THE COMPLETE GUIDE TO

WISCONSIN SALES AND USE TAXES

INTERIM UPDATE TO 2008 EDITION

(covering developments through February 11, 2014)

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Summary of Major Developments

Pending Federal Legislation Concerning Mail Order and Internet Sales

On May 6, 2013, the U.S. Senate passed the "Marketplace Fairness Act of 2013" (S.743) and it has moved on to the House of Representatives for consideration. As of the date of this *Interim Update* (February 11, 2014), the House had not voted on the Bill, and it remains pending. If ultimately enacted in its current form, it would give states the authority to require all sellers to collect and remit sales and use taxes on sales into their state, provided the destination state has adopted the Streamlined Sales and Use Tax Agreement, or alternative simplification measures. The Bill also contains a "small seller" exception, which provides that a state is authorized to require sales or use tax collection under the Bill only if the remote seller has "gross annual receipts in total remote sales in the United States in the preceding calendar year exceeding $1,000,000," as defined. If enacted, the Bills would, subject to the small seller exception, effectively reverse the decision of the U.S. Supreme Court in *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992). For a discussion of *Quill*, see Section 14.4 of *The Complete Guide*. The text of S.743 can be reviewed at: http://www.gpo.gov/fdsys/pkg/BILLS-113s743rfh/pdf/BILLS-113s743rfh.pdf.

Wis. Stat. § 73.03(71), enacted as part of 2013 Wis. Act. 20, provides that, if federal legislation is enacted that expands the state's authority to require out-of-state sellers to collect and remit Wisconsin use tax, the Department is required to (a) determine the amount of increased revenues and (b) determine how much the individual income tax rates may be reduced in order to eliminate the Wisconsin alternative minimum tax under Wis. Stat. § 71.08, and decrease individual income tax revenue by the increased tax collections. The Department would then be required to issue a certification concerning its findings and the elimination of the alternative minimum tax and new tax rates would take effect thereafter.

1. *Wisconsin Adopts the Streamlined Sales Tax Provisions.* As a part of recent legislation (primarily 2009 Wis. Act 2), the Wisconsin Legislature adopted the Streamlined Sales and Use Tax provisions, generally effective October 1, 2009. Many of the changes resulting from adoption of the Streamlined provisions are discussed in this *Interim Update*.

2. *Menasha and its Aftermath*. In 2008, the Wisconsin Supreme Court affirmed the decision of the Tax Appeals Commission in the *Menasha* case, which had concluded that the SAP software at issue was custom, and thus not taxable. Effective March 6, 2009, the Wisconsin Legislature reversed the result of the *Menasha* case. The Legislation, however, contains an important exception for modifications or enhancements to prewritten software that are designed

to the specifications of a specific purchaser if there is a "reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for the modification or enhancement." In addition, the Department of Revenue has published guidance concerning maintenance that is performed after March 5, 2009 on software that would be custom under the law as in effect on or before that date. Finally, taxpayers that purchased or licensed custom software prior to March 6, 2009 may have refund opportunities. See **Section 5.15**.

3. *Buy One, Get One Free Transactions*. Due to a statutory change effective October 1, 2009, there was considerable confusion with respect to how a retailer should treat items that it purchased and then provided to its customers in "buy one, get one free" and similar transactions. A further law change, effective September 1, 2011, eliminates much of the confusion in this area, in a manner that is generally helpful for retailers. In addition, the Department has published extensive guidance on the subject. See **Section 6.1**.

4. *"Deal of the Day" Vouchers and Certificates*. The Department of Revenue has provided detailed guidance concerning the sales and use tax treatment of "deal of the day" vouchers and certificates. The Department's basic conclusions are that (a) the sale of the certificate or voucher by the "deal of the day" company is not taxable, as the voucher or certificate is an intangible right; but (b) the retailer honoring the certificate or voucher is deemed to have receipts equal to the amount that the customer paid the deal of the day company for the certificate (plus whatever additional amount the customer might pay the retailer). See **Section 6.7**.

5. *Single Owner Entities that are Disregarded for Income Tax Purposes Now Disregarded for Sales and Use Tax Purposes*. In a major law change, the Legislature has provided that, effective July 1, 2009, a single-owner entity that is disregarded as a separate entity for Wisconsin income and franchise tax purposes is disregarded as a separate entity for Wisconsin sales and use tax purposes. In this *Interim Update*, we discuss the significance of the change, a narrow transition rule that provides limited relief, and planning to deal with the change. We also discuss some confusion that appears to exist concerning the effective date of the provision, which is July 1, 2009, but some have thought (incorrectly but understandably) might be October 1, 2009. See **Section 9.16**.

6. *Temporary Help Services*. The Tax Appeals Commission ruled in the taxpayer's favor with respect to the "temporary help services" issue discussed on pp. 252-253 of *The Complete Guide.* The Commission rejected the Department's "look through" approach, concluding that "it goes against the rule of construction that taxes may only be imposed by clear and express language, with all doubts and ambiguities resolved in favor of the taxpayer." The Commission also said that "Wis. Stat. § 77.52 does not tax 'services,' it taxes specific services that the Legislature listed … [and] 'temporary help services' is not listed in our statutes as a taxable service …." The Department neither appealed the Commission's decision nor issued a "notice of nonacquiescence," and thus is bound by the decision. In two subsequent Tax Releases, the Department of Revenue has provided guidance concerning its views on certain aspects of the "temporary help" issue, in light of the *Manpower* decision. See **Section 8.17**.

7. *Amendments to "Manufacturing" Exemptions.* Effective August 1, 2009, the Legislature made several changes to the statutory definition of manufacturing, presumably in an attempt to reduce or eliminate common disputes, such as when the manufacturing process begins and ends; what is included within the scope of manufacturing; whether research and development can fall within the scope of manufacturing; whether storage of work in process is within the scope of manufacturing; and what is a "plant." In addition, the Legislature has made several limiting changes to the "consumables" exemptions under Wis. Stat. § 77.54(2) and (2m). See **Section 10.6**, **Section 10.13** and **Section 11.11**.

8. *Retailer's Expense Allowance Reduced.* The retailer's discount is limited to $1,000 per reporting period, first applicable to taxes payable on October 1, 2009. See **Section 16.7**.

9. *New Penalties for Failure to Produce Records.* Effective July 1, 2009, the Legislature authorized the Department of Revenue to impose certain penalties for the failure to produce records or documents. The penalties include (a) the disallowance of deductions, credits, exemptions, or inclusion of additional taxable sales or additional taxable purchases to which the requested records relate; and (b) a penalty "for each violation" equal to the *greater* of $500 or 25 percent of the amount of the additional tax on any adjustment made by the Department that results from the person's failure to produce the records. The Department of Revenue has adopted a detailed administrative rule concerning this penalty. See **Section 16.10**.

10. *Wind Power*. The Department of Revenue has ruled on whether certain equipment used in the production of wind power qualifies as exempt "manufacturing machinery and equipment." See **Section 10.1**.

11. *Real Property Contractor as Purchasing Agent*. The Department of Revenue has published helpful guidance as to when a real property contractor will be considered a "purchasing agent" with respect to building materials purchased on behalf of an exempt project owner. See **Section 9.9**.

12. *Digital Goods*. Effective October 1, 2009, the sales and use tax was extended to the sale, lease, license or rental of certain digital goods. The digital goods generally include digital audio works (e.g., downloaded music), digital audiovisual works, digital books and (if transferred electronically) greeting cards, finished artwork, periodicals, and video or electronic games. See **Section 3.1**.

13. *New "Affiliate Nexus" Statute*. Effective July 1, 2009, the Legislature created Wis. Stat. § 77.51(13g)(d), which expands the definition of "retailer engaged in business in this state" to include persons that have certain "affiliates" that conduct certain listed activities for the person in Wisconsin. See **Section 14.4**.

14. *Guidance Regarding the New Exemption for Catalogs and Certain Envelopes*. The Department of Revenue has published guidance with respect to the Wis. Stat. § 77.54(25m) exemption (which was effective April 1, 2009) for certain catalogs and envelopes in which they are mailed. See **Section 9.22**.

15. *Sales and Use Tax Return Filing Options*. The Department of Revenue discontinued the Sales Internet Process filing option in June 2009. The TeleFile application and XML e-file transmission process for filing and paying remain available, and the Department is encouraging use of a new filing alternative, "My Tax Account." See **Section 16.6**.

16. *Direct-to-Dealer Rebates*. The Tax Appeals Commission has again ruled that a taxpayer could not reduce the use tax base with respect to a purchased motor vehicle by the amount of a direct-to-dealer rebate. See **Section 6.7**.

17. *Credit for Out-of-State Taxes*. The Department has published extensive guidance as to whether and when sales and use taxes paid to other states and their local units of government are creditable against Wisconsin state and local sales and use taxes. The Department says that the tax treatment in the new guidance applies for all periods open to adjustment under the statute of limitations – which may provide refund opportunities for certain taxpayers. See **Section 7.11**.

18. *Exemption Enacted for Admissions to Youth Sports Leagues*. Effective July 1, 2009, admissions (such as league entry fees) sold by a nonprofit organization to participate in any sports activity in which more than 50 percent of the participants are 19 years old or younger are not subject to Wisconsin sales or use tax. See **Section 8.4**.

19. *Hauling of Vehicles Taxable*. Effective July 1, 2009, the Legislature created a new statute providing that the *hauling* of motor vehicles by a tow truck (as defined) is taxable, unless an exemption applies. The Legislature appears to have been reacting to disputes as to whether the "hauling" of motor vehicles (such as on a flatbed truck) was "towing" within the meaning of already existing law. See **Section 8.12**.

20. *Raising of Animals for Research Purposes*. On November 3, 2008, the Tax Appeals Commission ruled that the breeding and raising of laboratory animals to sell for research purposes is not the "business of farming" within the meaning of the Wis. Stat. §§ 77.54(3)(a) or (3m) exemptions. Legislation, effective January 1, 2012, appears to reverse the result of that case in certain circumstances by creating a new exemption for property used in raising animals sold for use in biotechnology or manufacturing. See **Section 9.1** and **Section 9.22**.

21. *Department of Revenue Reform Legislation.* On November 16, 2011, the Legislature enacted 2011 Wis. Act 68, which makes numerous changes with respect to tax administration generally, including with respect to sales and use taxes. The Legislation generally became effective March 1, 2012. The provisions include (a) a more detailed "declaratory ruling" procedure, pursuant to which "any interested person" or "group or association of interested persons" can apply for a declaratory (and binding) ruling from the Department; (b) specific authorization for the Tax Appeals Commission to award a "successful party" (including taxpayers) the costs and attorneys fees that are "directly attributable" to responding to a "frivolous petition, claim, or defense"; (c) a listing of circumstances where taxpayers can rely on published advice, rules, and specific written advice of and from the Department; (d) a limitation on the extent to which Department rule changes can be retroactive; and (e) a change in the burden of proof with respect to negligence and certain other penalties, so that *the Department* must show that the taxpayer's action or inaction was due to the taxpayer's willful neglect and not to reasonable cause. See **Section 1.2**, **Section 16.10** and **Section 16.14**.

22. *Important New Exemptions for Certain Property Used in "Qualified Research" and Raising Animals Sold for use in Biotechnology*. Effective January 1, 2012, Wis. Stat. § 77.54(57) exempts certain property used in "qualified research" and in raising animals sold for use in biotechnology. The Department of Revenue has published extensive guidance concerning these new exemptions. See **Section 9.22**.

PREFACE:

THE STREAMLINED SALES TAX AND OTHER RECENT SALES AND USE TAX LEGISLATION

In 2009, Wisconsin became the 23rd state to adopt certain statutory provisions, often referred to as the "Streamlined Sales and Use Tax Provisions." The "Streamlined Sales Tax" is an effort by participating states to create uniformity with respect to certain important aspects of the sales and use tax laws, particularly with respect to major definitional items and sourcing rules, and to adopt uniform and simplified compliance procedures. As a result of these efforts, the participating states hope that (a) many more out-of-state sellers that currently are not registered to collect taxes on sales into their states will volunteer to do so, and (b) the U.S. Congress will take the simplification efforts into account, and pass legislation allowing states to require out-of-state sellers without a physical presence in the state to collect sales and use taxes on otherwise taxable sales into the state.

In Wisconsin, the bulk of the Streamlined Provisions were enacted as part of 2009 Wis. Act 2, generally effective October 1, 2009. One part of the Streamlined provisions, relating to computer software, had an earlier effective date of March 6, 2009. The biennial Budget Bill, 2009 Wis. Act 28, contained some technical corrections to the Streamlined provisions adopted in Act 2. A small number of additional Streamlined changes and clarifications are contained in 2009 Wis. Act 330, the latter with an effective date of May 27, 2010. In addition, the Department of Revenue has substantially rewritten its Administrative Code to take into account the many Streamlined Provisions, as well as numerous other law changes enacted in recent years.

The fiscal estimate for the software change was a tax increase of approximately $30 million per year. For the provisions effective October 1, 2009, the fiscal impact was estimated to be a slight tax decrease, although the State's hope is that increased compliance and voluntary registration will result in increased tax revenues of about $5 million per year. See Legislative Fiscal Bureau, "Summary of Budget Adjustment Provisions, 2009 Wis. Act 2 (February 23, 2009)," pp. 40-41, at: http://legis.wisconsin.gov/lfb/publications/budget/2007-09-Budget/Documents/2009_02_23Act2.pdf.

Despite the relatively modest fiscal estimates, the overall changes made by the Streamlined Provisions, combined with other recent legislation and amendments to the Administrative Code, are arguably the most significant set of changes to the Wisconsin sales and use tax law since its initial adoption in 1961. Some of the changes are more a matter of form, without major substantive significance. For example, the term "gross receipts" (formerly the term used to describe the tax base for the sales tax) has been changed to "sales price," and the term "sales price" (formerly, the tax base for the use tax) has been changed to "purchase price." As another example, as a result of Streamlined and other changes, there has been a fundamental change in the way the Wisconsin sales and use tax is described. Previously, a general statement

of the law was that sale of all tangible personal property was taxable, unless an exemption applied, but only those services specifically listed in the statutes are taxable, and even then, exemptions might apply. Now, however, a more accurate statement is that the following items are taxable (unless an exemption applies):

> "Tangible personal property, or items, property, or goods specified under s. 77.52 (1) (b), (c), or (d), or taxable services."

This conforming language, in fact, now appears in dozens of places throughout the statutes and the Administrative Code.

On the other hand, there are many substantive changes, some with considerable impact for some taxpayers. For example, there are numerous changes with respect to "bundled" transactions (involving the sale of multiple items for a single, nonitemized price); drop shipments; computer software; digital products; exemptions, especially with respect to certain food items and types of medical equipment; and collection of county taxes (now required of every seller registered to collect state sales tax, even if it does not have "nexus" in a particular county), among many others.

Voluminous resources are available with respect to the Streamlined Sales Tax. There is a national Streamlined Sales Tax organization, effectively an umbrella organization that plays a significant administrative role with respect to development and implementation of the Streamlined Provisions across the country. The organization has a website, with extensive material, updated frequently: http://www.streamlinedsalestax.org/. These materials include numerous rulings issued in response to ongoing interpretive requests submitted to the organization. While these rulings technically are not binding on courts of a state, they will be looked to by the Department of Revenue as a source of guidance in interpreting the uniform provisions, and may have some influence with the courts.

Another important source of information is the Wisconsin Department of Revenue's website, which contains a significant amount of helpful material, including legislative background papers, and a "taxability matrix" summarizing the operation of the tax. These materials are available at http://www.revenue.wi.gov/sstp/index.html.

***Note*: The developments discussed in this *Interim Update* are keyed to *The Complete Guide to Wisconsin Sales and Use Taxes* (2008 Edition) on a Section-by-Section basis. This *Interim Update* is inclusive of Wisconsin developments from January 1, 2008 through February 11, 2014.**

All Internet links listed in this *Interim Update* were last visited February 11, 2014.

Chapter 1

History and Overview of the Wisconsin Sales and Use Taxes

Section 1.1. History of Tax; Rates; County and Stadium Taxes; Other Limited Sales-Type Taxes.

- The Department of Revenue has revised Publication 410, *Local Exposition Taxes* (Feb. 2014) to "clarify" that separate and optional insurance charges are not subject to the Exposition rental car tax.

- Effective January 1, 2011, the 2.0% local exposition basic room tax in Milwaukee County increased to 2.5%. Note: if the lodging is furnished in the City of Milwaukee, the local exposition basic room tax *and* the additional 7.0% room tax apply. *Sales and Use Tax Report*, p. 2 (Sept. 2010).

- Effective April 1, 2010, the 0.5% county sales and use tax took effect in Fond du Lac County.

- The City of Wisconsin Dells and the Village of Lake Delton increased the rates of their "Premier Resort Area Taxes" from 0.5% to 1.0%, effective January 1, 2010.

- Effective July 1, 2010, the 0.25% local food and beverage tax imposed pursuant to Wis. Stat. § 77.981 increased to 0.5%.

- The Legislature enacted "police and fire protection fees," effective September 1, 2009. 2009 Wis. Act 28. Although the new fees are not sales or use taxes, the fees apply to certain telecommunications services that generally are subject to Wisconsin sales or use tax, and the Public Service Commission is authorized to contract with the Department of Revenue for the Department to collect the fees. The fees are (a) a monthly fee of $0.75 per assigned telephone number (except that, if multiple communications service

connections are provided to a subscriber, the fee is $0.75 on each of the first 10 connections and $0.075 for each additional connection thereafter); and (b) a fee of $0.38 on each retail transaction for prepaid wireless plans that occur in Wisconsin. The Legislature also has enacted a new sales and use tax exemption (Wis. Stat. § 77.54(55)), stating that the above fees are not included in the sales price for sales and use tax purposes (i.e., so there is no sales or use tax on the fees themselves). For further information, see *Sales and Use Tax Report*, pp. 7-8 (July 2009), *Sales and Use Tax Report*, pp. 1-3 (Sept. 2009); and *Sales and Use Tax Report*, p. 6 (Dec. 2010).

Important Streamlined Sales and Use Tax Change
Effective October 1, 2009

Effective October 1, 2009, retailers that are registered to collect and remit the 5% Wisconsin state sales and use tax are also required to collect and remit the applicable county and stadium sales and use taxes for any sales sourced to a county or stadium district that has such taxes. This applies even if the retailer is not "engaged in business" in the county or stadium district in question. Wis. Stat. § 77.73(3). Prior to the effective date, a retailer was required to collect and remit the county and stadium taxes only if the retailer was "engaged in business" in the applicable county and/or stadium district. See http://www.revenue.wi.gov/taxpro/news/090930a.html and *Sales and Use Tax Report*, pp. 2-3 (Dec. 2009).

- The Legislature has enacted a provision that says the sale, license, lease or rental of a product may be taxed only once, regardless of whether it is subject to tax under more than one imposition provision. 2009 Wis. Act 28, adding Wis. Stat. § 77.61(20), effective July 1, 2009. The Department of Revenue considers this a clarification of the law. See *Sales and Use Tax Report*, p. 2 (July 2009) (giving an example of a laundry service which could be taxable under either § 77.52(2)(a)6 or § 77.52(2)(a)10, but is taxed only once); and see the Tax Release posted by the Department at http://www.dor.state.wi.us/taxpro/news/toweluniform.html (Example 4) (providing that even though laundry services may fall within the meaning of § 77.52(2)(a)10, they are more specifically described in § 77.52(2)(a)6, and thus, that latter section governs).

- Effective October 1, 2009, the sales and use tax was extended to the sale, lease, license or rental of certain digital goods. The operative provision is contained in new Wis. Stat. § 77.52(1)(d), which states as follows:

> A tax is imposed on all retailers at the rate of 5 percent of the sales price from the sale, lease, license, or rental of specified digital goods and additional digital goods at retail for the right to use the specified digital goods or additional digital goods on a permanent or less than permanent basis and regardless of whether the purchaser is required to make continued payments for such right.

The term "specified digital goods" generally means digital audio works, digital audiovisual works, and digital books. The term "additional digital goods" generally means all of the following, if they are transferred electronically: greeting cards, finished artwork, periodicals, video or electronic games, and newspapers or other news or information products.

A detailed new statute (Wis. Stat. § 77.522) also has been enacted to determine the location of a sale or license of a digital good. Generally, if a purchaser receives the digital good at a seller's business location, the sale occurs there; if the purchaser does not receive the digital good at that location, the sale is sourced to the location where the purchaser, or the purchaser's designated donee, receives the digital good, including the location indicated by instructions known to the seller; if the location is still in question, the sale is sourced to the purchaser's address as indicated by the seller's business records, if they 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; and if the location is still in question, additional default rules apply. The location of a *license* generally will be determined in the same manner as the sale of a digital good. For these purposes, "receive" means taking possession or making first use of digital goods, whichever comes first.

