

**From:** Moschella, Vincent  
**Sent:** Tuesday, November 03, 2009 9:40 AM  
**To:** Reinelt, Eric; Billingsley, Hattie  
**Cc:** Egan, John  
**Subject:** Wisconsin Statutes and File No. 090711

Good morning. Attached please find copies of the Wisconsin Statutes pertinent to the sales tax issues under discussion.

On the first page, I have highlighted Sections 77.52(1) & (1b), which impose the sales tax upon all rentals of personal property, unless specifically exempted. This includes the crane rentals.

On the second page, I have highlighted Section 77.52(2)(a)9., which imposes the sales tax upon parking space for motor vehicles. This includes the Lake Express parking. This section also includes the docking of boats for consideration. This includes the docking fees at the Port.

On the second page, I have also highlighted Section 77.52(2)(a)20., which imposes the sales tax upon mowing and spraying. This includes nuisance weed control performed by the City and billed to the owner as a special charge. This exercise of the police power is subject to the sales tax because the owner is receiving a service from the City - the mowing or spraying of the property.

On the third page, I have highlighted Section 77.52(3), which authorizes the City to pass through all of the above described taxes to the consumer or user. Certainly, our recommendation for the future is that they all be passed through as allowed by law.

I will appear at F&P on Wednesday morning on File No. 090711. Please do not hesitate to call (X8409) or e-mail if you have any additional questions or concerns. Thank you.

(f) Any activities other than those described in sub. (13) (a) to (c) in which the seller is engaged.

(17m) "Service address" means the location of the telecommunications equipment from which telecommunications services are originated or at which telecommunications services are received by a buyer. If this is not a defined location; as in the case of mobile phones, paging systems, maritime systems, air-to-ground systems and the like; "service address" means the location where a buyer makes primary use of the telecommunications equipment as defined by telephone number, authorization code or location where bills are sent.

(17r) "Sign" means write one's signature or, if the department prescribes another method of authenticating, use that other method.

(18) "Storage" includes any keeping or retention in this state of tangible personal property purchased from a retailer for any purpose except sale in the regular course of business.

(20) "Tangible personal property" means all tangible personal property of every kind and description and includes electricity, natural gas, steam and water and also leased property affixed to realty if the lessor has the right to remove the property upon breach or termination of the lease agreement, unless the lessor of the property is also the lessor of the realty to which the property is affixed. "Tangible personal property" also includes coins and stamps of the United States sold or traded as collectors' items above their face value and computer programs except custom computer programs.

(21) "Taxpayer" means the person required to pay, collect, account for or who is otherwise directly interested in the taxes imposed by this subchapter.

(21m) "Telecommunications services" means sending messages and information transmitted through the use of local, toll and wide-area telephone service; channel services; telegraph services; teletypewriter; computer exchange services; cellular mobile telecommunications service; specialized mobile radio; stationary two-way radio; paging service; or any other form of mobile and portable one-way or two-way communications; or any other transmission of messages or information by electronic or similar means between or among points by wire, cable, fiber optics, laser, microwave, radio, satellite or similar facilities. "Telecommunications services" does not include sending collect telecommunications that are received outside of the state.

(22) (a) "Use" includes the exercise of any right or power over tangible personal property or taxable services incident to the ownership, possession or enjoyment of the property or services, or the results produced by the services, including installation or affixation to real property and including the possession of, or the exercise of any right or power over tangible personal property by a lessee under a lease, except that "use" does not include the activities under sub. (18).

(b) In this subsection "enjoyment" includes a purchaser's right to direct the disposition of property, whether or not the purchaser has possession of the property. "Enjoyment" also includes, but is not limited to, having shipped into this state by an out-of-state supplier printed material which is designed to promote the sale of property or services, or which is otherwise related to the business activities, of the purchaser of the printed material or printing service.

(23) "Use tax" means the tax imposed by s. 77.53.

History: 1973 c. 333; 1975 c. 39, 41, 99, 224; 1975 c. 413 s. 18; 1977 c. 29, 418; 1979 c. 1, 57 to 59, 61, 62; 1979 c. 174; 1981 c. 20; 1981 c. 79 s. 17; 1983 a. 23, 27; 1983 a. 189 ss. 92 to 108, 329 (12); 1983 a. 510, 538; 1983 a. 544 ss. 13 to 46, 47 (1) (b); 1985 a. 29, 332; 1987 a. 27, 399; 1989 a. 31, 335, 336; 1991 a. 39, 269, 316; 1993 a. 16, 112, 184; 1997 a. 27, 237; 1999 a. 9, 83; 2001 a. 45, 102; 2003 a. 48; 2005 a. 25, 327, 441, 479; 2007 a. 11, 20, 130.

