



Legislative Fiscal Bureau

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TO: Members
Joint Committee on Finance

FROM: Bob Lang, Director

SUBJECT: Senate Bill 625/Assembly Bill 905: Streamlined Sales Tax Modifications

Senate Bill 625 and Assembly Bill 905 are companion bills that would make a number of modifications to the sales tax statutes. SB 625 was introduced on March 17, 2010, and referred to the Senate Committee on Health, Health Insurance, Privacy, Property Tax Relief, and Revenue. On March 25, 2010, the bill was withdrawn from that committee and referred to the Joint Committee on Finance. AB 905 was introduced on March 26, 2010, and referred to the Joint Committee on Finance.

2009 Act 2 amended the sales and use tax statutes to conform to provisions of the Streamlined Sales and Use Tax Agreement (SSUTA). The first four provisions of the bills described below (relating to exemption certificates, sourcing of direct mail, filing sales tax returns, and estimated assessments) are needed to conform to new requirements of SSUTA that were adopted by the agreement's governing board after Act 2 became law. The other provisions would clarify certain statutes, and correct errors in Act 2.

SUMMARY OF BILLS

Exemption Certificates

Under current law, for the purpose of the proper administration of the sales and use tax statutes and to prevent evasion of the tax, it is presumed that all receipts are subject to the tax until the contrary is established. The burden of proving that a sale is not taxable is upon the person who makes the sale unless that person takes from the purchaser an electronic or a paper certificate, in a manner prescribed by the Department of Revenue (DOR), to the effect that the property, item, good, or service is purchased for resale or is otherwise exempt. Certain exempt sales do not require an exemption certificate.

In general, the exemption certificate relieves the seller of the tax otherwise applicable only if the seller obtains a fully completed exemption certificate, or the information required to prove the exemption, from a purchaser no later than 90 days after the date of the sale. However, if the seller has not obtained a fully completed exemption certificate or the information required to prove the exemption, the seller may, no later than 120 days after DOR requests that the seller substantiate the exemption, either provide proof of the exemption to the Department by other means or obtain, in good faith, a fully completed exemption certificate from the purchaser.

The bills would amend these provisions to specify that an exemption certificate would be considered to have been received by the seller in good faith if the certificate claims an exemption for which all of the following apply: (a) it was an exemption authorized by law on the date of the transaction in the jurisdiction where the transaction is sourced; (b) it could be applicable to the property, item, good, or service being purchased; and (c) it is reasonable for the purchaser's type of business.

The bills would also provide that if the seller obtains the information described in the preceding paragraph, the seller is relieved of any liability for the tax on the transaction unless it is discovered through the audit process that the seller had knowledge, or had reason to know, at the time such information was provided that the information relating to the exemption claimed was materially false or the seller otherwise knowingly participated in activity intended to purposefully evade the tax that is properly due on the transaction. In order to enforce this provision, the state would have to establish that the seller had knowledge, or had reason to know, at the time the information was provided that the information was materially false.

Sourcing of Direct Mail

Current Law

In general, Wisconsin uses destination-based sourcing to determine where a sale occurs for purposes of the sales and use tax. Under destination-based sourcing, a sale is considered to occur at the location where the purchaser takes possession of the property. Special provisions apply to certain transactions, including sales of direct mail.

Under the current statutes, the sale of direct mail is sourced to the location from which the direct mail is shipped, if the purchaser does not provide to the seller a direct pay permit, an exemption certificate claiming direct mail, or other information that indicates the appropriate taxing jurisdiction to which the direct mail is delivered to the ultimate recipients. In such cases, the seller must collect the sales tax and remit it to DOR.

However, if the purchaser provides an exemption certificate claiming direct mail or direct pay permit to the seller, the purchaser must pay the use tax on all purchases for which the tax is due and the seller is relieved from liability for collecting the tax.

If the purchaser provides delivery information indicating the jurisdictions to which the direct mail is delivered to the recipients, the seller must collect the tax according to the delivery information provided by the purchaser and, in the absence of bad faith, the seller is relieved of any further obligation to collect tax on any transaction for which the seller has collected tax pursuant to the delivery information provided by the purchaser.

An exemption certificate claiming direct mail provided to a seller under these provisions remains effective for all sales by the seller who received the exemption certificate to the purchaser who provided the exemption certificate, unless the purchaser revokes the exemption certificate in writing and provides such revocation to the seller.