Wis. Stat. § 77.52(1b) provides that the specified digital items will not be taxable if an exemption otherwise applies. Wis. Stat. § 77.54(50) provides an exemption for the sale of and the storage, use or other consumption of specified digital goods or additional digital goods if the sale of and the storage, use or other consumption of such goods sold in a tangible form is exempt from, or not subject to, tax.

In October 2009, the Department of Revenue released a publication that discusses the new digital goods provisions in considerable detail. The publication addresses the Department's views on (among other things) when and where a sale or license of a digital good takes place (including digital goods sold by "subscription"); the treatment of transactions that straddle the October 1, 2009 effective date; the types of digital goods at issue; and extensive examples of situations where an otherwise taxable digital good might qualify for exemption. Wis. Dep't. of Revenue Publ'n 240, *Digital Goods: How Do Wisconsin Sales and Use Taxes Apply to Sales and Purchases of Digital Goods?* (Oct. 2009), available at: http://www.dor.state.wi.us/pubs/pb240.pdf. And see Wis. Dep't. of Revenue Publ'n 245, *Advertising Companies: How Do Wisconsin Sales and Use Taxes Affect Your Operations?* (April 2012), available at: http://www.revenue.wi.gov/pubs/pb235.pdf. (discussing certain aspects of the digital products legislation in the context of advertising agencies).

The Department of Revenue estimated that this new tax would raise approximately $11 million during its first two years of existence. For further legislative background concerning the tax on digital goods, see Summary of Budget Adjustment Provisions – 2009 Wisconsin Act 2, pp. 35-40 Legislative Fiscal Bureau (February 23, 2009),

available at: http://legis.wisconsin.gov/lfb/publications/budget/2007-09-Budget/Documents/2009_02_23Act2.pdf.

Important Streamlined Sales and Use Tax Change
Effective October 1, 2009

The Local Food and Beverage Tax

Prior to October 1, 2009, the local food and beverage tax (see Wis. Stat. §§ 77.98 – 77.983) applied (with certain exceptions) to (a) the sale of meals, food, food products and beverages sold for direct consumption on the premises; and (b) the sale of the following items for off-premises consumption: meals and sandwiches (whether heated or not), heated food or heated beverages, soda fountain items, and candy, chewing gum, lozenges, popcorn and confections.

Effective October 1, 2009 (and as a result of a broader adoption of the Streamlined Provisions), the local food and beverage tax applies (with certain exceptions) to the sale of "alcoholic beverages," if the alcoholic beverages are for consumption on the seller's premises, "candy," "prepared food," and "soft drinks," all as specifically defined.

The Department has issued guidance, setting forth its views as to the impact of these changes for local food and beverage tax purposes. See http://www.revenue.wi.gov/taxpro/news/100127a.html. One of the items highlighted by the Department is that while the sale of soft drinks sold in cans or bottles for off-premises consumption was not subject to the tax prior to October 1, 2009, the change now requires that "sales of soft drinks are subject to the local food and beverage tax, regardless of whether the soft drinks are sold from a dispenser or sold in cans or bottles, and regardless of whether sold for consumption on or off the seller's premises."

Section 1.2. Sources and Authority of Statutes, Rules, Department of Revenue Pronouncements and Positions, and Cases Governing Sales and Use Taxes; Availability of Information Regarding Taxes.

November 2011 Tax Legislation
Relating to Important Administrative Matters

On November 16, 2011, the Legislature enacted 2011 Wis. Act 68, which makes numerous changes with respect to tax administration generally, including with respect to sales and use taxes. The Legislation generally becomes effective March 1, 2012. For an extensive discussion of many of the impacted areas prior to adoption of these provisions, see *The Complete Guide*, Sections 1.2, 16.10 and 16.14. The text of the legislation, as well as certain legislative background papers, can be reviewed at: https://docs.legis.wisconsin.gov/2011/proposals/se1/sb23.

The provisions include the following:

- A more detailed "declaratory ruling" procedure, pursuant to which "any interested person" or "group or association of interested persons" can apply for a declaratory (and binding) ruling from the Department.
- A detailed procedure by which a person can submit a petition to the Department, seeking to show that the Department has "established a [unpublished] standard by which it is construing a state tax statute," and forcing the Department to begin a rulemaking process with respect to that standard.
- A provision that specifically allows the Tax Appeals Commission to award a "successful party" (including taxpayers) the costs and attorneys fees that are "directly attributable" to responding to a "frivolous petition, claim, or defense."
- Detailed provisions concerning the circumstances where taxpayers can rely on published advice, rules, and specific written advice of and from the Department.
- A provision that limits the extent to which Department rule changes can be retroactive.
- A provision that when the Department of Revenue issues a "Notice of Nonacquiescence" with respect to a decision or order of the Tax Appeals Commission, the Commission's decision may nevertheless be cited by the Commission or the courts. This eliminates the argument sometimes made by the Department that when it issues a Notice of Nonacquiescence, the Commission's decision is (except with respect to the parties to the litigation) effectively rendered a nullity and of no precedential or persuasive value.
- Change in the burden of proof with respect to negligence and certain other penalties, so that *the Department* must show that the taxpayer's action or inaction was due to the taxpayer's willful neglect and not to reasonable cause.
- Prohibition of "class action" tax refund suits against either the Department or any other party.
- An anti-"browsing" provision that prohibits Department of Revenue personnel from reviewing sales or use tax returns or claims, or information derived therefrom, unless it is done in "performing the duties of [their] position."

2013 Wis. Act 20 creates new Wis. Stat. § 73.16(3), "relying on past audits." It first applies to audit determinations issued on January 1, 2014, regardless of when a prior audit determination was made. See 2013 Wis. Act 20, § 9337 (Initial applicability; Revenue). It will apply to all "determinations of the department," including for all members of a combined income tax group. Thus, it presumably applies to all taxes administered by the Department, including sales and use taxes. All of the following conditions must be satisfied to block an assessment/liability on an issue:

- The liability asserted is the result of a "tax issue" during the period associated with a "prior determination" for which the person is subject to and the tax issue is the "same" as the tax issue during the period associated with the current determination.
- A Department employee who was involved in the prior determination identified or reviewed the tax issue before completing the prior determination, as shown by "any schedules, exhibits, audit reports, documents, or other written evidence pertaining to the determination, and the schedules, exhibits, reports, documents and other written evidence show" that the department did not adjust the person's treatment of the issue.

- The liability asserted in the new audit was not asserted in the prior determination.
- The new provision does not apply to any period associated with a determination if the period begins after promulgation of a rule, dissemination of written guidance to the public or the person subject to the determination, the effective date of a statute, or the date on which the Tax Appeals Commission or court decision becomes final and conclusive and the rule, guidance, statute, or decision imposes the liability asserted by the Department.
- The new provision does not apply if the taxpayer did not give the Department employee adequate and accurate information or if the issue is settled by a written agreement between the Department and the taxpayer.

Comment: It will be particularly important for taxpayers to keep comprehensive records of prior audits, perhaps indefinitely.

- In *King's Enterprises of Wausau, Inc. v. Dep't. of Revenue*, Docket No. 10-S-130 (May 11, 2012), the Tax Appeals Commission held that the taxpayer failed to prove the elements of equitable estoppel against the Department of Revenue. The tax in question related to the sale of nonmotorized trailers to nonresidents, who picked the trailers up in Wisconsin. In the action before the Commission, the taxpayer admitted that the sales were subject to Wisconsin sales tax, but argued that several state employees told him (orally), prior to the periods in question, that the sales were not taxable. The Commission concluded that the taxpayer failed to prove its case, noting that the memory of one key witness was imprecise and that his testimony changed during the course of the hearing, and that the testimony of other witnesses conflicted. On appeal, the Dane County Circuit Court affirmed the Commission's decision. The Court of Appeals also subsequently affirmed the Commission's decision (Case No. 2013AP000516, Oct. 17, 2013).

- Wis. Stat. § 77.59(6)(b) has been amended, effective July 2, 2013, to provide that sales and use tax decisions of the Tax Appeals Commission may be appealed to the circuit court for Dane County or the circuit court for the county where the taxpayer's "commercial domicile" (as defined) is located, where the taxpayer owns other property, or where the taxpayer transacts business in Wisconsin. Previously, appeals in sales and use tax cases could only be taken to the circuit court for Dane County. 2013 Wis. Act 20.

- For a recent case addressing the scope of the equal protection clause of the U.S. Constitution in the context of a property tax dispute, see *Armour v. City of Indianapolis*, No. 11-161 (June 4, 2012). After the City of Indianapolis completed a sanitary sewer project, it sent affected homeowners notice of their payment obligations. Of the 180 affected homeowners, 38 elected to pay in a lump sum, with the remainder selecting long-term payment alternatives. The City subsequently enacted a resolution forgiving all assessment amounts still owed, but homeowners who had paid in a lump sum received no refund. A group of those who received no refund sued, claiming that the City's refusal violated the Equal Protection Clause of the U.S. Constitution. The U.S. Supreme Court held (in a 6 - 3 decision) that the City had a rational basis for its distinction and thus did

not violate the Equal Protection Clause. The Court reasoned that the City's classification did not involve a "fundamental right or suspect classification," but was instead limited to local, economic, social or commercial matters. Thus, the City's distinction would survive Equal Protection scrutiny as long as "there is any reasonably conceivable set of facts that could provide a rational basis for the classification." The Court then said that (a) "administrative concerns" can justify a tax-related distinction, and (b) such concerns existed in the case, as continuing to collect outstanding debts could have been costly and expensive. And granting refunds would have added further administrative costs (i.e., the costs of processing refunds).

- In *Dep't. of Revenue v. Menasha Corp*., 2008 WI 88, 311 Wis. 2d 579, 754 N.W.2d 95, the Wisconsin Supreme Court held that the Tax Appeals Commission reasonably concluded that the SAP software at issue was custom (and thus not taxable) software. In reaching this conclusion, the Court also held that (a) the Tax Appeals Commission is not required to give any deference to the Department of Revenue's interpretation of the Department's own administrative rules (in this case, the rule relating to computer software) but (b) the Tax Appeals Commission's interpretation of the Department's administrative rules is entitled to "controlling weight" deference, meaning that the Commission's interpretation of a Department administrative rule will be upheld by an appellate court if the Commission's interpretation is "reasonable and consistent with the meaning or purpose of the regulation." *Id*. at ¶72. See also **Section 5.15**.

- On May 5, 2010, the Wisconsin Supreme Court, applying the "due deference" standard of review, held that the Tax Appeals Commission reasonably concluded that symphony concerts, including high school and youth concerts, are primarily "entertainment" (and not educational) events within the meaning of Wis. Stat. § 77.52(2)(a)2. *Milwaukee Symphony Orchestra, Inc. v. Dep't. of Revenue*, 2010 WI 33, 781 N.W.2d 674.

- In *Harlan Sprague Dawley, Inc. v. Dep't. of Revenue*, Docket No. 02-S-416, Wis. Tax Rep. (CCH) ¶ 401-144 (WTAC Nov. 3, 2008), the Tax Appeals Commission ruled that the breeding and raising of laboratory animals to sell for research purposes is not the "business of farming" within the meaning of the Wis. Stat. §§ 77.54(3)(a) or (3m) exemptions. The Commission said that (a) the taxpayer's activities "were not specifically included within the terms of the exemption sought"; (b) Wis. Admin. Code § Tax 11.12(2)(f) states in part that farming "does not include … breeding or raising dogs, cats, other pets or animals intended for use in laboratories" and (c) Rule § Tax 11.12(2)(f) does not "conflict" with the statutes; and (d) it is permissible for the Rule to define "farming" less broadly "than it might have." Citing *Daimler Chrysler Services North America LLC v. Dep't. of Revenue*, Wis. Tax Rep. (CCH) ¶ 400-782 (WTAC 2004), *aff'd* 2006 WI App 265, 726 N.W. 312, the Commission also said that the Department's administrative rules "have the force and effect of law." Legislation, effective January 1, 2012, appears to reverse the substantive result of the case in certain circumstances by creating a new exemption for property used in raising animals sold for use in biotechnology or manufacturing. See **Section 9.1** and **Section 9.22**.

Section 1.4. Overview of Sales Taxes on Sales or Leases of Tangible Personal Property – Generally.

Effective June 8, 2011, the Legislature repealed Wis. Stat. § 77.52(4), which had provided that it was a misdemeanor for a retailer to advertise it would assume or absorb the sales tax. 2011 Wis. Act 18. A retailer that advertises that the sales tax will be assumed by the retailer or not added to the sales price is still responsible for paying the applicable sales tax to the Department.

Section 1.6. Overview of Sales Tax on Services.

The Tax Appeals Commission has again held that only those services specifically set forth in the statutes are taxable. *Manpower, Inc. v. Dep't. of Revenue*, Docket No. 050-S-046, Wis. Tax Rep. (CCH) ¶ 401-223 (WTAC August 12, 2009); *Brennan Marine, Inc. v. Dep't. of Revenue*, Docket No. 10-S-35 (WTAC Sept. 17, 2011). See **Section 8.11** and **Section 8.17**.

Section 1.7. Overview of the Use Tax.

On April 11, 2011, the Department posted two Tax Releases to its website, relating to the Wis. Stat. § 77.53(16) credit for sales or use taxes paid to another state. One of the Tax Releases relates to a situation where a Wisconsin customer brings tangible personal property (a computer) to a retailer in another state to have the computer repaired, and the customer then brings the repaired computer back to Wisconsin. In the Tax Release, the other state imposes sales tax on the repair parts, but not the labor. The Department concludes that the sales tax paid to the other state on the parts is creditable against the Wisconsin use tax, which is due on the total price paid for the parts and labor. In the other Tax Release, the Department addresses a situation where a non-Wisconsin contractor purchases and stores materials in its home state, and then performs a contract with those materials in Wisconsin. The contractor's home state considers the activity to be a real property construction activity, and requires the contractor to pay sales or use tax on its purchase of the materials (the contractor being considered to be the end of the selling chain). Wisconsin, on the other hand, considers the activity to be a tangible property improvement and requires the contractor to charge sales tax based on the total charge made to its customer. The Department concludes that the contractor may claim a credit against its Wisconsin tax due the sales tax paid to the contractor's home state with respect to purchase of the materials. The Tax Releases are available at http://www.dor.state.wi.us/taxpro/news/110411.html and http://www.dor.state.wi.us/taxpro/news/110411a.html.

Section 1.8. Methods of Interpreting Unclear Statutes.

- The Tax Appeals Commission discusses the rules of statutory interpretation, as applied to tax imposition statutes, in *Manpower, Inc. v. Dep't. of Revenue*, Docket No. 050-S-046, Wis. Tax Rep. (CCH) ¶ 401-223 (WTAC August 12, 2009), and *Brennan Marine, Inc. v. Dep't. of Revenue*, Docket No. 10-S-35 (WTAC Sept. 7, 2011). See **Section 8.11** and **Section 8.17**.

- In *Dep't. of Revenue v. Menasha Corp*., 2008 WI 88, 311 Wis. 2d 579, 754 N.W.2d 95, the Wisconsin Supreme Court held that the Tax Appeals Commission reasonably concluded that the SAP software at issue was custom (and thus not taxable) software. In reaching this conclusion, the Court also held that (a) the Tax Appeals Commission is not required to give any deference to the Department of Revenue's interpretation of the Department's own administrative rules (in this case, the rule relating to computer software) but (b) the Tax Appeals Commission's interpretation of the Department's administrative rules is entitled to "controlling weight" deference, meaning that the Commission's interpretation of a Department administrative rule will be upheld by an appellate court if the Commission's interpretation is "reasonable and consistent with the meaning or purpose of the regulation." *Id*. at ¶72. See also **Section 5.15**.

- In a recent decision, the Tax Appeals Commission considered the "substance and realities" of a construction contractor's purchase and sale structure in finding the contractor liable for use tax on certain materials. It is unclear what effect, if any, this decision will have outside the unusual fact pattern at issue in the case. *Sullivan Brothers, Inc. v. Dep't. of Revenue*, Docket No. 09-S-242 (August 14, 2012) (affirmed by the Dane County Circuit Court on Feb. 13, 2013; affirmed by the Wisconsin Court of Appeals on January 30, 2014 (Appeal No. 2013AP818)). See **Section 13.15**.

Chapter 2

Sales Taxes on Transfers of Property— The Meaning of "Sale"

Section 2.5. Transfers of Property Without "Consideration"; Meaning of "Consideration."

The enactment of the Streamlined Sales and Use Tax statutes has resulted in an important change with respect to the sales and use tax treatment of "bundled" transactions. See **Section 6.1**.

Section 2.6. Transfers for "Hidden" Consideration.

The enactment of the Streamlined Sales and Use Tax statutes has resulted in an important change with respect to the sales and use tax treatment of "bundled" transactions. See **Section 6.1**.

Section 2.7. Transfers of Property for Low or Nominal Consideration.

The enactment of the Streamlined Sales and Use Tax statutes has resulted in an important change with respect to situations where a product is provided "free" to a purchaser in conjunction with the required purchase of another product. See **Section 6.1**.

Section 2.9. Transfers of Property for Non-Monetary Consideration and Services.

There was an important change in the law, effective October 1, 2009, with respect to certain sales by restaurants to employees. The following paragraphs explain the basic issue, a previous law change (in 1999) that addressed the issue, and then the October 1, 2009 change.

a. Basic Issues. For many years, the sales and use tax treatment of food and certain related items provided by a restaurant to its employees has been somewhat unclear. Conceptually, there are two broad issues: (a) what is the treatment of the purchase by the restaurant of these items and (b) what is the treatment of the transfer by the restaurant of these items to employees? The questions are complicated by the fact that restaurants may have a variety of practices with respect to the transfer of these items – e.g., some restaurants may provide the meals and related items to employees for no separately stated consideration, some may charge (perhaps at a discount), and so on. See *The Complete Guide*, Sections 2.9 and 9.13.

b. 1999 Legislation. In 1999, the Legislature enacted a provision, Wis. Stat. § 77.54(20)(c)4m, that attempted to clarify the area. The statute as enacted said:

> Taxable sales do not include food and beverage items under pars. (b)4. and (c)2., and disposable products that are transferred with such items, that are

> provided by a restaurant to the restaurant's employee during the employee's work hours.

According to a Department of Revenue description of the change, the statute was intended to exempt only the restaurant's *purchase* of the items. Wis. Tax Bull. No. 116, p. 16 (Nov. 1999) ("Under prior law, sales of the above items to a restaurant that the restaurant provided to employees without consideration were subject to Wisconsin sales or use tax.") Apparently, the Department intended that the tax treatment of the transfer *to employees* be analyzed in accordance with general principles, which it initially thought were not changed by the 1999 legislation. Under these general principles, the transfer to the employees might or might not be taxable, depending on how the transfer was structured. See *The Complete Guide*, Section 2.9 and Wis. Admin. Code § Tax 11.87(2)(i).

c. Later Department Views. Based on informal discussions with the Department, we understand that the Department later determined Wis. Stat. § 77.54(20)(c)4m was worded broadly enough to exempt *both* the *purchase by the restaurant* of the applicable items *and* the transfer of these items *to employees* (even if, with respect to the transfer to employees, the restaurant made a specific charge to the employees).

d. October 1, 2009 Change. Effective October 1, 2009, statutory changes have been made in this area. Based on informal discussions with the Department, we understand that these changes were designed to make the law what the Department initially intended it to be as a result of the 1999 changes. The technical 2009 changes are the repeal of § 77.54(20)(c)4m, and the enactment of new § 77.54(20r), which states:

> The sales price from the sales of and the storage, use, or other consumption of candy, soft drinks, dietary supplements, and prepared foods, and disposable products that are transferred with such items, furnished for no consideration by a restaurant to the restaurant's employee during the employee's work hours.

e. Comment. Although new § 77.54(20r) could be clearer, it appears that the key change is that the new statute does not exempt applicable *sales by a restaurant to employees* (unless they are for "no consideration"; but if there is "no consideration," the transfers presumably would not have been taxable under pre-October 1, 2009 law, either). As to applicable *purchases by the restaurant*, there does not appear to be any material change from pre-October 1, 2009 law. While the new statute could be read to exempt *purchases by the restaurant* of the applicable items if they are provided to employees for "no consideration," that is not a change. Further, if the restaurant purchases applicable items for sale to employees in a transaction *with consideration*, the restaurant presumably would be able to claim a resale exemption for its purchase. Again, the real change appears to be that transfers to employees of applicable items "for consideration" are no longer expressly exempt. A Department of Revenue summary of this change (also not entirely clear) is available at: http://www.revenue.wi.gov/taxpro/news/100119a.html.