A tax on personal property assets was upheld since the seller had a permit under sub. (10) (a) [now sub. (9) (a)]. *Ramrod, Inc. v. DOR*, 64 Wis. 2d 499, 219 N.W.2d 604 (1974).

Under sub. (4) (i) [now sub. (14) (i)], the sale of building materials included the sale of an assembly kit to a dealer for construction of a silo; the dealer is a contractor under sub. (18) [now sub. (2)]. When the silo was erected on owned land, it was real property for purposes of this section. *DOR v. Smith Harvestore Products*, 72 Wis. 2d 60, 240 N.W.2d 357 (1976).

A retail sale within meaning of sub. (4) [now sub. (14)] is the final and ultimate employment of the property that results in its withdrawal from the marketplace. The

sale of gold to dentists for use in dental work was not a taxable sale. *DOR v. Milwaukee Refining Corp.* 80 Wis. 2d 44, 257 N.W.2d 855 (1977).

Provisions of the UCC as to the time title passes are inapplicable to sales tax law. Application of s. 77.51 is discussed. *Harold W. Fuchs Agency, Inc. v. DOR*, 91 Wis. 2d 283, 282 N.W.2d 625 (Ct. App. 1979).

The sale of business assets of a taxpayer who held a seller's permit was not exempted as an "occasional sale" under sub. (10) (a) [now sub. (9) (a)]. Constitutionality is discussed. *Midcontinent Broadcasting Co. v. DOR*, 98 Wis. 2d 379, 297 N.W.2d 191 (1980).

A manhole fabricator was not engaged in real property construction activities under sub. (2). *Advance Pipe & Supply v. DOR*, 128 Wis. 2d 431, 383 N.W.2d 502 (Ct. App. 1986).

Photocopying expenses billed to a law firm's clients are not subject to sales tax. *Frisch, Dudek & Slatery v. DOR*, 133 Wis. 2d 444, 396 N.W.2d 355 (Ct. App. 1986).

Whether articles of personal property are fixtures and thus real estate, is determined by the following tests: 1) actual physical annexation to the real estate; 2) application or adaptation to the use or purpose to which the realty is devoted; and 3) an intention on the part of the person making the annexation to make a permanent accession to the freehold. *All City Communication Company, Inc. v. DOR*, 2003 WI App 77, 263 Wis. 2d 394, 661 N.W.2d 845, 02-1201.

When dealers sold or assigned installment contracts to Chrysler and Chrysler paid the dealers the full amounts financed, including amounts attributable to sales tax financed as a part of the installment contracts and the dealers subsequently remitted the sales tax attributable to the purchases to DOR, Chrysler was not a retailer who has previously paid the sales tax under ss. 77.51 (4) (b) 4. and 77.52 (6) and was not entitled to a tax deduction for the portions of bad debts attributable to the sales taxes associated with those debts. *DaimlerChrysler Services North America LLC v. DOR*, 2006 WI App 265, 298 Wis. 2d 119, 726 N.W.2d 312, 06-0589.

For the use tax to apply to intercompany transfers with wholly-owned subsidiaries, the subsidiaries that transferred the fixed assets must be considered "retailers" under s. 77.51 (13). It is not the case that Wisconsin has a statutory scheme that taxes all transfers of tangible personal property, unless an explicit exemption applies. When the person transferring tangible personal property lacks mercantile intent, he or she will not be subject to tax, even though no explicit exemption applies. *Wisconsin Department of Revenue v. River City Refuse Removal, Inc.* 2007 WI 27, 299 Wis. 2d 561, 729 N.W.2d 396, 04-2468.

Administrative rules relating to custom computer programs under sub. (20) are applied. *Department of Revenue v. Menasha Corporation*, 2008 WI 88, \_\_\_ Wis. 2d \_\_\_, \_\_\_ N.W.2d \_\_\_, 04-3239.