Bill Provisions

The bills would create separate sourcing rules for sales of advertising and promotional direct mail and other direct mail.

"Advertising and promotional direct mail" would mean direct mail that has the primary purpose of attracting public attention to a product, person, business, or organization or to attempt to sell, popularize, or secure financial support for a product, person, business, or organization.

"Other direct mail" would mean any direct mail that is not advertising and promotional direct mail, regardless of whether advertising and promotional direct mail is included in the same mailing. "Other direct mail" would include all of the following:

- a. Transactional direct mail that contains personal information specific to the addressee, including invoices, bills, account statements, and payroll advices.
- b. Any legally required mailings, including privacy notices, tax reports, and stockholder reports.
- c. Other nonpromotional direct mail, including newsletters and informational pieces, that is delivered to existing or former shareholders, customers, employees, or agents.

"Other direct mail" would not include printed materials that result from developing billing information or providing any data processing service that is more than incidental to producing the other direct mail.

Sourcing of Advertising and Promotional Direct Mail. The bills would provide that, unless advertising and promotional direct mail and other direct mail are included in a single mailing, the sale of advertising and promotional direct mail (including a sale characterized under the laws of this state as the sale of a service when that service is an integral part of the production and distribution of printed material that meets the definition of advertising and promotional direct mail) is sourced to the location from which the mail is shipped, if the purchaser does not provide to the seller a

direct pay permit, an exemption certificate claiming direct mail, or other information that indicates the appropriate taxing jurisdiction to which the mail is delivered to the ultimate recipients.

If the purchaser provides an exemption certificate claiming direct mail or direct pay permit to the seller, the purchaser would be required to source the sales to the jurisdictions to which the advertising and promotional direct mail is delivered to the recipients and pay the use tax on all purchases for which the tax is due and the seller, in the absence of bad faith, would be relieved from all obligation to collect, pay, or remit the tax on any transaction to which the direct pay permit or exemption certificate applies.

If the purchaser provides delivery information indicating the jurisdictions to which the advertising and promotional direct mail is to be delivered to the recipients, the seller would be required to source the sale to those jurisdictions and collect and remit the tax according to the delivery information provided by the purchaser and, in the absence of bad faith, the seller would be relieved of any further obligation to collect tax on the sale of advertising and promotional direct mail for which the seller has sourced the sale and collected tax pursuant to the delivery information provided by the purchaser.

The bills would repeal the provision stating that an exemption certificate claiming direct mail provided to a seller under this provision remains effective for all sales by the seller who received the exemption certificate to the purchaser who provided the exemption certificate, unless the purchaser revokes the exemption certificate in writing and provides such revocation to the seller.

The bills would specify that if a transaction is a bundled transaction that includes advertising and promotional direct mail, the above provisions only apply if the primary purpose of the transaction is the sales of products or services that meet the definition of advertising and promotional direct mail.

Sourcing of Other Direct Mail. Under the bills, if the purchaser does not provide to the seller a direct pay permit or an exemption certificate claiming direct mail, the sale of other direct mail (including a sale characterized under the laws of this state as the sale of a service when that service is an integral part of the production and distribution of printed material that meets the definition of other direct mail), would be sourced to the purchaser's address as indicated by the seller's business records, if the records are maintained in the ordinary course of the seller's business and if using that address to establish the location of a sale is not in bad faith.

If the purchaser provides an exemption certificate claiming direct mail or direct pay permit to the seller, the purchaser would be required to source the sale to the jurisdictions to which the other direct mail is to be delivered to the recipients and to pay the use tax on all purchases for which the tax is due and the seller, in the absence of bad faith, would be relieved of all obligation to collect, pay, or remit tax on any transaction to which the direct pay permit or exemption certificate claiming direct mail applies.

Other Provisions. If advertising and promotional direct mail and other direct mail are included in a single mailing, the sale of that mailing would be sourced the same as a sale of other direct mail.

Transactions that include the development of billing information or the provision of a data processing service that is more than incidental to producing direct mail would not be considered direct mail and would be sourced using the general provisions, but transactions that include incidental data processing services would be considered direct mail and would be sourced as direct mail.

Under current law, and for purposes of these provisions, "incidental" means depending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal; or something incidental to the main purpose of the service. Tangible personal property or items, property, or goods 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, items, or goods, even though the property, items, or goods may be necessary or essential to providing the service.