Chapter 3

Sales Taxes on Transfers of Property – Leases

Section 3.1. Statutory and Regulatory Definitions of "Leases" and "Rentals."

Effective October 1, 2009, the sales and use tax was extended to the sale, lease, license or rental of certain digital goods. See **Section 1.1**.

Section 3.2. Other Requirements for Classification as a Lease.

The Department of Revenue has published guidance stating that "limousine service" (as defined) (a) is a transportation service that is not subject to Wisconsin sales or use tax, but (b) is subject to a 5% "limousine fee." In the guidance, the Department also provides detailed examples of what is and is not a "limousine," when a limousine service is considered to be provided in Wisconsin, and when a limousine is provided on an "hourly basis." Wis. Tax Bull. No. 179, pp. 5-7 (April 2013).

Section 3.3. Taxation of Leases – General Rules.

Important Streamlined Sales and Use Tax Change
Effective October 1, 2009

Provision of Equipment with Operator

Many transactions involve the provision of equipment along with an operator of the equipment. The question has long existed as to whether these transactions are a lease of the equipment, or are instead the provision of a service. The difference can matter, because the rental of tangible property generally is taxable (unless an exemption applies), whereas the provision of a service is taxable only if the service is one of those specifically listed in the statutes as taxable (and even then, an exemption may apply). Under pre-Streamlined law, these questions were generally resolved by examining the degree of control maintained by the operator and the degree of responsibility for completion of the work assumed by the operator. *Sales and Use Tax Report,* pp. 4-5 (Dec. 2009); *Sales and Use Tax Report,* p. 7 (Dec. 2010).

Under the new Streamlined provisions, this type of transaction is treated as a service, as long as the operator is "necessary" for the property to perform in the manner for which it is designed, and the operator does more than maintain, inspect or set up the property. See Wis. Admin. Code § Tax 11.29(5); *Sales and Use Tax Report*, pp. 4-6 (Dec. 2009) (providing numerous examples with respect to cranes); *Sales and Use Tax Report*, pp. 7-8 (Dec. 2010) (providing examples with respect to trucks and explaining the potential significance of the change in the context of the Wis. Stat. § 77.54(5)(b) "common or contract carrier" exemption); Wis. Tax Bull. No. 176, pp. 8-10 (Aug. 2012) (relating to movable storage containers); and Private Letter Ruling W1113002 (April 1, 2011), Wis. Tax Bull. No. 172, pp. 33-41 (July 2011) (setting forth 11 examples involving the issue of whether a company is renting out equipment (such as a crane) or is instead providing a moving or other type of service in which the company's operator uses the equipment to perform the service).

Transition issues have arisen as a result of the change. One issue is whether equipment purchased prior to October 1, 2009 solely for rental under the law as then in effect is now subject to a use tax if the equipment is deemed used in providing a service under the new rules. The Department says no. See *Sales and Use Tax Report*, p. 6, Question and Answer 1 (Dec. 2009). The Department has also issued guidance with respect to transition matters for repair parts and extended warranties. *Id*., pp. 6-7, Question and Answers 2 – 6.

***Comment*:** This will result in many more transactions of this type being treated as a service.

Chapter 4

Sales Taxes on Transfers of Tangible Personal Property – Transfers in Connection with Services

Section 4.1. General Rules.

- With respect to the discussion in the "Planning Tip" in the first column on p. 80 of *The Complete Guide*, please see the important legislative development discussed at **Section 9.16** of this Update.

- In *Paintball Dave's, Inc. v. Dep't. of Revenue*, Docket No. 07-S-145, Wis. Tax Rep. (CCH) ¶ 401-103 (WTAC April 9, 2008), the Tax Appeals Commission held that paintballs were "incidental" to the provision by the taxpayer of admissions to paintball games. As a result, the taxpayer owed Wisconsin use tax on its purchase of the paintballs, and could not claim that it purchased the paintballs for resale. The taxpayer claimed that the paintballs were not "incidental" to the service, arguing that they were an "essential" element of the service, in that the games could not be played without the paintballs. Citing Wis. Stat. § 77.51(5), however, the Commission held that the "main purpose or objective" of the taxpayer's customers was to obtain the paintball game service, rather than the paintballs, and that this was true even if "the property [paintballs] may be necessary of essential to providing the service." Although not entirely clear from the Commission's decision, it also appears that the taxpayer argued that imposing use tax on the purchase of the paintballs resulted in impermissible double taxation, in that the admissions to the paintball games were also taxable. To the extent the taxpayer was making that argument, the Commission appeared to reject it, apparently agreeing with the Department that there were two separate transactions (and taxes) – (a) the purchase of the paintballs (to which the *use* tax applied) and (b) the sale of admissions to the paintball games (to which *sales* tax applied).

Section 4.3. Classification as a "Lease" – Requirement that Possession of Property be Transferred.

The Department of Revenue has published guidance stating that "limousine service" (as defined) (a) is a transportation service that is not subject to Wisconsin sales or use tax, but (b) is subject to a 5% "limousine fee." In the guidance, the Department also provides detailed examples of what is and is not a "limousine," when a limousine service is considered to be provided in Wisconsin, and when a limousine is provided on an "hourly basis." Wis. Tax Bull. No. 179, pp. 5-7 (April 2013).

Section 4.6. The Principle of "Incidentality"—Meaning of "Incidental."

- The Department of Revenue has published guidance concerning charges for campsites that also provide electricity. See **Section 8.3**.

- The Department of Revenue has issued helpful guidance concerning the sales and use tax treatment of "Remote Deposit Capture Services" ("RDCS") provided by financial institutions to merchant customers.

  Merchants using RDCS scan checks they receive and send the scanned images to the financial institution for posting and clearing. In connection with the RDCS, the financial institution purchases scanners and software that it provides to merchants. The financial institution charges the merchant a monthly fee for use of the scanner, software and system support, plus a per item charge for each check, and a deposit charge for each deposit captured remotely. The financial institution requires the merchant to obtain the scanners and software from it.

  RDCS thus involves the provision of both a service and tangible personal property. The Department ruled that the objective of the merchants is to obtain the RDCS, and not the property provided by the financial institution, thus making the property "incidental" to the service. Accordingly, the charges to the merchant (including the itemized charges for the scanners and prewritten software) are for a service, which the Department says is non-taxable. Because the property is incidental to the service, however, the Department concludes that the financial institution is liable for Wisconsin sales or use tax on the property.

  The Department said, however, that the property would not be considered "incidental" to the service if the charge for the property was both separate *and* optional from the RDCS. In that case, the Department said that the financial institution could purchase the property without tax for resale (and would, although the ruling does not so state, be required to collect Wisconsin sales tax on its charges for the property to the merchants).

  The guidance is published at Wis. Tax Bull. No. 174, pp. 12-13 (Jan. 2012).

- The Department of Revenue has issued a private letter ruling that addresses the sales and use tax treatment of a service that includes taxable and non-taxable components. The taxable component is what the Department concludes is a telecommunications message service. The non-taxable components are various marketing and calling services. Under the facts, the Department says that the telecommunications messaging service is incidental to the non-taxable services. The Department says that if a "separate and optional charge" is made for the telecommunications message service, only that portion of the charge is subject to tax. Private Letter Ruling W1347003, Wis. Tax Bull. No. 183, pp. 19-21 (Jan. 2014).

- The Department of Revenue has issued guidance concerning the sales and use tax treatment of a web hosting service that is sold together with an email service. In the ruling, a taxpayer sells, for a set price ($25), web hosting on the taxpayer's website, plus up to ten email accounts hosted on a separate server. If a customer uses more than ten email accounts, it is charged an additional amount for each account over the ten. The Department concludes that the $25 charge is not taxable. The Department's rationale is that web hosting is the primary objective of the customers, and web hosting is not a taxable service. Further, while email accounts are generally taxable "telecommunications message services," the email provided as part of the $25 charge is "incidental" to the web hosting, and thus falls within the language of Wis. Stat. § 77.52(2)(a)5m that a telecommunications message service does not include services that are incidental to another service that is not taxable. The Department also concludes, however, that additional charges for each email account over the ten included with the package represents a charge for a telecommunications message service sold separately from the web hosting service, and is taxable. Finally, the Department notes that the $25 charge is not taxable pursuant to a "bundled" transaction, because neither the web hosting service nor the email service are a taxable service in this situation. The guidance is available at http://www.dor.state.wi.us/taxpro/news/110624c.html (posted July 7, 2011).

- In *Paintball Dave's, Inc. v. Dep't. of Revenue*, Docket No. 07-S-145, Wis. Tax Rep. (CCH) ¶ 401-103 (WTAC April 9, 2008), the Tax Appeals Commission held that paintballs were "incidental" to the provision by the taxpayer of admissions to paintball games. See **Section 4.1**.

- In *Engel and Summit Ski Corp. v. Dep't. of Revenue*, Docket Nos. 07-S-168, 07-S-169, Wis. Tax Rep. (CCH) ¶ 401-104 (WTAC May 27, 2008) the Tax Appeals Commission rejected the taxpayer's argument that certain snow-grooming tractors and related equipment were exempt manufacturing machinery and equipment under Wis. Stat. § 77.54(6)(a). Although the parties agreed that the taxpayer's production of snow constituted manufacturing tangible personal property (and that certain equipment qualified for the exemption), there was disagreement about whether the snow grooming equipment qualified. The Department's position was that the manufacturing process ended when the taxpayer deposited snow on the slopes of its facilities, and that the grooming equipment was used after that point. The taxpayer, however, argued that the manufacturing process did not end until the later production by the grooming tractors of a "corduroy groomed surface condition" composed of natural and man-man snow. The Commission rejected the taxpayer's argument, holding that (a) the taxpayer had not proven that the production of the groomed surface is "manufacturing" within the meaning of the statute; (b) the production of snow ended when the snow was stored in piles on slopes; (c) the taxpayer was not selling snow to its customers and (d) even if the taxpayer was selling snow, the "sales" of the snow would be incidental to the taxpayer's sales of skiing, snowboarding or snowtubing services. The Commission also noted (in footnote 3 of its opinion) that, pursuant to Wis. Stat. § 77.54(6r), the Wis. Stat. § 77.54(6)(a) exemption must be "strictly construed." Please note that, effective July 1, 2013, the Legislature has enacted an exemption for snowmaking and snow-grooming machines and

equipment, including accessories, attachments and parts for the machines and equipment and the fuel and electricity used to operate such machines and equipment, that are used exclusively and directly for snowmaking and snow grooming at ski hills, ski slopes, and ski trails. 2011 Wis. Act 32, creating Wis. Stat. § 77.54(58).

- In *Dep't. of Revenue v. Menasha Corp*., 2008 WI 88, 311 Wis. 2d 579, 754 N.W.2d 95, the Wisconsin Supreme Court held that the Tax Appeals Commission reasonably concluded that the SAP software at issue was custom (and thus not taxable) software. See **Section 1.2**.

Section 4.11. Application of Rules to Specific Service Industries.

- The Department has posted guidance on its website concerning the sales and use tax treatment of purchases and sales by summer camps, both before the effective date (October 1, 2009) of certain Streamlined Sales and Use Tax changes, and thereafter. The primary issue addressed by the guidance is how summer camps should perform sales and use tax reporting on their purchases and sales when they make a single, inclusive, non-itemized charge to a camper that includes both taxable and non-taxable items; e.g., a combined $500 charge that covers all instruction relating to the sports, as well as meals, lodging, and a tee shirt. With respect to post-September 30, 2009 periods (i.e., after adoption of the Streamlined provisions), the Department says that (a) a camp's charge for meals, lodging, and program access for one nonitemized price is not subject to tax because it is presumed that the taxable products included in the price are less than 10% of the total price and thus the exemption from Wisconsin sales and use tax provided in Wis. Stat. § 77.54 (51) applies; and (b) the camp is the consumer of all of the property, items, goods, and services provided and must pay Wisconsin sales or use tax on its purchases of those items. For pre-October 1, 2009 periods, the Department says that (a) the camp is required to make an allocation between the taxable and non-taxable items included (assuming it has adequate records to do so); (b) if the camp does not keep adequate records to make this allocation, the entire charge by the camp is subject to Wisconsin sales tax (but, for purposes of making the allocations, the camp may make certain specified assumptions concerning the charge for the rooms and meals). The Department also said that, if the camp had been filing returns but underreporting tax, the Department would waive penalties if the camp filed amended returns by December 31, 2010, paying the tax and applicable interest. With respect to nonfilers, the Department notes that the camp may apply under the Department's standard voluntary disclosure program for a limited lookback period. For further information, see http://www.revenue.wi.gov/html/sumcamp2.html.

- The Department of Revenue has published guidance stating that "limousine service" (as defined) (a) is a transportation service that is not subject to Wisconsin sales or use tax, but (b) is subject to a 5% "limousine fee." In the guidance, the Department also provides detailed examples of what is and is not a "limousine," when a limousine service is considered to be provided in Wisconsin, and when a limousine is provided on an "hourly basis." Wis. Tax Bull. No. 179, pp. 5-7 (April 2013).

- The Department of Revenue has published guidance concerning charges for campsites that also provide electricity. See **Section 8.3**.

Department of Revenue Guidance:
Taxable and Non-Taxable Computer
Hardware, Software and Services
(Including SaaS, PaaS and IaaS)

The Department of Revenue has published an extensive list of what it considers to be taxable and non-taxable computer hardware, software and services. See "Sales and Use Tax Treatment: Computer Hardware, Software, Services" (updated January 25, 2013): http://www.revenue.wi.gov/faqs/pcs/computerc.html. And see Wis. Admin. Code § Tax 11.71.

The Department says that the following are ***taxable***:

- Installation and setup of computer hardware
- Installation of hardware devices (including printers, hard drives, modems, monitors, etc.)
- Installation of prewritten computer software
- Configuration of prewritten computer software
- Online or on-site troubleshooting hardware problems
- Online or on-site troubleshooting of prewritten computer software
- Setting up hardware and prewritten computer software on a network
- Inspecting, servicing, or repairing prewritten computer software via modem
- Installation of prewritten computer software
- Inspection of hardware and prewritten computer software
- Consulting and design services provided in connection with the sale of computer hardware and prewritten computer software
- Internet access services, when the sale of the service is sourced to Wisconsin
- Installation or hook-up charges relating to Internet access services when the Internet access services are sourced to Wisconsin
- Sales of textbooks and manuals, whether furnished to the purchaser as tangible personal property or as a digital good
- Photographic services

The Department says that the following are ***non-taxable***:

- Writing computer software other than prewritten computer software
- Making modifications or enhancements to prewritten computer software that are designed and developed to the specifications of a specific purchaser, and the person making the modifications or enhancements provides a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for the modification or enhancement
- Installing computer software other than prewritten computer software
- Updating computer software other than prewritten computer software
- Training people on how to use software or hardware
- Writing queries of databases
- Designing screens, forms, reports, or menus
- Answering questions
- Reformatting data
- Data migration
- Data conversion
- Data recovery
- Making backups of data files
- Network assessment services that consist of network analysis and evaluation unrelated to a specific hardware or software problem and unrelated to the sale of computer hardware or computer software
- Hosting websites (that is, the storing of data on a computer) without selling any tangible personal property or any digital good
- Domain name registration and site maintenance/update services, if no tangible personal property or digital good is transferred or taxable service performed
- Designing websites and home pages, if the service is not primarily a photographic service. Whether the completed website design is transferred to the customer electronically (i.e., accessed or obtained by the purchaser by means other than tangible storage media), or transferred using a tangible storage medium (e.g., a CD), the charge for the website design work is not subject to tax
- Website database charges
- Charges for providing advertising or listing space on a website
- Access services that will be resold
- Training on how to use the Internet

The guidance also addresses services which permit persons at different locations to access the same prewritten computer software through remote access by telephone lines, microwave, or other means (sometimes referred to as “cloud computing” or “software as service” or “SaaS”). The Department says that these services are non-taxable when (a) the persons or the persons' employees who have access to the prewritten computer software are not located on the premises where the equipment/software is located and do not operate the equipment or control its operation, and (b) prewritten computer software that is downloaded or physically transferred to the customer or the customer's computers is incidental to the data processing services (that is, used solely to allow access to the service provider's hardware and software). The guidance contains the following helpful example:

> Company A, an Application Service Provider (ASP), provides access to its software. The software is stored on Company A's servers and the customer accesses the software via the Internet. Customers that contract with Company A have access to Company A's servers, but do not operate or have control over the servers. Company A has control over the computer hardware and software, loads the software onto the server, and is responsible for security measures regarding the computer equipment (file server) and software. In order for Company A's customers to access the hardware and software, the customers must use a client utility program that they download from Company A. Company A is providing a data processing service, which is not subject to Wisconsin sales and use tax, regardless of whether the server is located in Wisconsin or outside Wisconsin. Data processing services are not among the services subject to Wisconsin sales and use tax.
>
> The guidance also addresses when other transactions, sometimes referred to as "Infrastructure as a Service" ("IaaS") and "Platform as Service" ("PaaS"), are and are not taxable.

Chapter 5

Sales Taxes on Transfers of Property – "Retail," "Retailer," "Resale Certificates" and "Tangible Personal Property"

Section 5.0. Overview of Chapter.

Effective October 1, 2009, the sales and use tax was extended to the sale, lease license or rental of certain digital goods. See **Section 1.1**.

Section 5.2. "Retail" Sale—Requirement that Buyer Must "Sell" or "Lease" the Property.

The enactment of the Streamlined Sales and Use Tax statutes has resulted in an important change with respect to situations where a product is provided "free" to a purchaser in conjunction with the required purchase of another product. See **Section 6.1**.

Section 5.4. "Retail" Sale – Requirement that Resold Property Retain Character as Tangible Personal Property.

In *Chula Vista, Inc. v. Dep't. of Revenue*, Docket Nos. 09-S-247 and 09-P-248 (August 5, 2011), the Tax Appeals Commission held that large steel beams used to support the "flumes" of a water slide, together with related engineering services, were real property (as opposed to tangible property) improvements. In so ruling, the Commission applied the 3-part test stated in *Dep't. of Revenue v. A.O. Smith Harvestore Prods., Inc.*, 72 Wis. 2d 60, 67-68, 240 N.W.2d 357 (1976); i.e., (a) actual physical annexation to the real estate; (b) application or adaptation to the use or purpose to which the realty is devoted; and (c) an intention on the part of the person making the annexation to make a permanent accession to the freehold. The parties agreed that the first two tests were met, so the Commission addressed what courts consider the most important prong, i.e., "intent" – which is determined based on "an objective and presumed intention of that hypothetical ordinary reasonable person, to be ascertained in the light of the nature of the article, the degree of annexation, and the appropriateness of the article to the use to which the realty is put." Based on the evidence of record, the Commission concluded that the items in question were intended to become a permanent accession to the property. The Commission rejected various arguments made by the Department to the contrary, including that (a) there was a market for used items of the type in question; and (b) the taxpayer had depreciated the items for income tax purposes as tangible personal property. The Commission also rejected the Department's arguments that other aspects of its administrative rules and the statutes supported classification as tangible personal property. One of the Department's other arguments was that under Wis. Stat. § 77.52(2)(a)10 and (2)(ag)38, water slides are deemed to be tangible personal property after they are installed. The Commission noted that while that may be true, those statutes apply only for purposes of determining whether the services listed in § 77.52(2)(a)10 (repair, cleaning,

inspection, etc.) performed on the property *after* installation are taxable. That statute, in other words, does not apply for purposes of classification of the installation of the property.

Section 5.5. "Retail" Sale—Specific Applications.

Important Streamlined Sales and Use Tax Change
Effective October 1, 2009

Effective October 1, 2009, a retailer that is registered to collect and remit Wisconsin sales and use taxes must also collect and remit the applicable state, county, and/or stadium sales and use tax on its sales of motor vehicles, boats, snowmobiles, recreational vehicles (as defined), trailers, semitrailers, all-terrain vehicles, and aircraft, even if they are not "dealers" or "registered dealers" of these items. Prior to the effective date, a person who was not a "dealer" or "licensed dealer" was not required to collect and remit the applicable taxes on these sales. See http://www.revenue.wi.gov/taxpro/news/111027a.html; *Sales and Use Tax Report*, pp. 3-4 (Dec. 2009); Wis. Dep't. of Revenue Publ'n 201, p. 104 (Sept. 2011); and the Tax Release posted to the Department of Revenue's website at http://www.dor.state.wi.us/taxpro/news/111027.html (updated Oct. 27, 2011).