**77.52 Imposition of retail sales tax.** (1) For the privilege of selling, leasing or renting tangible personal property, including accessories, components, attachments, parts, supplies and materials, at retail a tax is imposed upon all retailers at the rate of 5% of the gross receipts from the sale, lease or rental of tangible personal property, including accessories, components, attachments, parts, supplies and materials, sold, leased or rented at retail in this state.

(1b) All sales, leases, or rentals of tangible personal property at retail in this state are subject to the tax imposed under sub. (1) unless an exemption in this subchapter applies.

(1m) The sales tax applies to the receipts of operators of vending machines located on army, navy or air force installations in this state and dispensing tangible personal property. This subsection shall not be deemed to require payment of sales tax measured by receipts of such operators who lease the machines to exchanges of the army, air force, navy or marine corps which acquire title to and sell the merchandise through the machines to authorized purchasers from such exchanges. The term "operator" as used in this subsection, means any person who owns or possesses vending machines and who controls the operations of the machines as by placing the merchandise therein or removing the coins therefrom, and who has access thereto for any purpose connected with the sale of merchandise through the machines, and whose compensation is based, in whole or in part, upon receipts from sales made through such machines.

(2) For the privilege of selling, performing or furnishing the services described under par. (a) at retail in this state to consumers or users, a tax is imposed upon all persons selling, performing or furnishing the services at the rate of 5% of the gross receipts from the sale, performance or furnishing of the services.

(a) The tax imposed herein applies to the following types of services:

1. The furnishing of rooms or lodging to transients by hotel-keepers, motel operators and other persons furnishing accommodations that are available to the public, irrespective of whether membership is required for use of the accommodations. In this subdivision, "transient" means any person residing for a continuous period of less than one month in a hotel, motel or other furnished accommodations available to the public. In this subdivision, "hotel" or "motel" means a building or group of buildings in

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which the public may obtain accommodations for a consideration, including, without limitation, such establishments as inns, motels, tourist homes, tourist houses or courts, lodging houses, rooming houses, summer camps, apartment hotels, resort lodges and cabins and any other building or group of buildings in which accommodations are available to the public, except accommodations, including mobile homes as defined in s. 101.91 (10), manufactured homes as defined in s. 101.91 (2), and recreational vehicles as defined in s. 340.01 (48r), rented for a continuous period of more than one month and accommodations furnished by any hospitals, sanatoriums, or nursing homes, or by corporations or associations organized and operated exclusively for religious, charitable or educational purposes provided that no part of the net earnings of such corporations and associations inures to the benefit of any private shareholder or individual. In this subdivision, "one month" means a calendar month or 30 days, whichever is less, counting the first day of the rental and not counting the last day of the rental.

2. a. Except as provided in subd. 2. b., the sale of admissions to amusement, athletic, entertainment or recreational events or places except county fairs, the sale, rental or use of regular bingo cards, extra regular cards, special bingo cards and the sale of bingo supplies to players and the furnishing, for dues, fees or other considerations, the privilege of access to clubs or the privilege of having access to or the use of amusement, entertainment, athletic or recreational devices or facilities, including the sale or furnishing of use of recreational facilities on a periodic basis or other recreational rights, including but not limited to membership rights, vacation services and club memberships.

b. Taxable sales do not include the sale of admissions by a gun club, including the sale of a gun club membership, if the gun club is a nonprofit organization and if the gun club provides safety classes to at least 25 individuals in the calendar year.

5. a. The sale of telecommunications services, except services subject to 4 USC 116 to 126, as amended by P.L. 106-252, that either originate or terminate in this state; except services that are obtained by means of a toll-free number, that originate outside this state and that terminate in this state; and are charged to a service address in this state, regardless of the location where that charge is billed or paid; and the sale of the rights to purchase telecommunications services, including purchasing reauthorization numbers, by paying in advance and by using an access number and authorization code, except sales that are subject to subd. 5. b.

b. The sale of services subject to 4 USC 116 to 126, as amended by P.L. 106-252, if the customer's place of primary use of the services is in this state, as determined under 4 USC 116 to 126, as amended by P.L. 106-252. For purposes of this subd. 5. b., all of the provisions of 4 USC 116 to 126, as amended by P.L. 106-252, are adopted, except that if 4 USC 116 to 126, as amended by P.L. 106-252, or the application of 4 USC 116 to 126, as amended by P.L. 106-252, is found unconstitutional the sale of telecommunications services is subject to the tax imposed under this section as provided in subd. 5. a.