Impact of Bills. The primary change under the bills relates to the sourcing of other direct mail, as defined above, in cases where the purchaser does not provide the seller with an exemption certificate claiming direct mail or a direct pay permit. Under current law, such sales are sourced to the location from which the mail is shipped, and the seller is responsible for collecting and remitting the tax, if the mail is shipped from a Wisconsin address. Under the bills, such sales would instead be sourced to the purchaser's address as indicated by the seller's business records, as long as using that address is not in bad faith. The seller would be required to collect and remit the tax to DOR, if the purchaser's address was in Wisconsin. If the purchaser's address was in another state, the sale would not be taxable in this state.

It should also be noted that Wisconsin provides exemptions for printed advertising and promotional materials subsequently transported outside Wisconsin and for catalogs. Therefore, the direct mail sourcing rules primarily affect shipments of nonpromotional materials such as billing statements and annual reports.

Filing Sales Tax Returns

Under current law, the due date for sales tax returns depends upon the amount of tax due from the seller. The largest retailers file on a monthly basis, and the return is due by the 20th day of the month following the month in which the sales occurred. Other sellers must file by the last day of the following month, and very small sellers file quarterly or annual returns.

The bills would specify that, except for sellers that use a certified service provider, a seller who registers through the streamlined sales tax governing board's central registration system and indicates at the time of registration that it anticipates making no sales into this state is not required

to file a return in this state until such time as it makes a taxable sale that is sourced to this state.

Once such a seller makes a taxable sale that is sourced to this state, that seller would be required to file a return that is due by the last day of the month following the last day of the calendar quarter in which the sale occurred and would be required to continue to file quarterly returns, unless the seller is notified in writing by DOR of a different filing frequency.

[Certified service providers are entities that contract with sellers to file and pay sales and use taxes on their behalf.]

Current law requires that persons who are required to file sales tax returns must deliver the return together with a remittance of the amount of the tax due to DOR or such other place as DOR designates. The bills would also require that the return be filed and the tax paid in the manner and form prescribed by the Department.

Failure to File -- Estimated Assessments

Under current law, if any person fails to file a return, DOR must make an estimate of the amount of the tax due, along with a 25% penalty. The estimate must be made for the period in respect to which the person failed to make a return and must be based upon any information which is in DOR's possession or may come into its possession.

The bills would create an exception to this provision for out-of-state retailers that are not required to obtain a seller's permit but have voluntarily registered and obtained a seller's permit. If such a seller has failed to timely file a return that is due, DOR would be required to notify the seller of the failure to file and provide the seller at least 30 days to file the return prior to making the estimate described above, except that if the seller has a history of not filing returns, or filing returns late, DOR could make the estimate without providing such notice.

Prepared Food

Under current law, prepared food is taxable. Among other things, "prepared food" includes food and food ingredients sold with eating utensils that are provided by the retailer. The bills would correct inconsistencies in the statutes delineating when a retailer is considered to be providing eating utensils under this provision.

Prepaid Calling Services

The bills would clarify that prepaid calling services are taxable telecommunications services.

Deduction for Bad Debt

Under current law, sellers may claim a deduction from gross receipts on their sales tax return

for bad debt that the seller writes off as uncollectible and that is eligible to be deducted as a bad debt for federal income tax purposes. The bills would clarify that this deduction only applies to bad debt for which the seller has paid the sales tax.

Local Exposition District Tax

Under current law, as adopted in Act 2, a local exposition district may impose a tax on the retail sale within the district's jurisdiction of candy, prepared food, and soft drinks, unless exempt from the state sales tax.

The bills would specify that the tax may also be imposed on alcoholic beverages purchased for consumption on the seller's premises.

"Premises" would be broadly construed and would include the lobby, aisles, and auditorium of a theater or the seating, aisles, and parking area of an arena, a rink, or a stadium, or the parking area of a drive-in or an outdoor theater. The premises of a caterer with respect to catered meals or beverages would be the place where served.

These provisions would first apply retroactively to sales occurring on October 1, 2009.

DOR indicates that the proposed changes would make the law consistent with the current interpretation of the exposition district tax statutes.

Cross References

The bills would also correct certain cross references regarding local sales and use taxes and make nonsubstantive wording changes.

Effective Date

Except for the retroactive effective date for the local exposition district tax, the bills' provisions would take effect on the day after publication.

FISCAL EFFECT

It is estimated that the bills would have a minimal impact on state revenues.

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