Section 5.6. Resale Certificates—General Rules.

Important Streamlined Sales and Use Tax Change
Effective October 1, 2009

Exemption Certificates

Under pre-Streamlined law, an exemption certificate provided by the buyer to the seller relieved the seller of the burden of proving the sale was not taxable, only if, among other things, it was accepted in "good faith." The Streamlined provisions make several changes in the treatment of exemption certificates.

a. An exemption certificate relieves the seller from the burden of proving a sale is not taxable 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* (except as noted below).

b. The certificate does not relieve the seller of the burden of proof if the seller fraudulently fails to collect sales tax, solicits the purchaser to claim an unlawful exemption, or accepts an exemption certificate from a purchaser who claims to be an entity that is not subject to the sales tax, if the subject of the transaction sought to be covered by the exemption certificate is received by the purchaser at a location operated by the seller in this state and the exemption certificate clearly and affirmatively indicates that the claimed exemption is not available in this state.

c. If the seller has not obtained a fully completed exemption certificate or the information required to prove the exemption, the seller could, *no later than 120 days after the Department requests that the seller substantiate the exemption*, either provide proof of the exemption by other means or obtain, in "good faith," a fully completed exemption certificate from the purchaser. Effective May 27, 2010, Wis. Stat. § 77.52 (14) (am) 2 provides that an exemption certificate is received by the seller in "good faith" if the claimed exemption (a) was authorized by law on the date of the transaction in the jurisdiction where the transaction is sourced; (b) could be applicable to the property, item, good, or service being purchased; and (c) is reasonable for the purchaser's type of business. See also Wis. Stat. §§ 77.51(14)(am)3 and 77.53(11)(b)3 (providing situations where a seller may not be relieved from liability even though it obtains the exemption certificate).

d. Wis. Stat. § 77.60(13) provides that a person who uses an exemption certificate (or direct pay permit or exemption certificate claiming "direct mail") "in a manner that is prohibited by or inconsistent with this subchapter" shall "pay a penalty of $250 for each invoice or bill of sale related to the prohibited or inconsistent use or incorrect information." See also Wis. Admin. Code § Tax 11.14(15)(b).

Note: On March 2, 2011, the Department of Revenue posted a helpful Power Point presentation to its website that discusses the requirements relating to exemption certificates under the Streamlined provisions. The Power Point, which was prepared by the Streamlined Sales Tax Governing Board's Audit Committee, explains the requirements of obtaining exemption certificates, what information is required to be entered on the exemption certificates, how incomplete exemption certificates will be handled, and what "good faith" means and when it applies. The Power Point also states that the "fully complete" standard applies to exemption certificates received on the date of the sale, received within 90 days after the date of the sale, *or on file prior to the beginning of the audit* (see slides 9 & 11). The Power Point is available at: http://www.dor.state.wi.us/sstp/sstppwrpt.pdf.

***Comment*:** Given the restrictions on timing imposed by the new rules, sellers are well advised to obtain properly completed exemption certificates, as appropriate, contemporaneous with the sales transaction.

Section 5.7. Resale Certificate – Specific Requirements.

The legislative adoption of the Streamlined Sales and Use Tax provisions has resulted in some important changes with respect to exemption certificates. See **Section 5.6**.

Section 5.8. "Retailer" – Introduction and General Requirements.

In *Cellar Door North Central, Inc. v. Dep't. of Revenue*, Docket No. 08-S-067 (WTAC Jan. 22, 2013), the Tax Appeals Commission concluded that, based on the record before it, the petitioner was a "co-promoter" of concerts, and thus liable for sales tax that had been collected (but not remitted to the Department) on the sale of admissions to concerts at issue in the case. The Department had made alternative assessments under Wis. Stat. § 77.59(9m) to Cellar Door and

the "co-promoter," but determined that the tax was uncollectible from the co-promoter, and thus pursued Cellar Door. The Dane County Circuit Court has affirmed the Commission's decision. Case No. 13-CV-617 (Aug. 26, 2013).

Section 5.11. "Retailer"—Other Multiple Party Sellers.

Important Streamlined Sales and Use Tax Change
Effective October 1, 2009

Drop Shipments

Under pre-Streamlined law, if a Wisconsin purchaser placed an order for otherwise taxable property from an out-of-state seller that was not registered to collect Wisconsin sales or use tax, which in turn notified a Wisconsin seller to ship the product directly from its inventory (a "drop shipment"), the Department treated the in-state seller as the retail seller, liable for the tax. See Wis. Admin. Code § Tax 11.94(1)(e) (as in effect prior to October 1, 2009). This was true even though the Wisconsin seller was in economic effect selling the property for resale, and often did not know the retail selling price. Under the Streamlined provisions, the Wisconsin seller is no longer treated as the taxable retailer. See 2009 Wis. Act 2, § 305, repealing Wis. Stat. § 77.51(14)(d). The Wisconsin purchaser, however, remains liable for use tax (as applicable) on the property. For a Department of Revenue summary of this change, see http://www.revenue.wi.gov/taxpro/news/100119.html.

"Deal of the Day"
Certificates and Vouchers

The Department of Revenue has published a Tax Release that addresses the Wisconsin sales and use tax treatment of discounted certificates and product vouchers. The basic fact pattern involves what are commonly referred to as "deal of the day" certificates or vouchers. The Department summarizes the background relating to these transactions as follows:

> A merchant enters into an agreement with a promotional company: (1) to have that promotional company sell, at a discount from face value, certificates that may be redeemed for the face value of the certificate when purchasing goods or services from that merchant or (2) to have that promotional company sell vouchers that may be redeemed for a particular good or service that is furnished by the merchant to the holder of the voucher. In either situation, the retailer can identify the amount for which the certificate or voucher was sold to the customer.

> These certificates and vouchers: (1) are commonly advertised on various web sites, (2) are e-mailed to persons who have agreed to receive such e-mails, and (3) are often referred to as "deal of the day" certificates or vouchers. A person desiring to purchase the certificate or voucher does so by contacting and paying the promotional company and not the issuing merchant. The purchaser then presents the certificate or voucher to the issuing merchant in exchange for goods or services from that merchant, as indicated on the certificate or voucher.

The Department concludes that the promotional company's sale of the certificate is not subject to sales or use tax, as the sale of the certificate "is the sale of [a non-taxable] intangible right." The Department also says that the merchant that accepts the certificate has receipts from the sale of goods or services in an amount equal to the amount for which the certificate was sold by the promotional company (plus any additional amounts it receives from the person using the certificate as payment for the goods or services purchased). The Department then concludes that the merchant's sales price includes all consideration received by the merchant for the sale, "without deduction for any expenses incurred by the merchant and paid to the promotional company for its services of advertising and selling the certificates." The Department provides the following example:

> Promotional Company sells a certificate with a face value of $50 to Customer for $30. Under the terms of the agreement between Merchant and Promotional Company, Promotional Company is obligated to remit $15 of the $30 it collected from Customer to Merchant. Promotional Company keeps the remaining $15 in return for the advertising and promotional services it provides to Merchant under the agreement. Customer goes to Merchant's store and selects clothing with a retail selling price of $99.99. Customer pays for the clothing by presenting the $50 certificate and using a credit card to pay $49.99. Merchant's taxable receipts from this sale are $79.99 ($30.00, the amount for which Customer purchased the certificate, plus $49.99, the additional amount Customer paid Merchant), and Merchant is liable for Wisconsin state, Milwaukee County, and baseball stadium sales tax of $4.48 ($79.99 x 5.6%). The $20 difference between the face value of the certificate ($50) and the $30 Customer paid for the certificate is a discount allowed by Merchant and is not included in the measure subject to Wisconsin sales or use tax.
>
> Promotional Company's receipts ($30) from its sale of the certificate to Customer are not subject to Wisconsin sales or use taxes.

Wis. Tax Bull. No. 176, pp. 8 - 10 (Aug. 2012).

The state sales and use tax treatment of "deal of the day" vouchers across the country is not uniform. For a 2012 multistate survey, see the material posted to the Streamlined Sales and Use Tax website at:

http://www.streamlinedsalestax.org/uploads/downloads/SLAC%20Meeting%20Materials/2012/SL12004%20Sales%20Price%20Deal%20Vouchers%20Survey%202012.pdf

http://www.streamlinedsalestax.org/uploads/downloads/SLAC%20Meeting%20Materials/2012/SL12005%20Sales%20Price%20deal%20voucher%20survey%20comments.pdf

Assessments in the Alternative

In *Cellar Door North Central, Inc. v. Dep't. of Revenue*, Docket No. 08-S-067 (WTAC Jan. 22, 2013), the Tax Appeals Commission concluded that, based on the record before it, the petitioner was a "co-promoter" of concerts, and thus liable for sales tax that had been collected (but not remitted to the Department) on the sale of admissions to concerts at issue in the case. The Department had made alternative assessments under Wis. Stat. § 77.59(9m) to Cellar Door and the "co-promoter," but determined that the tax was uncollectible from the co-promoter, and thus pursued Cellar Door. The Dane County Circuit Court has affirmed the Commission's decision. Case No. 13-CV-617 (Aug. 26, 2013).

Section 5.12. "Retailer"—Government Agencies.

In a private letter ruling, the Department of Revenue addressed the Wisconsin sales and use tax consequences when a company that manufactured and sold yearbooks to a school also provided order fulfillment services for the students, including taking orders and collecting funds from the orders. The issue was whether the taxable retailer of the yearbooks was the school or the yearbook manufacturer; the Department ruled that it was the school. According to the Department, the yearbook manufacturer was "just taking orders and collecting the amounts due on behalf of the school … the school is the retailer of these yearbooks…." Among the facts in the ruling are that (a) the school was responsible for the sale and delivery of the yearbooks; (b) all yearbooks were delivered to the school for distribution; and (c) the selling price for the yearbooks was set by the school. Because the school was considered to be the retailer, sales tax was not due on the sale of the yearbooks, as Wis. Stat. § 77.54(4) provides an exemption for sales of tangible personal property by certain elementary or secondary schools. Private Letter Ruling W0907003 (Nov. 25, 2008), Wis. Tax Bull. No. 161, pp. 15-16 (April 2009).

Section 5.14. "Tangible Personal Property" – Distinguished from Real Property.

In *Chula Vista, Inc. v. Dep't. of Revenue*, Docket Nos. 09-S-247 and 09-P-248 (August 5, 2011), the Tax Appeals Commission held that large steel beams used to support the "flumes" of a water slide, together with related engineering services, were real property (as opposed to tangible property) improvements. In so ruling, the Commission applied the 3-part test stated in *Dep't. of Revenue v. A.O. Smith Harvestore Prods., Inc.*, 72 Wis. 2d 60, 67-68, 240 N.W.2d 357 (1976); i.e., (a) actual physical annexation to the real estate; (b) application or adaptation to the use or

purpose to which the realty is devoted; and (c) an intention on the part of the person making the annexation to make a permanent accession to the freehold. The parties agreed that the first two tests were met, so the Commission addressed what courts consider the most important prong, i.e., "intent" – which is determined based on "an objective and presumed intention of that hypothetical ordinary reasonable person, to be ascertained in the light of the nature of the article, the degree of annexation, and the appropriateness of the article to the use to which the realty is put." Based on the evidence of record, the Commission concluded that the items in question were intended to become a permanent accession to the property. The Commission rejected various arguments made by the Department to the contrary, including that (a) there was a market for used items of the type in question; and (b) the taxpayer had depreciated the items for income tax purposes as tangible personal property. The Commission also rejected the Department's arguments that other aspects of its administrative rules and the statutes supported classification as tangible personal property. One of the Department's other arguments was that under Wis. Stat. § 77.52(2)(a)10 and (2)(ag)38, water slides are deemed to be tangible personal property after they are installed. The Commission noted that while that may be true, those statutes apply only for purposes of determining whether the services listed in § 77.52(2)(a)10 (repair, cleaning, inspection, etc.) performed on the property *after* installation are taxable. That statute, in other words, does not apply for purposes of classification of the installation of the property.

Section 5.15. "Tangible Personal Property"—Distinguished from Services and Intangible Property.

- In *Dep't. of Revenue v. Menasha Corp*., 2008 WI 88, 311 Wis. 2d 579, 754 N.W.2d 95, the Wisconsin Supreme Court held that the Tax Appeals Commission reasonably concluded that the SAP software at issue was custom (and thus not taxable) software. In reaching this conclusion, the Court also held that (a) the Tax Appeals Commission is not required to give any deference to the Department of Revenue's interpretation of the Department's own administrative rules (in this case, the rule relating to computer software) but (b) the Tax Appeals Commission's interpretation of the Department's administrative rules is entitled to "controlling weight" deference, meaning that the Commission's interpretation of a Department administrative rule will be upheld by an appellate court if the Commission's interpretation is "reasonable and consistent with the meaning or purpose of the regulation." *Id*. at ¶72. The Department of Revenue has issued guidance concerning the filing and processing of refund claims based on the *Menasha* decision. *See* http://www.revenue.wi.gov/faqs/ise/menasha.html and http://www.revenue.wi.gov/forms/sales/softquest.pdf. In addition, the Department has posted information on its website (at http://www.revenue.wi.gov/taxpro/news/090529.html) that persons filing claims for refund of sales and use tax paid on software and related services under the *Menasha* decision "no longer need to submit with their claim a completed 'Request for Computer Software Determination'" for the software products listed below:

SOFTWARE	VENDOR
Epicor Enterprise	Epicor
ERP LN (aka Baan)	Infor Global Solutions
ERP SL (aka SyteLine)	Infor Global Solutions
ERP SX Enterprise (aka SX Enterprise)	Infor Global Solutions
ERP XA (aka MAPICS)	Infor Global Solutions
IFS Applications	Industrial and Financial Systems
JD Edwards One World	JD Edwards
JD Edwards EnterpriseOne	Oracle
JD Edwards World	Oracle
Lawson M3	Lawson Software
Lawson S3	Lawson Software
Microsoft Dynamics AX (formerly Axapta)	Microsoft
Microsoft Dynamics GP (formerly Great Plains)	Microsoft
Oracle e-Business Suite	Oracle
Peoplesoft HRMS	Peoplesoft
Peoplesoft Financials	Peoplesoft
Peoplesoft HR Payroll	Peoplesoft
SAP R/3	SAP
mySAP	SAP

- Effective March 6, 2009, the Legislature amended the definition of "tangible personal property" in Wis. Stat. § 77.51(20) to include "prewritten computer software, regardless of how it is delivered to the purchaser." 2009 Wis. Act 2. According to the Department of Revenue, this change is intended to reverse the effect of the *Menasha* decision. The entire definition of "prewritten software" is set forth in Wis. Stat. § 77.51(10r):

> "Prewritten computer software" means computer software, including prewritten upgrades, that is not designed and developed by the author or other creator to the specifications of a specific purchaser. The combining of 2 or more "prewritten computer software" programs or prewritten portions of computer software does not cause the combination to be other than "prewritten computer software." "Prewritten computer software" includes software designed and developed by the author or other creator to the specifications of a specific purchaser if it is sold to a person other than the specific purchaser. For purposes of this subsection, if a person modifies or enhances computer software of which the person is not the author or creator, the person is the author or creator only of the person's modifications or enhancements. "Prewritten computer software" or a

> prewritten portion of computer software that is modified or enhanced to any degree, with regard to a modification or enhancement that is designed and developed to the specifications of a specific purchaser, remains "prewritten computer software," except that if there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for the modification or enhancement, the modification or enhancement is not "prewritten computer software."

***Comment*:** the statute (§ 77.51(10r)) contains an important exception for modifications or enhancements to prewritten software that are designed to the specifications of a specific purchaser if there is a "reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for the modification or enhancement." The Department says that the exception "is limited to modifications or enhancements that consist of writing program code to enable software to perform functions not available in the existing prewritten software. Examples of services that are not considered modifications or enhancements … include reconfiguration of start-up information, reinstallation of functions inadvertently deleted, and adding new program code to repair existing functions." See "Wisconsin Tax Treatment of Computer Software," n. 5, at http://www.revenue.wi.gov/taxpro/news/100421.pdf.

In any event, potentially qualifying taxpayers should be especially careful to take steps to meet the "reasonable, separately stated" exception.

- The Department of Revenue has published guidance with respect to the sales and use tax treatment of software maintenance contracts before and after the March 6, 2009 effective date. According to the Department, "the tax treatment of a computer software maintenance contract follows the tax treatment of the purchase of the software to which the contract relates." For example, if a person purchased software prior to the March 6, 2009 effective date that at the time was not taxable, a maintenance contract for that software would not be taxable, "regardless of whether the maintenance contract is purchased before or after March 6, 2009." *Sales and Use Tax Report*, p. 2 (March 2009). In addition, the Department says that when a maintenance contract for taxable software includes both taxable and non-taxable products and services, the tax treatment depends in part on whether the contract was sold prior to October 1, 2009. For those types of contracts sold prior to that date, the Department says that "the entire charge … is taxable unless it is determined by the department that another method, such as allocation or primary purpose, more accurately reflects the tax." For contracts sold on or after that date, the entire sales price is taxable "unless, at the retailer's option, the retailer can identify by reasonable and verifiable standards from the retailer's books and records that are kept in the ordinary course of business for other purposes, including purposes unrelated to taxes, the portion of the price that is attributable to products or services that are not subject to the tax. That portion of the sales price is not taxable." *Sales and Use Tax Report*, p. 2 (March 2009). The Department has posted a chart to its website (at http://www.revenue.wi.gov/taxpro/news/100421.pdf) summarizing the sales and use tax

treatment of computer software, and related maintenance contracts, before and after the March 6, 2009 effective date.

- The Department of Revenue has ruled that the sale of access to a web-based logistical management services system is not subject to Wisconsin sales or use tax. According to the ruling, the taxpayer provides its customers with web-based inbound/outbound logistical management services, which operate through the Internet on a per-transaction, multiple-user basis. The taxpayer's customers are not required to purchase or install on their computers any of the taxpayer's software or hardware, and the taxpayer's software is not installed on any customer computer. The customers "log in to the system to manage their overall transportation function, including bench marking and transportation services." Based on these and other facts, the Department ruled that the activity was analogous to non-taxable time sharing services under Wis. Admin. Code § Tax 11.71(3). The Department also ruled that, under the facts, related implementation, consulting and training were not taxable. Private Letter Ruling W0921002 (March 6, 2009), Wis. Tax Bull. No. 163, pp. 8-10 (July 2009).

- In Private Letter Ruling W1025002 (March 24, 2010), Wis. Tax Bull. No. 168, pp. 13-16, the Department ruled that, under the facts described in the ruling, a variety of fees relating to an account management system which could be accessed by subscribers were not subject to Wisconsin sales or use tax. The fees (described in detail in the ruling) were labeled set up, training, data migration, forms programming, and application service fees.

Department of Revenue Guidance:
Taxable and Non-Taxable Computer
Hardware, Software and Services
(Including SaaS, PaaS and IaaS)

The Department of Revenue has published an extensive list of what it considers to be taxable and non-taxable computer hardware, software and services. See "Sales and Use Tax Treatment: Computer Hardware, Software, Services" (updated January 25, 2013): http://www.revenue.wi.gov/faqs/pcs/computerc.html. And see Wis. Admin. Code § Tax 11.71.