5m. The sale of services that consist of recording telecommunications messages and transmitting them to the purchaser of the service or at that purchaser's direction, but not including those services if they are merely an incidental, as defined in s. 77.51 (5), element of another service that is sold to that purchaser and is not taxable under this subchapter.

6. Laundry, dry cleaning, pressing and dyeing services, except when performed on raw materials or goods in process destined for sale, except when performed on cloth diapers by a diaper service and except when the service is performed by the customer through the use of coin-operated, self-service machines.

7. Photographic services including the processing, printing and enlarging of film as well as the service of photographers for the taking, reproducing and sale of photographs.

9. Parking or providing parking space for motor vehicles and aircraft for a consideration and docking or providing storage space for boats for a consideration.

10. Except for services provided by veterinarians and except for installing or applying tangible personal property that, subject to par. (ag), when installed or applied, will constitute an addition or capital improvement of real property, the repair, service, alteration, fitting, cleaning, painting, coating, towing, inspection, and maintenance of all items of tangible personal property unless, at the time of that repair, service, alteration, fitting, cleaning, painting, coating, towing, inspection, or maintenance, a sale in this state of the type of property repaired, serviced, altered, fitted, cleaned, painted, coated, towed, inspected, or maintained would have been exempt to the customer from sales taxation under this subchapter, other than the exempt sale of a motor vehicle or truck body to a nonresident under s. 77.54 (5) (a) and other than nontaxable sales under s. 77.51 (14r). The tax imposed under this subsection applies to the repair, service, alteration, fitting, cleaning, painting, coating, towing, inspection, or maintenance of items listed in par. (ag), regardless of whether the installation or application of tangible personal property related to the items is an addition to or a capital improvement of real property, except that the tax imposed under this subsection does not apply to the original installation or the complete replacement of an item listed in par. (ag), if that installation or replacement is a real property construction activity under s. 77.51 (2).

11. The producing, fabricating, processing, printing or imprinting of tangible personal property for a consideration for consumers who furnish directly or indirectly the materials used in the producing, fabricating, processing, printing or imprinting. This subdivision does not apply to the printing or imprinting of tangible personal property that results in printed material, catalogs, or envelopes that are exempt under s. 77.54 (25) or (25m).

NOTE: Subd. 11. is shown as amended eff. 4-1-09 by 2007 Wis. Act 20. Prior to 4-1-09 it reads:

11. The producing, fabricating, processing, printing or imprinting of tangible personal property for a consideration for consumers who furnish directly or indirectly the materials used in the producing, fabricating, processing, printing or imprinting. This subdivision does not apply to the printing or imprinting of tangible personal property which will be subsequently transported outside the state for use outside the state by the consumer for advertising purposes.

12. The sale of cable television system services, or video services, as defined in s. 66.0420 (2) (y), including installation charges.

20. The sale of landscaping and lawn maintenance services including landscape planning and counseling, lawn and garden services such as planting, mowing, spraying and fertilizing and shrub and tree services.

(ag) For purposes of par. (a) 10., the following items shall be considered to have retained their character as tangible personal property, regardless of the extent to which the item is fastened to, connected with, or built into real property:

1. Furnaces.
2. Boilers.
3. Stoves.
4. Ovens, including associated hoods and exhaust systems.
5. Heaters.
6. Air conditioners.
7. Humidifiers.
8. Dehumidifiers.
9. Refrigerators.
10. Coolers.
11. Freezers.
12. Water pumps.
13. Water heaters.
14. Water conditioners and softeners.
15. Clothes washers.

