consumed by the subcontractor in real property construction activities.

5 **SECTION 20.** 77.54 (60) (d) 2. and 3. of the statutes are created to read:

6 77.54 **(60)** (d) 2. "Prime contractor" means a contractor who enters into a
7 construction contract with an owner or lessee of real property, except for leased
8 property under s. 77.52 (1) (c).

9 3. "Subcontractor" means a contractor who enters into a construction contract
10 with a prime contractor or another subcontractor.

11 **SECTION 21.** 77.61 (19) (intro.) of the statutes is renumbered 77.61 (19) (a)
12 (intro.) and amended to read:

13 77.61 **(19)** (a) (intro.) A person who fails to produce records or documents, as
14 provided under s. ~~73.03 (9)~~ or 77.59 (2), that support amounts or other information
15 required to be shown on a return required under s. 77.58 and fails to comply in good
16 faith with a summons issued pursuant to s. 73.03 (9) seeking those records and
17 documents may be subject to any of the following penalties, as determined by the
18 department, except that the department may not impose a penalty under this
19 subsection if the person shows that under all facts and circumstances the person's
20 response, or failure to respond, to the department's request was reasonable or
21 justified by factors beyond the person's control:

22 **SECTION 22.** 77.61 (19) (a) and (b) of the statutes are renumbered 77.61 (19) (a)
23 1. and 2.

24 **SECTION 23. Nonstatutory provisions.**

1 (1) The repeal of sections 20.566 (1) (hn) and 73.03 (28d) of the statutes does
2 not affect the validity of any assessment based entirely or in part on information or
3 documents obtained from the multistate tax commission prior to the repeal.

4 **SECTION 24. Initial applicability.**

5 (1) The treatment of sections 71.10 (1m) (b) (intro.), 1., and 2., 71.30 (2m) (b)
6 (intro.), 1., and 2., and 71.80 (1m) (b) (intro.), 1., and 2. of the statutes first applies
7 to taxable years beginning on January 1 of the year in which this subsection takes
8 effect, except that if this subsection takes effect after July 31, this act first applies
9 to taxable years beginning on January 1 of the year following the year in which this
10 subsection takes effect.

11 (2) The treatment of section 73.03 (28d) of the statutes first applies to a contract
12 that is entered into or extended, modified, or renewed on July 1, 2017.

13 (3) The treatment of sections 71.80 (9m) (intro.), (a), and (b) and 77.61 (19)
14 (intro.), (a), and (b) of the statutes first applies to an audit commenced, or a summons
15 issued, on the effective date of this subsection.

16 (4) The treatment of sections 77.52 (2m) (b) and 77.54 (60) (a), (b), (bm), (c) and
17 2., and (d) 2. and 3. of the statutes first applies to a contract that is entered into or
18 extended, modified, or renewed on the effective date of this subsection.

19 **SECTION 25. Effective dates.** This act takes effect on the day after publication,
20 except as follows:

21 (1) The treatment of section 20.566 (1) (hn) of the statutes takes effect on July
22 1, 2017.

23 (END)