The Department says that the following are ***taxable***:

- Installation and setup of computer hardware
- Installation of hardware devices (including printers, hard drives, modems, monitors, etc.)
- Installation of prewritten computer software
- Configuration of prewritten computer software
- Online or on-site troubleshooting hardware problems
- Online or on-site troubleshooting of prewritten computer software
- Setting up hardware and prewritten computer software on a network
- Inspecting, servicing, or repairing prewritten computer software via modem
- Installation of prewritten computer software
- Inspection of hardware and prewritten computer software

- Consulting and design services provided in connection with the sale of computer hardware and prewritten computer software
- Internet access services, when the sale of the service is sourced to Wisconsin
- Installation or hook-up charges relating to Internet access services when the Internet access services are sourced to Wisconsin
- Sales of textbooks and manuals, whether furnished to the purchaser as tangible personal property or as a digital good
- Photographic services

The Department says that the following are ***non-taxable***:

- Writing computer software other than prewritten computer software
- Making modifications or enhancements to prewritten computer software that are designed and developed to the specifications of a specific purchaser, and the person making the modifications or enhancements provides a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for the modification or enhancement
- Installing computer software other than prewritten computer software
- Updating computer software other than prewritten computer software
- Training people on how to use software or hardware
- Writing queries of databases
- Designing screens, forms, reports, or menus
- Answering questions
- Reformatting data
- Data migration
- Data conversion
- Data recovery
- Making backups of data files
- Network assessment services that consist of network analysis and evaluation unrelated to a specific hardware or software problem and unrelated to the sale of computer hardware or computer software
- Hosting websites (that is, the storing of data on a computer) without selling any tangible personal property or any digital good
- Domain name registration and site maintenance/update services, if no tangible personal property or digital good is transferred or taxable service performed
- Designing websites and home pages, if the service is not primarily a photographic service. Whether the completed website design is transferred to the customer electronically (i.e., accessed or obtained by the purchaser by means other than tangible storage media), or transferred using a tangible storage medium (e.g., a CD), the charge for the website design work is not subject to tax
- Website database charges
- Charges for providing advertising or listing space on a website
- Access services that will be resold
- Training on how to use the Internet

The guidance also addresses services which permit persons at different locations to access the same prewritten computer software through remote access by telephone lines, microwave, or other means (sometimes referred to as "cloud computing" or "software as service" or "SaaS"). The Department says that these services are non-taxable when (a) the persons or the persons' employees who have access to the prewritten computer software are not located on the premises where the equipment/software is located and do not operate the equipment or control its operation, and (b) prewritten computer software that is downloaded or physically transferred to the customer or the customer's computers is incidental to the data processing services (that is, used solely to allow access to the service provider's hardware and software). The guidance contains the following helpful example:

> Company A, an Application Service Provider (ASP), provides access to its software. The software is stored on Company A's servers and the customer accesses the software via the Internet. Customers that contract with Company A have access to Company A's servers, but do not operate or have control over the servers. Company A has control over the computer hardware and software, loads the software onto the server, and is responsible for security measures regarding the computer equipment (file server) and software. In order for Company A's customers to access the hardware and software, the customers must use a client utility program that they download from Company A. Company A is providing a data processing service, which is not subject to Wisconsin sales and use tax, regardless of whether the server is located in Wisconsin or outside Wisconsin. Data processing services are not among the services subject to Wisconsin sales and use tax.

The guidance also addresses when other transactions, sometimes referred to as "Infrastructure as a Service" ("IaaS") and "Platform as Service" ("PaaS") are and are not taxable.

Chapter 6

Calculating Taxable Gross Receipts

Section 6.1. Segregating Taxable from Non-taxable Receipts.

Important Streamlined Sales and Use Tax Change
Effective October 1, 2009

"Bundled Transactions"

It is common for parties to engage in a transaction where one or more "taxable" items are bundled together with one or more "non-taxable" items. The issue, in general, is whether the entire transaction is taxable, whether it is completely non-taxable, or whether an allocation must be made on some basis. These situations can involve mixtures of taxable and non-taxable property or a mixture of taxable and non-taxable services. Sometimes taxpayers separately state the charges for the various components; sometimes they do not. (Please note that transactions also often involve the transfer of property with services; these are sometimes analyzed under a different set of tax rules, involving the question of whether property is "incidental" to a service. For purposes of simplicity, this section on "bundled" transactions does not address those situations.)

It was not entirely clear, under pre-Streamlined law, how typical "bundled" transactions were treated. In certain narrow situations, the statutes dictated the result. For example, with respect to prepackaged food items that contained a combination of taxable and exempt food, Wis. Stat. § 77.54(20m) provided (prior to its repeal on October 1, 2009):

> The gross receipts from the sales of, and the storage, use or other consumption of, food, food products or beverages and of other goods that are packaged together by a person other than a retailer before the sale to the final consumer if 50% or more of the sales price of the package is attributable to goods that are exempt.

Outside the above narrow context, in situations where a single charge was made, the Department sometimes stated that taxpayers could apply a "primary purpose" test that resulted in the transaction being entirely taxable or non-taxable based on the primary purpose of the buyer, or, in some situations, the seller. The Department also at times said that the seller had the authority to perform a reasonable allocation based on the respective costs of the items to the seller. In addition, Wis. Admin. Code § Tax 11.67(2)(c) (prior to October 1, 2009) said (as to bundled transactions involving services):

(c) If there is a single charge for providing both taxable and non-taxable services, the entire charge is subject to the tax, unless it is determined by the department that another method, such as allocation or primary purpose of the transaction, more accurately reflects the tax. If the charges for taxable and non-taxable services are separately stated on an invoice, the tax applies only to the charge properly attributable to the taxable services, unless it is determined by the department that the primary purpose of the transaction method for computing the tax more accurately reflects the tax.

Another issue was how to treat situations where a retailer transferred a "free" item of tangible property to a purchaser in conjunction with the customer's required purchase of other tangible property. According to the Department of Revenue, prior to the October 1, 2009 effective date, retailers were (a) considered to have made a retail sale of property they transferred to purchasers who were "required" to purchase other property in order to obtain the free item and (b) entitled to purchase the "free" items tax-free, for resale. See *Sales and Use Tax Report*, p. 7 (Dec. 2009).

The Streamlined provisions contain detailed rules with respect to "bundled" transactions.

a. The general rule is that tax applies on the entire sales price of products comprised of exempt items that are bundled with taxable items by the seller. See Wis. Stat. § 77.52(20).

b. There is, however, a major exception: if the retailer can identify, by reasonable and verifiable standards from the retailer's books and records, the portion of the price that is attributable to the non-taxable products, that portion of the sales price is non-taxable. *Id.* For an example of the application of this rule with respect to the Wis. Stat. § 77.54(46) exemption for the American flag or Wisconsin flag, when sold as part of flag "kits," see the Department Tax Release posted at http://www.revenue.wi.gov/taxpro/news/101108b.html and available at Wis. Tax Bull. No. 170, pp. 7-8 (Jan. 2011).

c. There also is an exception for transactions in which the value of the taxable products is no greater than 10% of the value of all the bundled products. Wis. Stat. § 77.51(1f). For an example of the Department's application of the new 10% rule with respect to summer camps, see **Section 4.11** of this *Interim Update*.

d. And there is an exception for certain goods packaged and sold together containing food and food ingredients, drugs, durable medical equipment, mobility enhancing equipment, prosthetic devices, or medical supplies if the value of the non-taxable items is at least 50% of the value of all the tangible personal property included. This rule is similar to the rule in existence prior to the effective date of Streamlined for bundled food packages, pursuant to Wis. Stat. § 77.54(20m). *Id.* For an example of the application of the 50% rule in the context of the sale of gift baskets that include food products, see the Tax Release posted by the Department of Revenue (On May 7, 2012) at: http://www.revenue.wi.gov/taxpro/news/120507c.html. For other examples of the

application of the 50% rule, see Wis. Tax Bull. No. 174, p. 10 (Jan. 2012) (home brewing kits), Wis. Tax Bull. No. 175, p. 19 (April 2012) (contact lens travel kits); and Private Letter Ruling W1249001 (Sept. 18, 2012), Wis. Tax Bull. No. 178, pp. 14-17 (Jan. 2013) (a kit containing and used to mix an exempt "drug" and an exempt "prosthetic device").

e. With respect to situations where a product is provided "free" to a purchaser in conjunction with the required purchase of another product, the Streamlined provisions, as initially enacted (and prior to an important change, described below, that is effective September 1, 2011), appeared to say that the seller was the consumer of that "free" item (i.e., not a reseller), and thus required to pay a use tax on its purchase price. See Wis. Stat. § 77.51(1f)(intro.) (defining "bundled transaction" to mean the retail sale of 2 or more "distinct and identifiable products"); § 77.51(3pf)(b) (providing that a "distinct and identifiable product" does *not* include a product provided free of charge in conjunction with the required purchase of another product, if the sales price of the other product "does not vary depending on whether the product provided free of charge is included in the transaction"); and § 77.52(21) (providing that a person who provides a product that is not a distinct and identifiable product is the consumer of the product and "shall pay the tax imposed under this subchapter on the purchase price of that product"). Thus, for example, the Department's view was that if a retailer engaged in a "buy one, get one free" sale, it would owe use tax on its cost of the item transferred for "free." And see *Sales and Use Tax Report*, pp. 7-9 (Dec. 2009) (providing the Department's views on this change, and including additional examples involving transactions involving a mix of taxable and non-taxable property, and transactions that straddle the October 1, 2009 effective date); Wis. Admin. Code § Tax 11.985 ("Bundled Transactions"); and **Section 8.3** of this *Interim Update*, summarizing a recent private letter ruling involving transfers by a hotel to its guests of "free" admissions to a water park. This was a significant and controversial change from the law as in effect prior to October 1, 2009. On December 14, 2010, the Department posted a Tax Release to its website, containing 20 examples with respect to common buy one, get one free transactions, as well as similar type situations (such as receiving "free" products in redemption of "points," and a car dealer's provision of a loaner in connection with repair service). The examples provided helpful guidance with respect to the Department's views on the types of situations that would (and would not) result in items being considered as provided for "free," prior to the September 1, 2011 law change discussed below. In most cases, taxpayers could, with proper and detailed planning, structure these types of transactions to obtain the same type of result as under pre-October 1, 2009 law. Still, however, complexities and ambiguities remained, and the area was a trap for the unwary.

Finally, effective September 1, 2011, it appears that the controversy on this issue has ended, at least in most cases. That is because, effective that date, the Legislature enacted Wis. Stat. § 77.52(21)(b), providing that:

> A person who provides a product that is not distinct and identifiable because it is provided free of charge to a purchaser who must also purchase another product that is subject to the tax imposed under this subchapter from that person in the same transaction may purchase the product provided free of charge without tax, for resale.

This statutory change applies only to situations where the product that is sold is subject to Wisconsin sales or use tax. In its January 2012 Tax Bulletin, the Department published a lengthy Tax Release, setting forth its views with respect to 22 common buy one, get one free type transactions under the laws in effect (a) prior to October 1, 2009; (b) on and after October 1, 2009 and before September 1, 2011; and (c) on and after September 1, 2011. The examples include situations where the retailer sells only taxable products, sells only non-taxable products, and sells a mix of taxable and non-taxable products. The Department also addresses "transition" issues with respect to items purchased by retailers prior to the law changes but provided afterwards. Tax Release, Wis. Tax Bull. No. 174, pp. 17-27 (Jan. 2012); see also Wis. Admin. Code § Tax 11.28(3)(c)1.a. (Example), ag., and ar.

Note: In the December 1, 2011 edition of this *Interim Update*, the authors raised a question concerning the relationship between the September 1, 2011 statutory change and the longstanding "incidentality" rules. Take, for example, the case of a hotel, which provides taxable lodging to its guests, together with complementary soaps and shampoos. Under the "incidentality" rules, the soaps and shampoos are normally considered to be "incidental" to the provision of the lodging, meaning that the hotel owes sales or use tax with respect to its purchase of those items. The authors raised the question as to whether, under the September 1, 2011 statutory change, the hotel could purchase those items for resale (i.e., without tax). A similar analysis applies in numerous other situations, such as in the case of a baseball team that sells taxable admissions, and purchases items that it gives away in connection with the admissions. In the January 2012 Tax Release cited in the above paragraph, the Department addressed these types of situations, concluding that (in its view) the incidentality rules, and not the September 1, 2011 change, govern (see Examples 21 and 22).

Section 6.5. Gross Receipts of Lessors.

- The Department has issued guidance to the effect that separate and optional charges for motor vehicle fuel (including the cost of the fuel, mark-up and overhead) by a rental car company to a person who rents a motor vehicle are not subject to Wisconsin sales and use tax if the proper excise taxes were paid by the rental car company to the motor vehicle fuel supplier. Wis. Tax Bull. No. 174, p. 13 (Jan. 2012).

- The Department of Revenue has revised Publication 410, *Local Exposition Taxes* (Feb. 2014) to "clarify" that separate and optional insurance charges are not subject to the Exposition rental car tax.

Section 6.6. Advance Payments.

- The Department of Revenue has issued guidance to the effect that "layaway" charges are included in the selling price of merchandise for purposes of computing Wisconsin sales or use tax. *Sales and Use Tax Report*, p. 12 (Dec. 2009).

- The Department has published advice to the effect that the sale of discount/membership cards is (a) fully taxable, if the underlying retailer sells only taxable property or services; (b) fully non-taxable, if the retailer sells only non-taxable property or services; and (c) partially taxable, to the proportionate extent purchases eventually made by the customer are taxable. With respect to (c), the Department says that unless the retailer can prove the percentage of taxable purchases, the sale of the discount/membership will be fully taxable, and that if the retailer does not know the taxable percentage at the time the card is sold, it "may" charge tax on the entire sales price for the card. The Department also says that sale of cards is not taxable if the purchaser provides a fully-completed "continuous" exemption certificate, or if the purchaser is an exempt entity that documents its exempt status in the specified manners. *Sales and Use Tax Report*, p. 3-4 (March 2011).

Section 6.7. Discounts, Refunds, Patronage Dividends, Certificates, Stamps, Coupons and Rebates.

"Deal of the Day"
Certificates and Vouchers

The Department of Revenue has published a Tax Release that addresses the Wisconsin sales and use tax treatment of discounted certificates and product vouchers. The basic fact pattern involves what are commonly referred to as "deal of the day" certificates or vouchers. The Department summarizes the background relating to these transactions as follows:

> A merchant enters into an agreement with a promotional company: (1) to have that promotional company sell, at a discount from face value, certificates that may be redeemed for the face value of the certificate when purchasing goods or services from that merchant or (2) to have that promotional company sell vouchers that may be redeemed for a particular good or service that is furnished by the merchant to the holder of the voucher. In either situation, the retailer can identify the amount for which the certificate or voucher was sold to the customer.

> These certificates and vouchers: (1) are commonly advertised on various web sites, (2) are e-mailed to persons who have agreed to receive such e-mails, and (3) are often referred to as "deal of the day" certificates or vouchers. A person desiring to purchase the certificate or voucher does so by contacting and paying the promotional company and not the issuing merchant. The purchaser then presents the certificate or voucher to the issuing merchant in exchange for goods or services from that merchant, as indicated on the certificate or voucher.

The Department concludes that the promotional company's sale of the certificate is not subject to sales or use tax, as the sale of the certificate "is the sale of [a non-taxable] intangible right." The Department also says that the merchant that accepts the certificate has receipts from the sale of goods or services in an amount equal to the amount for which the certificate was sold by the promotional company (plus any additional amounts it receives from the person using the certificate as payment for the goods or services purchased). The Department then concludes that the merchant's sales price includes all consideration received by the merchant for the sale, "without deduction for any expenses incurred by the merchant and paid to the promotional company for its services of advertising and selling the certificates." The Department provides the following example:

> Promotional Company sells a certificate with a face value of $50 to Customer for $30. Under the terms of the agreement between Merchant and Promotional Company, Promotional Company is obligated to remit $15 of the $30 it collected from Customer to Merchant. Promotional Company keeps the remaining $15 in return for the advertising and promotional services it provides to Merchant under the agreement. Customer goes to Merchant's store and selects clothing with a retail selling price of $99.99. Customer pays for the clothing by presenting the $50 certificate and using a credit card to pay $49.99.
>
> Merchant's taxable receipts from this sale are $79.99 ($30.00, the amount for which Customer purchased the certificate, plus $49.99, the additional amount Customer paid Merchant), and Merchant is liable for Wisconsin state, Milwaukee County, and baseball stadium sales tax of $4.48 ($79.99 x 5.6%). The $20 difference between the face value of the certificate ($50) and the $30 Customer paid for the certificate is a discount allowed by Merchant and is not included in the measure subject to Wisconsin sales or use tax.
>
> Promotional Company's receipts ($30) from its sale of the certificate to Customer are not subject to Wisconsin sales or use taxes.

Wis. Tax Bull. No. 176, pp. 8 - 10 (Aug. 2012).

The state sales and use tax treatment of "deal of the day" vouchers across the country is not uniform. For a 2012 multistate survey, see the material posted to the Streamlined Sales and Use Tax website at:

http://www.streamlinedsalestax.org/uploads/downloads/SLAC%20Meeting%20Materials/2012/SL12004%20Sales%20Price%20Deal%20Vouchers%20Survey%202012.pdf

http://www.streamlinedsalestax.org/uploads/downloads/SLAC%20Meeting%20Materials/2012/SL12005%20Sales%20Price%20deal%20voucher%20survey%20comments.pdf

- In Private Letter Ruling W1113001 (March 30, 2011), Wis. Tax Bull. No. 172, pp. 32-33 (July 2011), the Department addresses a situation where a seller provides discounts on merchandise sold to persons who host events at which orders for the company's merchandise are placed by others, with the discounts provided to the host being based on the number of orders taken at the sales event. The Department concludes that the discounts provided to the host are not part of the "sales price" or "purchase price" of the property, since they are provided directly by the seller and are not reimbursed by a third party.

- In *Suiter v. Dep't. of Revenue*, Docket No. 08-S-121-SC (WTAC Oct. 31, 2008), the Tax Appeals Commission, citing Wis. Admin. Code § Tax 11.28(6), ruled that a taxpayer could not reduce the use tax base with respect to a purchased motor vehicle by the amount of a direct-to-dealer rebate. The Commission also declined the taxpayer's request to waive interest (due, according to the taxpayer, as a result of an "honest mistake made by someone else" in handling the vehicle registration). The Commission said that the assessment of interest is mandatory and not reviewable by the Commission.

- The Department of Revenue has posted guidance on its website (at http://www.dor.state.wi.us/taxpro/news/090723.html) to the effect that the stated amount of the electronic voucher applied by a car dealer under the "CARS" (sometimes called the "cash for clunkers") program as payment towards a person's purchase of a new fuel efficient vehicle is not subject to Wisconsin sales or use tax.

Section 6.10. Reduction of Gross Receipts for Taxes Payable by Seller.

- Effective July 2, 2013, the Legislature amended the definitions of "sales price" and "purchase price" to provide that they do not include "taxes imposed on the seller that are separately stated on the invoice, bill of sale, or similar document that the seller gives to the purchaser if the law imposing or authorizing the tax provides that the seller may, but is not required to, pass on to and collect the tax from the user or consumer." 2013 Wis. Act 20. The Department says that, as a result of this amendment, (a) the *State* Universal Service Fund (USF) fee is no longer included in the retailer's taxable sales price; but (b) the federal excise tax imposed on the first retail sale of heavy trucks and trailers under I.R.C. § 4051 is included in the retailer's taxable sales price. The Department also notes that the *Federal* USF fee continues to be included in the retailer's taxable sales price. *Sales and Use Tax Report*, p. 2 (Dec. 2013); Wis. Tax. Bull. No. 182, pp. 4-5 (Oct. 2013).

- Effective June 8, 2011, the Legislature repealed Wis. Stat. § 77.52(4) which had provided that it was a misdemeanor for a retailer to advertise it would assume or absorb the sales tax. 2011 Wis. Act 18. A retailer that advertises that the sales tax will be assumed by the retailer or not added to the sales price is still responsible for paying the applicable sales tax to the Department.

- The Legislature enacted "police and fire protection fees," effective September 1, 2009. See **Section 1.1**.

- The Department has published a reminder that if the motor vehicle fuel or alternate fuel tax under Wis. Stat. Ch. 78 is refunded because the buyer does not use the fuel to operate a motor vehicle upon public highways, the fuel becomes subject to Wisconsin use tax unless another exemption applies (e.g., use in farming). *Sales and Use Tax Report*, p. 4 (Sept. 2009).

Section 6.11. Transportation Charges.

On June 28, 2011, the Department of Revenue posted a Tax Release to its website, addressing the question of *where* a multistate sale of tangible personal property takes place, under the law in effect both before and after the adoption of the Streamlined sourcing provisions, effective October 1, 2009. The Tax Release includes six examples, addressing a variety of situations where the buyer or seller hires either a common or contract carrier to perform the delivery, and where a buyer's own employee picks up the property from the seller's location. In the examples involving the use of a *common carrier* (regardless of whether retained by the seller or buyer), or a *contract carrier* retained by seller, or the buyer's own employees, the results are the same both before and after the adoption of the Streamlined provisions. The result is different, however, in the examples involving delivery by a "contract carrier" retained by the purchaser. In those situations, prior to October 1, 2009, the sale occurred at the location where the contract carrier took possession of the property from the seller. On and after October 1, 2009, however, the sale occurs where the buyer receives the property from the contract carrier, even when the contract carrier is retained by the buyer. See Examples 1 & 2. The Tax Release is available at http://www.dor.state.wi.us/taxpro/news/110620.html. It should be emphasized that these examples deal with the question of *where* a sale takes place, and do not deal with the issue of when *delivery charges* are includible in the sales price or purchase price for property. With respect to delivery charges, see Wis. Admin. Code § Tax 11.94 and Section 6.11 of *The Complete Guide*.

Section 6.12. Handling, Installation and Other Charges.