16. Clothes dryers.
17. Dishwashers.
18. Garbage disposal units.
19. Radios and radio antennas.
20. Incinerators.
21. Television receivers and antennas.
22. Record players.
23. Tape players.
24. Jukeboxes.
25. Vacuum cleaners.
26. Furniture and furnishings.
27. Carpeting and rugs.
28. Bathroom fixtures.
29. Sinks.
30. Awnings.
31. Blinds.
32. Gas and electric logs.
33. Heat lamps.
34. Electronic dust collectors.
35. Grills and rotisseries.
36. Bar equipment.
37. Intercoms.
38. Recreational, sporting, gymnasium, and athletic goods and equipment including, by way of illustration but not of limitation, all of the following:
  - a. Bowling alleys.
  - b. Golf practice equipment.
  - c. Pool tables.
  - d. Punching bags.
  - e. Ski tows.
  - f. Swimming pools.
39. Equipment in offices, business facilities, schools, and hospitals but not in residential facilities including personal residences, apartments, long-term care facilities, as defined under s. 16.009 (1) (em), state institutions, as defined under s. 101.123 (1) (i), Type 1 juvenile correctional facilities, as defined in s. 938.02 (19), or similar facilities including, by way of illustration but not of limitation, all of the following:
  - a. Lamps.
  - b. Chandeliers.
  - c. Fans.
  - d. Venetian blinds.
  - e. Canvas awnings.
  - f. Office and business machines.
  - g. Ice and milk dispensers.
  - h. Beverage-making equipment.
  - i. Vending machines.
  - j. Soda fountains.
  - k. Steam warmers and tables.
  - l. Compressors.
  - m. Condensing units and evaporative condensers.
  - n. Pneumatic conveying systems.
40. Laundry, dry cleaning, and pressing machines.
41. Power tools.
42. Burglar alarm and fire alarm fixtures.
43. Electric clocks.
44. Electric signs.

(am) For purposes of par. (a) 12. "cable television system" means any facility which, for a fee, regularly amplifies and transmits by wire, coaxial cable, lightwave or microwave, simultaneously to 50 or more subscribers, programs broadcast by television or radio stations or originated by themselves or any other party. "Cable television system" does not include a master

antenna system which serves one residential, commercial or government building or complex of buildings under common ownership or control if that facility does not provide any broadcast signals other than those which may be viewed in that facility.

(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 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).

(b) With respect to the services subject to tax under sub. (2) (a) 7., 10., 11. and 20., all property physically transferred to the customer in conjunction with the selling, performing or furnishing of the service is a sale of tangible personal property separate from the selling, performing or furnishing of the service.

(2n) The selling, performing, or furnishing of the services described under sub. (2) (a) at retail in this state is subject to the tax imposed under sub. (2) unless an exemption in this subchapter applies.

(3) The taxes imposed by this section may be collected from the consumer or user.

(3m) In regard to the sale of the rights to purchase telecommunications services under sub. (2) (a) 5. a.:

(a) If the sale takes place at a retailer's place of business, the situs of the sale is that place.

(b) If the sale does not take place at a retailer's place of business and an item that will implement the right to purchase telecommunications services is shipped, the situs of the sale is the customer's shipping address.

(c) If the sale does not take place at a retailer's place of business and no item that will implement the right to purchase telecommunications services is shipped, the situs of the sale is the customer's billing address.

(3n) In regard to the sale of the rights to purchase telecommunications services under sub. (2) (a) 5. b., the situs of the sale is as determined under 4 USC 116 to 126, as amended by P.L. 106-252.

(4) It is unlawful for any retailer to advertise or hold out or state to the public or to any customer, directly or indirectly, that the tax or any part thereof will be assumed or absorbed by the retailer or that it will not be added to the selling price of the property sold or that if added it, or any part thereof, will be refunded. Any person who violates this subsection is guilty of a misdemeanor.

(5) The department may by rule provide that the amount collected by the retailer from the consumer or user in reimbursement of the retailer's tax be displayed separately from the list price, the price advertised in the premises, the marked price, or other price on the sales check or other proof of sale.

(6) A retailer is relieved from liability for sales tax insofar as the measure of the tax is represented by accounts which have been found to be worthless and charged off for income or franchise tax purposes. If the retailer has previously paid the tax, the retailer may, under rules prescribed by the department, take as a deduction from the measure of the tax the amount found worthless and charged off for income or franchise tax purposes. If any such accounts are thereafter collected in whole or in part by the retailer, the amount as collected shall be included in the first return filed after such collection and the tax paid with the return.

(7) Every person desiring to operate as a seller within this state who holds a valid certificate under s. 73.03 (50) shall file with the department an application for a permit for each place of operations. Every application for a permit shall be made upon a form prescribed by the department and shall set forth the name under which the applicant intends to operate, the location of the applicant's place of operations, and the other information that the department requires. The application shall be signed by the owner if a sole proprietor; in the case of sellers other than sole proprietors, the application shall be signed by the person authorized to act on behalf of such sellers. A nonprofit organization that has gross receipts taxable under s. 77.54 (7m) shall obtain a seller's