- The Department of Revenue has ruled that "swipe fees" that retailers charge a customer using a credit card are part of the sales price for the item in question. If the credit card is used to pay for both taxable and non-taxable items, the retailer may allocate the swipe fee between the taxable and non-taxable components. For example, if a customer purchases $65 of items from a grocery store, consisting $28 in taxable items and $37 in exempt food, and the retailer also charges a 2% swipe fee, the taxable sales price would be $28.56 (consisting of the $28 sales price plus the 2% swipe fee relating to those items (.02 x $28)). Wis. Tax Bull. No. 179, pp. 4-5 (April 2013).

- In Private Letter Ruling W1009007 (Dec. 4, 2009), Wis. Tax Bull. No. 166, pp. 18-19 (May 2010), the Department of Revenue ruled that a fee paid by a borrower for a lender's

agreement to cancel a part of a note (relating to the purchase of an automobile) is not subject to Wisconsin sales or use tax.

- The Department of Revenue has ruled that the charge for the "rental" of a cylinder used to transfer gas that is tax-exempt is also exempt if the cylinder is retained by the customer for a period of 30 days or less. The Department considers the "rental charge" – even if it is separately stated and invoiced on a different date – to be part of the seller's gross receipts from the sale of the natural gas. The Department's guidance cautions that this treatment only applies to cylinders that are used to transfer exempt gas from the vendor's location to the customer's location. The ruling also discusses certain situations where the "rental" will be considered separate from the sale of the gas. *Sales and Use Tax Report*, p. 2 (Dec. 2008).

- The Department has ruled that certain "facilities," "customer," or "fixed" charges made by utilities when selling fuel and electricity to customers are includible in the "gross receipts" and "sales price" of the fuel and electricity for Wisconsin sales and use tax purposes. According to the ruling, these charges are made by the utilities to collect their "fixed" costs (including a return on the utilities' investments in their meters), are not for the rental of equipment (as the customer "does not have control of the equipment"), and are separately stated on the bills. The significance of the ruling is that the specified charges are includible in the sales and use tax base from the sale of electricity and fuel and thus are eligible for the Wis. Stat. § 77.54(30)(a)6. exemption, which became effective January 1, 2006, for the sale of "fuel and electricity consumed in manufacturing tangible personal property…." In addition, these charges would have qualified (as part of the sale of fuel and electricity) for the Wis. Stat. § 71.28(3)(b) income or franchise tax credit as it existed for taxable years beginning before January 1, 2006. Wis. Tax. Bull. No. 158, pp. 12-13 (Oct. 2008).

- The Department of Revenue has stated that a taxpayer's charge for expense reimbursements is included in its selling price of tangible personal property or taxable services, regardless of whether the expense reimbursements are separately stated on the taxpayer's invoice to its customer. The Department says that if the property or service is taxable, the amount of the expense reimbursement is taxable, but if the property or service sold is not taxable, the reimbursement is not taxable. Private Letter Ruling W0907003 (March 6, 2009), Wis. Tax Bull. No. 163, pp. 8-10 (July 2009) (citing as authority Wis. Stat. § 77.51(4)(a)2). But compare the conclusion of the Kansas Court of Appeals that expense reimbursements are not part of the sale of the property, and thus not taxable. In *the Matter of the Appeal of Cessna Employees Credit Union*, No. 105,139 (Kansas Ct. App. April 6, 2012).

Section 6.13. Warranties, Insurance and Maintenance Charges.

- In a recent private letter ruling, the Department of Revenue addresses the sales and use tax treatment of charges for an automobile "lease excess wear protection waiver" ("LEWP"). According to the ruling, the charge for the LEWP is an optional charge that

allows a customer to pay a predetermined amount for excess wear and tear in lieu of the actual wear and tear charges that would otherwise be due at lease termination. The customer has the option of either paying for the LEWP at lease signing or capitalizing the cost into monthly lease payments. If the amounts are capitalized into the lease, they are not separately stated on the monthly lease invoices. The Department ruled that the charges for the LEWP are not subject to Wisconsin sales and use tax, because the LEWP constitutes "insurance" (and not a warranty) for Wisconsin sales and use tax purposes (and this is true even if the LEWP is not considered insurance for insurance regulatory purposes). The Department adds that if the LEWP is capitalized into the monthly lease payments, an allocation of the monthly lease payment must be made to reflect the taxable portion of the lease payment and the "exempt" portion of the lease payment. Private Letter Ruling W1333001 (May 17, 2013), published in Wis. Tax. Bull. No. 182, pp. 7-9 (Oct. 2013).

- A Tax Release discusses the Department of Revenue's views on the sales and use tax treatment of home warranty contracts. The Tax Release addresses the sales and use tax treatment of (a) the initial charge for the contract; (b) the amount paid to a contractor to perform repairs under the contract; (c) the contractor's charge to the homeowner for any deductible; and (d) the amounts paid by the contractor for materials that it purchases in performing the contract. Tax Release, Wis. Tax Bull. No. 181, pp. 4-5 (August 2013).

Section 6.14. Exchanges, Trade-ins and Other Non-Monetary Consideration.

- The Department has again stated that the transfer of property or items, property or goods in exchange for services, realty or intangibles may be subject to sales or use tax. The guidance also notes, however, the long-standing rule that the transfer of tangible personal property or items, property or goods for other tangible personal property or items, property or goods may be non-taxable. *Sales and Use Tax Report*, p. 4 (Sept. 2010).

- The Department of Revenue has published extensive guidance concerning the sales and use tax treatment of "trade-ins" and "turn-ins" of owned and leased vehicles. Tax Release, Wis. Tax Bull. No. 177, pp. 9 - 28 (Oct. 2012).

Section 6.16. Amounts Received by Seller from Third Parties.

The Department of Revenue has posted guidance on its website (at http://www.dor.state.wi.us/taxpro/news/090723.html) to the effect that the stated amount of the electronic voucher applied by a car dealer under the "CARS" (sometimes called the "cash for clunkers") program as payment towards a person's purchase of a new fuel efficient vehicle is not subject to Wisconsin sales or use tax.

Chapter 7

The Wisconsin Use Tax

Section 7.1. General Description of Use Tax.

The Department of Revenue has issued guidance to the effect that a nonresident who registers a snowmobile or ATV in Wisconsin is required to pay Wisconsin sales or use tax due on the purchase at the time the snowmobile is registered or titled in Wisconsin, including those that are registered or titled for the purpose of obtaining a trail pass from the Department of Natural Resources. The Department also says, however, that if the person has previously paid a sales or use tax that was legally due and owing to another state, the sales or use tax paid to the other state may be used as a credit against the Wisconsin tax due. The Tax Release is posted at http://www.dor.state.wi.us/taxpro/news/101220a.html (posted December 23, 2010). See also *Sales and Use Tax Report*, p. 2 (March 2011).

Section 7.2. Relationship Between Use Tax and Sales Tax.

Effective January 1, 2011, the use tax base for motor vehicle dealers for the use of motor vehicles assigned to certain employees and dealership owners increased from $138 to $139 per plate per month. *Sales and Use Tax Report*, p. 1 (Sept. 2010). The tax base increased to $144 as of January 1, 2012, and will increase to $146 as of January 1, 2013. *Sales and Use Tax Report*, p. 2 (Sept. 2012).

Section 7.4. Exceptions and Exemptions.

- Effective July 1, 2009, the Legislature has provided a credit against the use tax for sales tax paid to a federally recognized American Indian tribe or band in Wisconsin for purchases of property or services that occurred on tribal lands. The credit is to be determined "by agreement between the department and the tribal council under s. 73.03(65)." For this purpose, "sales tax" includes a use or excise tax imposed on the use of tangible personal property or taxable service by the tribe or band. 2009 Wis. Act 28, creating Wis. Stat. § 77.53(16m).

- The Department has published a reminder that if the motor vehicle fuel or alternate fuel tax under Wis. Stat. Ch. 78 is refunded because the buyer does not use the fuel to operate a motor vehicle upon public highways, the fuel becomes subject to Wisconsin use tax unless another exemption applies (e.g., use in farming). *Sales and Use Tax Report*, p. 4 (Sept. 2009).

- The Department of Revenue has again published guidance to the effect that materials are subject to Wisconsin sales or use tax if purchased or stored *in* Wisconsin, even if the materials are subsequently used in the construction of real property *outside* Wisconsin.

The Department says that the classification of an improvement as the sale of real property or tangible personal property is determined under Wisconsin law. *Sales and Use Tax Report*, p. 9 (Dec. 2009). For planning ideas to avoid this problem, see Section 13.17 (at pp. 413-414) of *The Complete Guide*.

- The Department of Revenue has issued guidance to the effect that a nonresident who registers a snowmobile or ATV in Wisconsin is required to pay Wisconsin sales or use tax due on the purchase at the time the snowmobile is registered or titled in Wisconsin, including those that are registered or titled for the purpose of obtaining a trail pass from the Department of Natural Resources. The Department also says, however, that if the person has previously paid a sales or use tax that was legally due and owing to another state, the sales or use tax paid to the other state may be used as a credit against the Wisconsin tax due. The Tax Release is posted at http://www.dor.state.wi.us/taxpro/news/101220a.html (posted December 23, 2010). See also *Sales and Use Tax Report*, p. 2 (March 2011).

Section 7.10. Measure of Use Tax.

Important Streamlined Sales and Use Tax Change
Effective October 1, 2009

Repeal of "Six Month" Rule

In some situations, a purchaser may acquire property, treating the transaction as non-taxable (such as a purchase for resale), but later use the property in a taxable manner. The sales and use tax question is whether the purchaser owes use tax based on the cost (sales price) of the property when initially acquired, or the fair market value of the property (which is often lower) at the time of first use, or some other value. Under pre-Streamlined law, the use tax base was the cost of the property, unless the first use occurred more than 6 months after the purchase, in which case the purchaser could base the tax either on the sales price or the fair market value of the property at the time of first use. Under the new Streamlined provision, the 6 month rule has been repealed, with the result that the tax base will be the purchaser's purchase price. 2009 Wis. Act 2, § 486, amending Wis. Stat. § 77.57.

Section 7.11. Credit for Out-of-State Taxes.

- On April 11, 2011, the Department posted two Tax Releases to its website, relating to the Wis. Stat. § 77.53(16) credit for sales or use taxes paid to another state. One of the Tax Releases relates to a situation where a Wisconsin customer brings tangible personal property (a computer) to a retailer in another state to have the computer repaired, and the customer then brings the repaired computer back to Wisconsin. In the Tax Release, the other state imposes sales tax on the repair parts, but not the labor. The Department concludes that the sales tax paid to the other state on the parts is creditable against the Wisconsin use tax, which is due on the total price paid for the parts and labor. In the other Tax Release, the Department addresses a situation where a non-Wisconsin

contractor purchases and stores materials in its home state, and then performs a contract with those materials in Wisconsin. The contractor's home state considers the activity to be a real property construction activity, and requires the contractor to pay sales or use tax on its purchase of the materials (the contractor being considered to be the end of the selling chain). Wisconsin, on the other hand, considers the activity to be a tangible property improvement and requires the contractor to charge sales tax based on the total charge made to its customer. The Department concludes that the contractor may claim a credit against its Wisconsin tax due the sales tax paid to the contractor's home state with respect to purchase of the materials. The Tax Releases are available at http://www.dor.state.wi.us/taxpro/news/110411.html and http://www.dor.state.wi.us/taxpro/news/110411a.html.

- The Department has published extensive guidance as to whether and when sales and use taxes paid to other states and their local units of government are creditable against Wisconsin state and local sales and use taxes. An important part of the guidance is that the Department has reversed its long-standing position that, in general, sales and use taxes paid to another *state* are creditable only against Wisconsin *state* sales tax (and not *local* Wisconsin taxes), and sales and use taxes paid to *local* units of government in other states are creditable only against similar Wisconsin *local* sales and use taxes (and not against *state* tax). Tax Release, Wisconsin Tax Bull. No. 157, pp. 28-49 (July 2008). The Tax Release supersedes the Tax Releases published in Wis. Tax Bull. No. 75, p. 17 (Jan. 1992) ("Credit for Sales Tax Paid in Minnesota") and Wis. Tax Bull. No. 100, p. 29 (Jan. 1997) ("Credit for Sales and Use Taxes Paid to Other States and Local Units of Government"). The Department says that the tax treatment in the new Tax Release applies for all periods open to adjustment under the statute of limitations – which may provide refund opportunities for certain taxpayers. In the Tax Release, the Department does repeat its prior positions that (a) no Wisconsin sales or use tax credits (state or local) are available for taxes improperly paid to another state (such as when tax is paid to that other state when the transaction is not taxable by that state) (Question 11, pp. 42-43) and (b) Wisconsin sales and use tax credits may not be claimed for other states' taxes that are imposed *after* Wisconsin's taxes are imposed (Question 12, p. 43).

Section 7.12. Seller's Obligation to Collect Use Tax.

Important Streamlined Sales and Use Tax Change
Effective October 1, 2009

Prior to adoption of the Streamlined provisions, Wis. Stat. § 77.53(3) stated that:

> (3) Every retailer engaged in business in this state and making sales of tangible personal property or taxable services for delivery into this state *or with knowledge directly or indirectly that the property or service is intended for storage, use or other consumption in this state*, shall, at the time of making the sales or, if the storage, use or other consumption of the tangible personal property or taxable service is not then taxable under this section, at the time the storage, use or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt in the manner and form prescribed by the department.

(emphasis supplied).

The part of the statute that said "with knowledge directly or indirectly that the property or service is intended for storage, use or other consumption in this state" caused serious problems for some sellers. For example, in *Palmer Johnson, Inc. v. Dep't. of Revenue*, Docket No. S-8308, Wis. Tax Rep. (CCH) ¶ 202-277 (WTAC Sept. 26, 1983), the taxpayer delivered a yacht to a Michigan location, with its crew receiving a ride back to Wisconsin from the buyer. The Department argued that Palmer Johnson should have collected Wisconsin use tax on the yacht, even though the yacht was delivered in Michigan, and the Tax Appeals Commission agreed. The Department has applied the statute in a variety of other contexts, where the property, for one reason or another, ends up back in Wisconsin.

The Legislature has repealed the problematic part of § 77.53(3). Effective October 1, 2009, the statute now reads:

> **(3)** Every retailer engaged in business in this state and making sales of tangible personal property, or items, property, or goods under s. 77.52 (1) (b), (c), or (d), or taxable services that are sourced to this state under s. 77.522, shall, at the time of making the sales, collect the tax from the purchaser and give to the purchaser a receipt in the manner and form prescribed by the department.

Chapter 8

Sales and Use Taxes on Services

Section 8.2. Taxable Services – Wisconsin Use Tax.

On April 11, 2011, the Department posted two Tax Releases to its website, relating to the Wis. Stat. § 77.53(16) credit for sales or use taxes paid to another state. One of the Tax Releases relates to a situation where a Wisconsin customer brings tangible personal property (a computer) to a retailer in another state to have the computer repaired, and the customer then brings the repaired computer back to Wisconsin. In the Tax Release, the other state imposes sales tax on the repair parts, but not the labor. The Department concludes that the sales tax paid to the other state on the parts is creditable against the Wisconsin use tax, which is due on the total price paid for the parts and labor. In the other Tax Release, the Department addresses a situation where a non-Wisconsin contractor purchases and stores materials in its home state, and then performs a contract with those materials in Wisconsin. The contractor's home state considers the activity to be a real property construction activity, and requires the contractor to pay sales or use tax on its purchase of the materials (the contractor being considered to be the end of the selling chain). Wisconsin, on the other hand, considers the activity to be a tangible property improvement and requires the contractor to charge sales tax based on the total charge made to its customer. The Department concludes that the contractor may claim a credit against its Wisconsin tax due the sales tax paid to the contractor's home state with respect to purchase of the materials. The Tax Releases are available at http://www.dor.state.wi.us/taxpro/news/110411.html and http://www.dor.state.wi.us/taxpro/news/110411a.html.

Section 8.3. Rooms or Lodging.

- In Private Letter Ruling W1020001 (Feb. 19, 2010), Wis. Tax Bull. No. 168, pp. 11-13 (July 2010), the Department ruled that a hotel's purchase of admissions to an amusement park under specified "partnering contracts" were retail sales to the hotel, and not sales for resale by the hotel to its guests (even though the admissions were transferred to the guests). The Department concluded that, under the "bundling" rules in effect beginning October 1, 2009, the hotel was deemed the end user of the admissions because the admissions were furnished without charge in connection with the required purchase of lodging, and the price of the lodging did not vary depending on whether the admissions were included in the transaction. The Department also concluded the same result occurred under the law as in effect prior to October 1, 2009. For a detailed summary of the "bundling" rules, see **Section 6.1**.

- The Department of Revenue has published guidance concerning charges for campsites that also provide electricity. The Department says that, with certain exceptions, the entire charge to the customer for both the campsite and the electricity is subject to sales tax. Furthermore, the Department says that the campground provider must pay sales or use tax

on its *purchase* of the electricity, unless, with respect to the provision of electricity to the campground's customer, there is a "separate and optional" charge for the electricity. By "separate and optional," the Department means the customer can pay a lesser amount for the same campsite without the electricity. If the charge for electricity is "separate and optional," the campground provider may purchase the electricity tax free (for resale), although the provision of the electricity to the customer is taxable, unless an exemption applies. The Department emphasizes that if the campsite charge is to a person who uses the site as the person's primary residence, (a) the charge to the customer for the campsite is exempt from sales tax; and (b) charges for electricity during the months of November through April, and charges (at any time) for fuel oil, propane and wood, also are exempt. See: http://www.revenue.wi.gov/taxpro/news/120827.html (posted August 27, 2012).

Section 8.4. Admissions.

- The Department of Revenue has published guidance concerning charges for campsites that also provide electricity. See **Section 8.3**.

- On December 14, 2010, the Department of Revenue posted a Tax Release to its website, providing that Wisconsin sales and use tax does not apply to admissions charged for un-tethered hot air balloon rides, sightseeing flights, using an aircraft to tow a hang glider, and carrying a sky diver to an in-air jump point. The Tax Release reverses the Department's prior position that these activities are taxable (for the Department's prior views on these activities, see Wis. Admin. Code § Tax 11.84(2)(c) and Private Letter Ruling W0124006). The Department says that it has changed its position because it believes that taxing these activities would violate a federal law (49 U.S.C. § 40116) that prohibits the taxation of certain activities in "air commerce." The Department notes that its reversal of position is retroactive, covering all periods open to refund under the statute of limitations (possibly presenting refund opportunities for impacted taxpayers). The Department notes, however, that its reversal of position does not apply to tethered or moored hot air balloon rides, because those do "not travel in interstate commerce." See http://www.dor.state.wi.us/taxpro/news/101213a.html.

- The Department has published advice to the effect that the sale of discount/membership cards is (a) fully taxable, if the underlying retailer sells only taxable property or services; (b) fully non-taxable, if the retailer sells only non-taxable property or services; and (c) partially taxable, to the proportionate extent purchases eventually made by the customer are taxable. With respect to (c), the Department says that unless the retailer can prove the percentage of taxable purchases, the sale of the discount/membership will be fully taxable, and that if the retailer does not know the taxable percentage at the time the card is sold, it "may" charge tax on the entire sales price for the card. The Department also says that sale of cards is not taxable if the purchaser provides a fully-completed "continuous" exemption certificate, or if the purchaser is an exempt entity that documents its exempt status in the specified manners. *Sales and Use Tax Report,* p. 3-4 (March 2011).

- On May 5, 2010, the Wisconsin Supreme Court, applying the "due deference" standard of review, held that the Tax Appeals Commission reasonably concluded that symphony concerts, including high school and youth concerts, are primarily "entertainment" (and not educational) events within the meaning of Wis. Stat. § 77.52(2)(a)2. *Milwaukee Symphony Orchestra, Inc. v. Dep't. of Revenue*, 2010 WI 33, 781 N.W.2d 674.

- The enactment of the Streamlined Sales and Use Tax statutes has resulted in an important change with respect to the sales and use tax treatment of summer camps. See **Section 4.11**.

- Effective July 1, 2009, admissions (such as league entry fees) sold by a nonprofit organization to participate in any sports activity in which more than 50 percent of the participants are 19 years old or younger are not subject to Wisconsin sales or use tax. 2009 Wis. Act 28, creating Wis. Stat. § 77.52(2)(a)2.c.

- The Department has published guidance to the effect that charges by municipal swimming pools to enter the pool are subject to sales or use tax. The Department says this is true even if the majority of the persons using the pool are under 19 years of age, as fees to access pools are not (in the Department's view) a "sports activity" for purposes of Wis. Stat. § 77.52(2)(a)2.c. *Sales and Use Tax Report*, p. 4 (Sept. 2009).

- The Department of Revenue has posted information to its website (at http://www.revenue.wi.gov/faqs/pcs/horses.html) to the effect that the furnishing of horse trail rides is a service subject to Wisconsin sales tax as "admissions" under Wis. Stat. § 77.52(2)(a)2. See also **Section 8.12** and **Section 9.1**.

- In Private Letter Ruling W1020001 (Feb. 19, 2010), Wis. Tax Bull. No. 168, pp. 11-13 (July 2010), the Department ruled that a hotel's purchase of admissions to an amusement park under specified "partnering contracts" were retail sales to the hotel, and not sales for resale by the hotel to its guests (even though the admissions were transferred to the guests). The Department concluded that, under the "bundling" rules in effect beginning October 1, 2009, the hotel was deemed the end user of the admissions because the admissions were furnished without charge in connection with the required purchase of lodging, and the price of the lodging did not vary depending on whether the admissions were included in the transaction. The Department also concluded the same result occurred under the law as in effect prior to October 1, 2009. For a detailed summary of the "bundling" rules, see **Section 6.1**.

- The Department has stated that amounts paid to view educational seminars – either in person or via live streaming video – are not subject to Wisconsin sales or use tax. The Department states, however, that the sale of (a) a DVD recording of the seminar is taxable, as the sale of tangible personal property and (b) an electronic download of the recorded seminar via the Internet is taxable, as the sale of a digital audiovisual work. Wis. Tax Bull. No. 170, pp. 8-9 (Jan. 2011).

Section 8.5. Telecommunications Services—Introduction.

The Legislature enacted "police and fire protection fees," effective September 1, 2009. 2009 Wis. Act 28. Although the new fees are not sales or use taxes, the fees apply to certain telecommunications services that generally are subject to Wisconsin sales or use tax, and the Public Service Commission is authorized to contract with the Department of Revenue for the Department to collect the fees. The fees are (a) a monthly fee of $0.75 per assigned telephone number; and (b) a fee of $0.38 on each retail transaction for prepaid wireless plans that occur in Wisconsin. The Legislature also has enacted a new sales and use tax exemption (Wis. Stat. § 77.54(55)), stating that the above fees are not included in the sales price for sales and use tax purposes (i.e., so there is no sales or use tax on the fees themselves). For further information, see *Sales and Use Tax Report*, pp. 7-8 (July 2009); *Sales and Use Tax Report*, pp. 3-4 (July 2009); and *Sales and Use Tax Report*, p. 6 (Dec. 2010).

Section 8.6. Telecommunications Services—the Meaning of "Telecommunications Service," "Originate or Terminate in this State," and "Service Address in this State."

- The Department of Revenue has issued helpful guidance concerning the sales and use tax treatment of "Remote Deposit Capture Services" ("RDCS") provided by financial institutions to merchant customers, and certain equipment and prewritten software utilized in providing RDCS. See **Section 4.6** of this Update.

- The Milwaukee Business Journal has reported that, effective April 1, 2012, General Motors began collecting Wisconsin sales and use tax from its Wisconsin customers with respect to the "On Star" service. The issue of whether the On Star service is taxable had been pending in litigation before the Tax Appeals Commission, but the parties agreed to a settlement and the action has been dismissed. The terms of the settlement are not public. The Milwaukee Business Journal article is available at http://www.bizjournals.com/milwaukee/news/2012/03/29/sales-tax-starts-for-wisconsin-onstar.html (posted March 29, 2012).

- The Department of Revenue has posted guidance to its website to the effect that the sale of Internet access service is subject to Wisconsin sales or use tax if the customer's "place of primary use" is in Wisconsin. The Department states that although the Internet Tax Freedom Act provides a moratorium on the taxation of Internet access services until November 1, 2014, Wisconsin is exempt from the moratorium (a position that Department has taken for many years). As for "place of primary use," the Department says this is the street address representative of where the customer's use of the Internet access service primarily occurs, which must be both (a) the residential street address or the primary business address of the customer; and (b) within the licensed service area of the home service provider. The Department's guidance also contains a reminder that the Wisconsin sales and use tax applies to the purchase of taxable products purchased over the Internet – and that if the seller does not collect the tax, the buyer must report and pay the use tax to the Department. The guidance is posted at: http://www.revenue.wi.gov/taxpro/news/120712.html (updated July 12, 2012). The

guidance replaces previous guidance posted at http://www.revenue.wi.gov/taxpro/news/071106.html (dated November 6, 2007). The new guidance is similar to the previous guidance, except that the new guidance states that the sale is sourced to "place of primary use"; the previous standard was that the service was taxable if the service originated or terminated in Wisconsin and was billed to a "service address" in the state).

- In Private Letter Ruling W1025002 (March 24, 2010), Wis. Tax Bull. No. 168, pp. 13-16, the Department ruled that, under the facts described in the ruling, a variety of fees relating to an account management system which could be accessed by subscribers were not subject to Wisconsin sales or use tax. The fees (described in detail in the ruling) were labeled set up, training, data migration, forms programming, and application service fees.

Section 8.8. Telecommunications Message Services.

- The Department of Revenue has issued a private letter ruling that addresses the sales and use tax treatment of a service that includes taxable and non-taxable components. The taxable component is what the Department concludes is a telecommunications message service. The non-taxable components are various marketing and calling services. Under the facts, the Department says that the telecommunications messaging service is incidental to the non-taxable services. The Department says that if a "separate and optional charge" is made for the telecommunications message service, only that portion of the charge is subject to tax. Private Letter Ruling W1347003, Wis. Tax Bull. No. 183, pp. 19-21 (Jan. 2014).

- The Department of Revenue has issued helpful guidance concerning the sales and use tax treatment of "Remote Deposit Capture Services" ("RDCS") provided by financial institutions to merchant customers, and certain equipment and prewritten software utilized in providing RDCS. See **Section 4.6** of this Update.

- The Milwaukee Business Journal has reported that, effective April 1, 2012, General Motors began collecting Wisconsin sales and use tax from its Wisconsin customers with respect to the "On Star" service. The issue of whether the On Star service is taxable had been pending in litigation before the Tax Appeals Commission, but the parties agreed to a settlement and the action has been dismissed. The terms of the settlement are not public. The Milwaukee Business Journal article is available at http://www.bizjournals.com/milwaukee/news/2012/03/29/sales-tax-starts-for-wisconsin-onstar.html (posted March 29, 2012).

- The Department of Revenue has issued guidance concerning the sales and use tax treatment of a web hosting service that is sold together with an email service. In the ruling, a taxpayer sells, for a set price ($25), web hosting on the taxpayer's website, plus up to ten email accounts hosted on a separate server. If a customer uses more than ten email accounts, it is charged an additional amount for each account over the ten. The Department concludes that the $25 charge is not taxable. The Department's rationale is

that web hosting is the primary objective of the customers, and web hosting is not a taxable service. Further, while email accounts are generally taxable "telecommunications message services," the email provided as part of the $25 charge is "incidental" to the web hosting, and thus falls within the language of Wis. Stat. § 77.52(2)(a)5m that a telecommunications message service does not include services that are incidental to another service that is not taxable. The Department also concludes, however, that additional charges for each email account over the ten included with the package represents a charge for a telecommunications message service sold separately from the web hosting service, and is taxable. Finally, the Department notes that the $25 charge is not taxable pursuant to a "bundled" transaction, because neither the web hosting service nor the email service are a taxable service in this situation. The guidance is available at http://www.dor.state.wi.us/taxpro/news/110624c.html (posted July 7, 2011).

Section 8.9. Laundry Services.

- Effective October 1, 2013, Wis. Stat. § 77.52(2)(a)6 is amended to provide that laundry, dry cleaning, pressing and dyeing services are not taxable when performed by the customer through the use of self-service machines. Previously, the exception applied only to self-service, *coin-operated* machines. The effect of the amendment is that the specified services provided by self-service machines are not taxable, regardless of whether the machines are operated by tokens, magnetic cards or other medium other than coins.

- On May 14, 2012, the Department of Revenue posted a Tax Release to its website which discusses the sales and use tax treatment of clean towel and uniform providers. The Tax Release includes six examples, which illustrate the following principles:

  a. A company that purchases and owns towels and then rents them to a manufacturer (and from time to time cleans them) may purchase the towels for resale (i.e., tax free), and the subsequent rental to the manufacturer will be exempt if the manufacturer uses them exclusively and directly in manufacturing (such as to clean machinery to prevent contamination of its products during the manufacturing process). See Examples 1 and 2.

  b. A company that owns towels and rents them out, but hires a third party to clean them, may purchase the cleaning services for resale (i.e., tax free). See Example 3.

  c. When a towel service provides only a cleaning service (i.e., does not own the towels), the service is a taxable laundry service under Wis. Stat. § 77.52(2)(a)6, unless an exception or exemption applies. The Department addresses this in an example involving cleaning services on towels owned by a manufacturer, and used exclusively and directly by it, in the manufacturing process. The Department concludes that the cleaning services are taxable, even though they are performed on "exempt" property. The Department acknowledges that Wis. Stat. § 77.52(2)(a)10 (dealing with cleaning and other services on tangible personal property) contains an exception for cleaning services performed on exempt property, but says that the "more specific" tax imposition statute for laundry

services (Wis. Stat. § 77.52(2)(a)6) governs, and that statute does not contain an exception for laundry services performed on exempt property. See Example 4.

d. A company that purchases, owns and rents uniforms to a hotel may purchase them for resale, and the rental (and any cleaning charge) to the hotel would be taxable. See Examples 5 and 6.

The Tax Release is available at: http://www.dor.state.wi.us/taxpro/news/toweluniform.html

Section 8.11. Parking and Docking.

Movable Storage Containers

The Department of Revenue has published a Tax Release relating to the sales and use tax treatment of movable storage containers. The Department says:

- The charges for providing and moving a storage container are non-taxable when the container is brought to a customer's location, and then moved to another location as directed by the customer (as when a person moves from one residence to another), or moved to a storage warehouse. The Department considers these fact patterns to involve a non-taxable moving or storage service.

- The charges for providing a storage container which is kept at the customer's home or business location generally is taxable. The Department considers this to be the rental of tangible personal property (and thus taxable).

The Department's guidance notes, however, that while storage and moving of property generally are non-taxable, the statutes expressly provide that parking or providing parking space for motor vehicles and aircraft, or for docking or providing storage space for boats, is taxable. Wis. Tax Bull. No. 176, pp. 8 - 10 (Aug. 2012).

- On March 23, 2012, the Department posted guidance to its website to the effect that common and contract carriers do not qualify for sales and use tax exemption on parking charges. The guidance is available at: http://www.revenue.wi.gov/taxpro/news/120323.html and also is published at Wis. Tax Bull. No. 176, pp. 5-8 (August 2012).

- In *Brennan Marine, Inc. v. Dep't. of Revenue*, Docket No. 10-S-35 (WTAC Sept. 7, 2011), the Tax Appeals Commission held that the taxpayer's barge fleeting services did not constitute the "docking or providing storage space for boats" within the meaning of Wis. Stat. § 77.52(2)(a)9. The Commission summarized the taxpayer's activities as marshaling barges and then tying them to a mooring in the Mississippi river, and then, when the appropriate dock is ready for them, taking them by tow to a dock, where the barges are unloaded and cleaned and then brought back to the mooring. Citing a dictionary definition of "to fleet" (to alter the position of: shift), the Commission

concluded that fleeting is fundamentally different than "docking" or "providing storage space," and that the temporary storage component involved in fleeting individual barges is an incidental part of the fleeting service. The Commission also noted that the taxpayer does not own a dock, and that there is a question as to whether the taxpayer provides any storage "space" for the barges. Finally, the Commission noted that, in the case of tax imposition statutes, the tax must be imposed by "clear and express" language and that doubts or ambiguities must be resolved in the taxpayer's favor.

Section 8.12. Services on Tangible Personal Property.

- In its December 2013 *Sales and Use Tax Report*, the Department discusses its views on the sales and use tax treatment of hanging holiday lights. The Department says that the service of hanging someone else's lights or decorations is a taxable service under Wis. Stat. § 77.52(2)(a)10. The Department also says that when a company owns the lights or decorations and provides, sets up, and takes them down (but does not operate the lights or decorations), it is renting the lights or decorations. Although the Department does not so state, if the company owns and operates the lights and decorations, it presumably would be providing a non-taxable service.

- In a Tax release published in Wis. Tax Bull. No. 179, pp. 11-14 (April 2013), the Department considered whether a variety of services constitute taxable "inspection" services under Wis. Stat. § 77.52(2)(a)10. The Tax Release illustrates several key principles: (a) a taxable "inspection" service is a service which is performed to determine whether tangible personal property or an item, property or good is functioning properly or is in need of repair, service, alteration, fitting, cleaning, painting, coating, towing, or maintenance; (b) taxable inspection services do not include services performed to determine the physical or chemical properties or make-up of tangible personal property; and (c) even if the inspection service is otherwise taxable, it will not be taxable if an exemption or exception applies (such as services sold for resale or to an exempt customer) or if the service is considered to be real estate at the time the service is performed. The Department then provides 14 examples, as follows:

Example	Subject	Service	Department Conclusion (Taxable versus non-taxable)
1	Building mold	Checking for mold in a building. Testing involves placing a Petri dish in the room or area being tested.	Non-taxable. This involves inspection of real estate, not tangible property, items, property or goods.
2	Trace gases from equipment	Testing to determine whether gases are leaking from medical gas equipment. Testing involves checking the air for gases.	Taxable. Testing is done to determine whether the equipment (tangible property) is functioning correctly.
3	Water quality	Check well to determine if water is suitable for drinking (i.e., does not contain contaminants).	Non-taxable. The service only involves testing to determine the physical or chemical properties of the water. *Note*: The Department says that if the company is hired to inspect the well to determine if the well is allowing contaminants into the water, the charge would still be non-taxable, since the well is real property.
4	Equipment annual evaluation	Provide an annual evaluation of a piece of medical diagnostic equipment, as required by the federal Food and Drug Administration.	Taxable. The service is an inspection to determine if the equipment (which is tangible personal property) is functioning properly.
5	Metallurgical analysis	Determination of which metals are contained within a product and the characteristics of the metal. The customer receives a detailed report of the results.	Non-taxable. This is a testing service to determine the physical or chemical properties or make-up of the metals.
6	Door security system	Evaluate whether a security door access system is functioning properly. The system is	Non-taxable. This involves inspection of real estate, not tangible property, items, property or goods.

Example	Subject	Service	Department Conclusion (Taxable versus non-taxable)
		permanently affixed to the building and was real property when installed in the building.	
7	Fire alarm	Evaluate whether a fire alarm system is operating properly. The system is permanently affixed to the building and was real property when installed in the building.	Taxable. Although the fire alarm system was real property when installed, § 77.52(2) deems a fire alarm system to retain its character as tangible personal property for purposes of repair or other service.
8	Mineral properties	Determine which types of minerals are present in certain rocks. The rocks are tangible personal property when severed from the earth.	Non-taxable. The service only involves testing to determine the physical or chemical properties of the rocks.
9	Emissions	Emissions testing on motor vehicles. The Wisconsin Department of Transportation certifies and contracts with a company to do the testing. The individuals whose vehicles are tested do not pay to have their vehicle's emissions tested.	Non-taxable. This generally is a taxable inspection service (of tangible property) to determine if it is functioning properly. However, the Wisconsin Department of Transportation is exempt from Wisconsin sales or use taxes on its purchases.
10	Concrete hardness	Test fresh concrete as it is poured on a construction site. The testing is to determine the strength of the concrete by determining its chemical properties. Some samples are tested on site and some are tested off site.	Non-taxable. The service only involves testing to determine the physical or chemical properties of the concrete.
11	Products for resale	A company is hired by a wholesaler to ensure that products the wholesaler purchases are not broken or	Non-taxable. While this is a taxable testing service on tangible property, the wholesaler's purchase of the

Example	Subject	Service	Department Conclusion (Taxable versus non-taxable)
		damaged. The wholesaler will then sell acceptable products to its customers.	inspection service is for resale and thus not taxable. The Department says that the wholesaler "must" provide the company with a fully-completed exemption certificate claiming resale.
12	Speedometer	Check the accuracy of a speedometer.	Taxable. This is an inspection service to determine if tangible personal property (i.e., the speedometer) is functioning properly.
13	Soil	Testing a soil sample provided by a farmer. The laboratory analyzes the soil for mineral content and acidity and provides the farmer with a written report describing the soil and recommending actions for the farmer to take.	Non-taxable. The testing only involves testing to determine the physical or chemical properties of the soil.
14	Soil analysis kit	Customer purchases a soil analysis kit. The kit includes instructions for collecting soil, a hand tool for collecting the sample, a container to put the soil in, and a pre-paid mailer for sending the sample to a laboratory. The laboratory analyzes the soil and sends the customer a detailed report describing the soil and recommending actions for the customer to take.	Non-taxable. The service only involves testing to determine the physical or chemical properties of the soil. Although some tangible property is transferred to the customer, the true object of the service is to receive the non-taxable soil analysis.

- A Tax Release discusses the Department of Revenue's views on the sales and use tax treatment of home warranty contracts. The Tax Release addresses the sales and use tax treatment of (a) the initial charge for the contract; (b) the amount paid to a contractor to perform repairs under the contract; (c) the contractor's charge to the homeowner for any

deductible; and (d) the amounts paid by the contractor for materials that it purchases in performing the contract. Tax Release, Wis. Tax Bull. No. 181, pp. 4-5 (August 2013).

- The Department of Revenue has published its views as to whether a variety of appliances (such as dishwashers, microwaves, refrigerators, ranges and wine coolers) are considered tangible property or real property improvements, under a variety of circumstances. *Sales and Use Tax Report*, pp. 1 – 3 (July 2013).

- On May 14, 2012, the Department of Revenue posted a Tax Release to its website which discusses the sales and use tax treatment of clean towel and uniform providers. See **Section 8.9** of this Update.

- In *Chula Vista, Inc. v. Dep't. of Revenue*, Docket Nos. 09-S-247 and 09-P-248 (August 5, 2011), the Tax Appeals Commission held that large steel beams used to support the "flumes" of a water slide, together with related engineering services, were real property (as opposed to tangible property) improvements. In so ruling, the Commission applied the 3-part test stated in *Dep't. of Revenue v. A.O. Smith Harvestore Prods., Inc.*, 72 Wis. 2d 60, 67-68, 240 N.W.2d 357 (1976); i.e., (a) actual physical annexation to the real estate; (b) application or adaptation to the use or purpose to which the realty is devoted; and (c) an intention on the part of the person making the annexation to make a permanent accession to the freehold. The parties agreed that the first two tests were met, so the Commission addressed what courts consider the most important prong, i.e., "intent" – which is determined based on "an objective and presumed intention of that hypothetical ordinary reasonable person, to be ascertained in the light of the nature of the article, the degree of annexation, and the appropriateness of the article to the use to which the realty is put." Based on the evidence of record, the Commission concluded that the items in question were intended to become a permanent accession to the property. The Commission rejected various arguments made by the Department to the contrary, including that (a) there was a market for used items of the type in question; and (b) the taxpayer had depreciated the items for income tax purposes as tangible personal property. The Commission also rejected the Department's arguments that other aspects of its administrative rules and the statutes supported classification as tangible personal property. One of the Department's other arguments was that under Wis. Stat. § 77.52(2)(a)10 and (2)(ag)38, water slides are deemed to be tangible personal property after they are installed. The Commission noted that while that may be true, those statutes apply only for purposes of determining whether the services listed in § 77.52(2)(a)10 (repair, cleaning, inspection, etc.) performed on the property *after* installation are taxable. That statute, in other words, does not apply for purposes of classification of the installation of the property.

- On July 7, 2011, the Department of Revenue posted guidance to its website, discussing the sales and use tax consequences of the sale, installation and repair of dishwashers. The guidance is available at: http://www.dor.state.wi.us/taxpro/news/110624b.html. With respect to remedying potentially erroneous sales tax treatment by contractors (e.g., if a contractor treats a sale as taxable when it should have been treated as a non-taxable

real property improvement, or *vice versa*), see Section 13.12 of *The Complete Guide*. With respect to potential customer remedies for erroneous treatment, see **Section 16.14** of *The Complete Guide* and this *Interim Update*.

- In Priv. Ltr. Rul. W0820001 (Feb. 25, 2008), Wis. Tax Bull. No. 158, pp. 14-15 (Oct. 2008), the Department ruled that certain services provided by a medical physicist in surveying radiology equipment to assess image quality and radiation performance constituted the taxable "inspection" of tangible personal property pursuant to Wis. Stat. § 77.52(2)(a)10. The ruling also stated that although the physicist may have been providing services other than the inspection of tangible personal property, the "primary objective" of the service was to determine whether the equipment was in compliance with certain regulatory standards – "that is, the service of inspection of tangible personal property." The Department also cited Wis. Admin. Code § Tax 11.67(2)(c) for the proposition that if there is a single charge for providing both taxable and non-taxable services, the entire charge is subject to the tax, "unless it is determined by the department that another method, such as allocation or primary purpose of the transaction, more accurately reflects the tax."

- The Department of Revenue has again stated that charges for snowplowing, sanding and salting roads, sidewalks or parking lots are not subject to Wisconsin sales or use tax. The Department says this is true even if the charge by the service provider is based on the amount of salt or sand used. The Department also says that the service provider must pay sales or use tax on its purchase of the salt or sand used in providing the service. *Sales and Use Tax Report*, p. 2 (Dec. 2008); *Sales and Use Tax Report*, pp. 2-3 (Dec. 2013).

- The Department has published advice to the effect that the removing of snow and clearing ice dams from roofs is not taxable, because these are services to real property. *Sales and Use Tax Report*, p. 5 (March 2011).

- The Department has published advice to the effect that swimming pool cleaning and maintenance services are taxable, regardless of whether the pool is above-ground or in-ground. The Department's rationale is that, for purposes of Wis. Stat. §§ 77.52(2)(a)10 and 77.52(2)(ag)38f., swimming pools are deemed to be tangible personal property, regardless of the extent to which they are fastened to, connected with, or built into real property. *Sales and Use Tax Report*, p. 5 (March 2011).

- Effective July 1, 2009, the Legislature created Wis. Stat. § 77.52(2)(a)8m, providing that the towing *and hauling* of motor vehicles by a tow truck (as defined) are taxable, unless an exemption applies. 2009 Wis. Act 28. It should be noted that Wis. Stat. § 77.52(2)(a)10 continues to apply to (among other things) the "towing" of "tangible personal property." The Legislature appears to have enacted new § 77.52(2)(a)8m due to disputes which had arisen as to whether the "hauling" of motor vehicles (such as on a flatbed truck) was "towing" within the meaning of Wis. Stat. § 77.52(2)(a)10.

Department of Revenue Guidance:
Taxable and Non-Taxable Computer
Hardware, Software and Services
(Including SaaS, PaaS and IaaS)

The Department of Revenue has published an extensive list of what it considers to be taxable and non-taxable computer hardware, software and services. See "Sales and Use Tax Treatment: Computer Hardware, Software, Services (updated January 25, 2013): http://www.revenue.wi.gov/faqs/pcs/computerc.html. And see Wis. Admin. Code § Tax 11.71.

The Department says that the following are ***taxable***:

- Installation and setup of computer hardware
- Installation of hardware devices (including printers, hard drives, modems, monitors, etc.)
- Installation of prewritten computer software
- Configuration of prewritten computer software
- Online or on-site troubleshooting hardware problems
- Online or on-site troubleshooting of prewritten computer software
- Setting up hardware and prewritten computer software on a network
- Inspecting, servicing, or repairing prewritten computer software via modem
- Installation of prewritten computer software
- Inspection of hardware and prewritten computer software
- Consulting and design services provided in connection with the sale of computer hardware and prewritten computer software
- Internet access services, when the sale of the service is sourced to Wisconsin
- Installation or hook-up charges relating to Internet access services when the Internet access services are sourced to Wisconsin
- Sales of textbooks and manuals, whether furnished to the purchaser as tangible personal property or as a digital good
- Photographic services

The Department says that the following are ***non-taxable***:

- Writing computer software other than prewritten computer software
- Making modifications or enhancements to prewritten computer software that are designed and developed to the specifications of a specific purchaser, and the person making the modifications or enhancements provides a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for the modification or enhancement
- Installing computer software other than prewritten computer software
- Updating computer software other than prewritten computer software
- Training people on how to use software or hardware
- Writing queries of databases
- Designing screens, forms, reports, or menus
- Answering questions

- Reformatting data
- Data migration
- Data conversion
- Data recovery
- Making backups of data files
- Network assessment services that consist of network analysis and evaluation unrelated to a specific hardware or software problem and unrelated to the sale of computer hardware or computer software
- Hosting websites (that is, the storing of data on a computer) without selling any tangible personal property or any digital good
- Domain name registration and site maintenance/update services, if no tangible personal property or digital good is transferred or taxable service performed
- Designing websites and home pages, if the service is not primarily a photographic service. Whether the completed website design is transferred to the customer electronically (i.e., accessed or obtained by the purchaser by means other than tangible storage media), or transferred using a tangible storage medium (e.g., a CD), the charge for the website design work is not subject to tax
- Website database charges
- Charges for providing advertising or listing space on a website
- Access services that will be resold
- Training on how to use the Internet

The guidance also addresses services which permit persons at different locations to access the same prewritten computer software through remote access by telephone lines, microwave, or other means (sometimes referred to as "cloud computing" or "software as service" or "SaaS"). The Department says that these services are non-taxable when (a) the persons or the persons' employees who have access to the prewritten computer software are not located on the premises where the equipment/software is located and do not operate the equipment or control its operation, and (b) prewritten computer software that is downloaded or physically transferred to the customer or the customer's computers is incidental to the data processing services (that is, used solely to allow access to the service provider's hardware and software). The guidance contains the following helpful example:

> Company A, an Application Service Provider (ASP), provides access to its software. The software is stored on Company A's servers and the customer accesses the software via the Internet. Customers that contract with Company A have access to Company A's servers, but do not operate or have control over the servers. Company A has control over the computer hardware and software, loads the software onto the server, and is responsible for security measures regarding the computer equipment (file server) and software. In order for Company A's customers to access the hardware and software, the customers must use a client utility program that they download from Company A. Company A is providing a data processing service, which is not subject to Wisconsin sales and use tax, regardless of whether the server is located in Wisconsin or outside Wisconsin. Data processing services are not among the services subject to Wisconsin sales and use tax.

The guidance also addresses when other transactions, sometimes referred to as "Infrastructure as a Service" ("IaaS") and "Platform as Service" ("PaaS") are and are not taxable.

- The Department has posted information on its website (at http://www.revenue.wi.gov/faqs/pcs/horses.html), setting forth the Department's views with respect to the sales and use tax treatment of a wide variety of services relating to horses. The Department says that the following are taxable:

  a. the sale of horses for use in racing, pleasure riding, or show;

  b. the boarding and maintenance, including exercise, of horses used for racing, pleasure riding, or show (however, the retailer may purchase the feed for the animals without tax);

  c. the charge for mare care services for horses used for racing, pleasure riding, or show, excluding charges for veterinary services and separately stated charges for foal training; and

  d. the furnishing of horse trail rides (however, the Department says that persons operating riding stables must pay tax on the purchase of feed, unless an exemption applies; e.g., they also sell feed and purchase it for resale).

  On the other hand, the Department says that the following are not taxable:

  a. training horses (however, persons engaged in training horses must pay tax on the purchase of feed, unless an exemption applies);

  b. mare care service, farrier service, and dietary supplements for mares used exclusively for farming (i.e., the commercial breeding and raising of horses, or "farm work stock"); and

  c. taking care of horses on a customer's property.

  In addition, the Department discusses its views with respect to the sale of horses used in farming – i.e., the commercial breeding or raising of horses, or farm work stock. See **Section 9.1**.

Section 8.15. Landscaping and Lawn Maintenance Services.

- The Department of Revenue has again stated that charges for snowplowing, sanding and salting roads, sidewalks, or parking lots are not subject to Wisconsin sales or use tax. The Department says this is true even if the charge by the service provider is based on the amount of salt or sand used. The Department also says that the service provider must pay sales or use tax on its purchase of the salt or sand used in providing the service. See

Sales and Use Tax Report, p. 2 (Dec. 2008); and "Landscaping Services and Snow Removal Services," available at: http://www.revenue.wi.gov/taxpro/news/101108a.html; and *Sales and Use Tax Report*, pp. 3-4 (Dec. 2010).

- The Department has published advice to the effect that the removing of snow and clearing ice dams from roofs is not taxable, because these are services to real property. *Sales and Use Tax Report*, p. 5 (March 2011).

- The Department has published advice to the effect that swimming pool cleaning and maintenance services are taxable, regardless of whether the pool is above-ground or in-ground. The Department's rationale is that, for purposes of Wis. Stat. §§ 77.52(2)(a)10 and 77.52(2)(ag)38f., swimming pools are deemed to be tangible personal property, regardless of the extent to which they are fastened to, connected with, or built into real property. *Sales and Use Tax Report*, p. 5 (March 2011).

- The Department has published guidance concerning the sales and use tax treatment of a single contract which provides for both taxable landscaping services and non-taxable snow removal services for a set amount per month. The Department says that for the months during which only lawn maintenance service is provided, the entire charge is taxable; for the months during which only snow removal service is provided, no tax should be charged; and for months during which a mix of lawn maintenance and snow removal are provided, the service provider should make a reasonable allocation between the two services. *Sales and Use Tax Report*, pp. 3-4 (Dec. 2010).

- The Department has stated that lawn rolling, watering lawns, aerating lawns and raking leaves are taxable "lawn maintenance services." See *Sales and Use Tax Report*, p. 4 (Sept. 2009); and "Landscaping Services and Snow Removal Services," available at: http://www.revenue.wi.gov/taxpro/news/101108a.html.

- In December 2007, the Department revised Publication 210, *Sales and Use Tax Treatment of Landscaping*, to specifically state that, in the Department's view, non-taxable "rough grading" does *not* include "the stripping off of topsoil and plant material … [or] the grading of the final planting material (e.g., top soil) in preparation of planting seed, sod, or other plant material." In other words, the Department appears to consider these activities to be taxable landscaping and lawn maintenance services. This view is arguably incorrect.

Section 8.16. Non-Taxable Services.

- The Department of Revenue has issued a private letter ruling that addresses the sales and use tax treatment of a service that includes taxable and non-taxable components. The taxable component is what the Department concludes is a telecommunications message service. The non-taxable components are various marketing and calling services. Under the facts, the Department says that the telecommunications messaging service is incidental to the non-taxable services. The Department says that if a "separate and

optional charge" is made for the telecommunications message service, only that portion of the charge is subject to tax. Private Letter Ruling W1347003, Wis. Tax Bull. No. 183, pp. 19-21 (Jan. 2014).

- In Private Letter Ruling W1308002 (Nov. 30, 2012), Wis. Tax Bull. No. 179, pp. 20-21 (April 2013), the Department ruled that charges for temporary staffing or permanent placement of physical therapists and physicians are non-taxable. The Department's rationale is that none of these services are of a type listed in Wis. Stat. § 77.52(2)(a).

- The Department of Revenue has issued helpful guidance concerning the sales and use tax treatment of "Remote Deposit Capture Services" ("RDCS") provided by financial institutions to merchant customers, and certain equipment and prewritten software utilized in providing RDCS. See **Section 4.6** of this Update.

- The Department of Revenue has ruled that the sale of access to a web-based logistical management services system is not subject to Wisconsin sales or use tax. According to the ruling, the taxpayer provides its customers with web-based inbound/outbound logistical management services, which operate through the Internet on a per-transaction, multiple-user basis. The taxpayer's customers are not required to purchase or install on their computers any of the taxpayer's software or hardware, and the taxpayer's software is not installed on any customer computer. The customers "log in to the system to manage their overall transportation function, including benching marking and transportation services." Based on these and other facts, the Department ruled that the activity was analogous to non-taxable time sharing services under Wis. Admin. Code § Tax 11.71(3). The Department also ruled that, under the facts, related implementation, consulting and training were not taxable. Private Letter Ruling W0907003 (March 6, 2009), Wis. Tax Bull. No. 163, pp. 8-10 (July 2009).

- In Private Letter Ruling W1025002 (March 24, 2010), Wis. Tax Bull. No. 168, pp. 13-16, the Department ruled that, under the facts described in the ruling, a variety of fees relating to an account management system which could be accessed by subscribers were not subject to Wisconsin sales or use tax. The fees (described in detail in the ruling) were labeled set up, training, data migration, forms programming, and application service fees.

- The Department has stated that amounts paid to view educational seminars – either in person or via live streaming video – are not subject to Wisconsin sales or use tax. The Department states, however, that the sale of (a) a DVD recording of the seminar is taxable, as the sale of tangible personal property and (b) an electronic download of the recorded seminar via the Internet is taxable, as the sale of a digital audiovisual work. Wis. Tax Bull. No. 170, pp. 8-9 (Jan. 2011).

Department of Revenue Guidance:
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The Department says that the following are ***taxable***:

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- Online or on-site troubleshooting hardware problems
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- Inspecting, servicing, or repairing prewritten computer software via modem
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- Inspections of hardware and prewritten computer software
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- Internet access services, when the sale of the service is sourced to Wisconsin
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- Writing computer software other than prewritten computer software
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- Updating computer software other than prewritten computer software
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- Reformatting data
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The guidance also addresses services which permit persons at different locations to access the same prewritten computer software through remote access by telephone lines, microwave, or other means (sometimes referred to as "cloud computing" or "software as service" or "SaaS"). The Department says that these services are non-taxable when (a) the persons or the persons' employees who have access to the prewritten computer software are not located on the premises where the equipment/software is located and do not operate the equipment or control its operation, and (b) prewritten computer software that is downloaded or physically transferred to the customer or the customer's computers is incidental to the data processing services (that is, used solely to allow access to the service provider's hardware and software). The guidance contains the following helpful example:

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The guidance also addresses when other transactions, sometimes referred to as "Infrastructure as a Service" ("IaaS") and "Platform as Service" ("PaaS") are and are not taxable.

Section 8.17. Sale of Taxable and Non-taxable Services in Same Transaction.

- The Department of Revenue has issued a private letter ruling that addresses the sales and use tax treatment of a service that includes taxable and non-taxable components. The taxable component is what the Department concludes is a telecommunications message service. The non-taxable components are various marketing and calling services. Under the facts, the Department says that the telecommunications messaging service is incidental to the non-taxable services. The Department says that if a "separate and optional charge" is made for the telecommunications message service, only that portion of the charge is subject to tax. Private Letter Ruling W1347003, Wis. Tax Bull. No. 183, pp. 19-21 (Jan. 2014).

- The enactment of the Streamlined Sales and Use Tax statutes has resulted in an important change with respect to transactions involving "bundled" products (including services). See **Section 6.1**.

- The Department has published guidance concerning the sales and use tax treatment of a single contract which provides for both taxable landscaping services and non-taxable snow removal services for a set amount per month. The Department says that for the months during which only lawn maintenance service is provided, the entire charge is taxable; for the months during which only snow removal service is provided, no tax should be charged; and for months during which a mix of lawn maintenance and snow removal are provided, the service provider should make a reasonable allocation between the two services. *Sales and Use Tax Report*, pp. 3-4 (Dec. 2010).

- The Tax Appeals Commission has ruled in the taxpayer's favor with respect to the "temporary help services" issue discussed on pp. 252-253 of *The Complete Guide.* See *Manpower, Inc. v. Dep't. of Revenue*, Docket No. 05-S-046, Wis. Tax Rep. (CCH) ¶ 401-223 (WTAC Aug. 12, 2009). The Commission rejected the Department's "look through" approach, concluding that "it goes against the rule of construction that taxes may only be imposed by clear and express language, with all doubts and ambiguities resolved in favor of the taxpayer." The Commission said that "Wis. Stat. § 77.52 does not tax 'services,' it taxes specific services that the Legislature listed … [and] 'temporary help services' is not listed in our statutes as a taxable service …." (Slip Op. at 27). The Commission's decision includes a lengthy discussion of the rules of statutory interpretation, as applied to tax imposition statutes. (Slip. Op. at 15-27). The Department neither appealed the *Manpower* decision nor issued a "notice of nonacquiescence," and thus is bound by the decision. Taxpayers that have been remitting tax on these transactions should consider filing refund claims with respect thereto. In two Tax Releases, the Department has provided guidance concerning its views on certain aspects of the "temporary help" issue, in light of the *Manpower* decision. See Wis. Tax Bull. No. 165, pp. 6-11 (Feb. 2010) and

Wis. Tax Bull. No. 168, pp. 8-10 (July 2010). In the Tax Releases, the Department sets forth a detailed 3-part test for determining when a person will be considered to be providing non-taxable temporary help services. The Department also provides several examples illustrating application of the test. The Department's interpretations are arguably an overly restrictive view of the *Manpower* case.

- In Private Letter Ruling W1308002 (Nov. 30, 2012), Wis. Tax Bull. No. 179, pp. 20-21 (April 2013), the Department ruled that charges for temporary staffing or permanent placement of physical therapists and physicians are non-taxable. The Department's rationale is that none of these services are of a type listed in Wis. Stat. § 77.52(2)(a).

- In Priv. Ltr. Rul. W0820001 (Feb. 25, 2008), Wis. Tax Bull. No. 158, pp. 14-15 (Oct. 2008), the Department ruled that certain services provided by a medical physicist in surveying radiology equipment to assess image quality and radiation performance constituted the taxable "inspection" of tangible personal property pursuant to Wis. Stat. § 77.52(2)(a)10. The ruling also stated that although the physicist may have been providing services other than the inspection of tangible personal property, the "primary objective" of the service was to determine whether the equipment was in compliance with certain regulatory standards – "that is, the service of inspection of tangible personal property." The Department also cited Wis. Admin. Code § Tax 11.67(2)(c) for the proposition that "(i)f there is a single charge for providing both taxable and non-taxable services, the entire charge is subject to the tax, unless it is determined by the department that another method, such as allocation or primary purpose of the transaction, more accurately reflects the tax."

Section 8.18. Taxable Services – When a Sale or Furnishing Occurs.

On July 7, 2011, the Department of Revenue posted extensive guidance to its website, setting forth the Department's views on when and where a sale of an admission to amusement, athletic, entertainment or recreational events or places occurs. The Department says that a sale of an admission takes place "at the time the retailer agrees to sell the admission to the consumer," and that the location of the sale is "where the event takes place." Thus, for instance, the sale of an admission to an event or place outside Wisconsin would not be subject to Wisconsin sales or use tax. The guidance contains 20 examples, several involving ticket brokers and travel agents, and situations where the Department believes they are the actual retailer of the admission. The guidance applies for sales and purchases on and after October 1, 2009. For transactions prior to October 1, 2009, the Department says that guidance published in its July 1999 Tax Bulletin (which is discussed in *The Complete Guide*) applies. The new guidance is available at: http://www.dor.state.wi.us/taxpro/news/admissions.html.

Chapter 9

Statutory Exemptions from Sales and Use Taxation

Important Note Concerning Exemptions Under the Streamlined Sales and Use Tax Effective October 1, 2009

Wisconsin's adoption of the Streamlined Sales and Use Tax provisions resulted in certain changes with respect to Wisconsin sales and use tax exemptions, generally effective October 1, 2009. The next edition of *The Complete Guide*, which we will publish during 2011, will cover all of the Streamlined Sales and Use Tax changes, including changes relating to exemptions. The following are examples of some of the more significant changes in exemptions.

- Some items that had been exempt became taxable, and some items that were taxable became exempt. An example of an item that no longer qualifies for exemption is cloth diapers.

- In addition, the exemptions for equipment used in the treatment of diabetes and used to administer oxygen became limited to equipment for in-home use.

- The types of durable medical equipment (sometimes called "DME") that are exempt have been expanded to include DME such as hospital beds, patient lifts, and I.V. stands that are purchased for in-home use.

- The types of mobility enhancing equipment and prosthetic devices that are exempt from tax have been expanded to cover canes, handrails, and grab bars to assist in rising from a commode, tub, or shower; tub and shower stools; ankle braces; and arch supports.

- Some food that was exempt (such as ready-to-drink tea and marshmallows) became taxable. Some types of food that were taxable (such as fruit drink with 51% to 99% juice or any candy containing flour) became exempt. In short, "food and food ingredients for human consumption," are exempt, except for "candy," "dietary supplements," "prepared food" and "soft drinks" (all as specifically defined). For extensive information concerning these provisions, including numerous examples, see Publication 220, "*Grocers – How Do Wisconsin Sales and Use Tax Affect Your Operations,*" (Oct. 2010). For further examples demonstrating the relationships between these terms, see "Sales of Ice Cream Cakes and Similar Items," which was posted by the Department of Revenue to its website on November 8, 2010: http://www.revenue.wi.gov/taxpro/news/101108c.html.

The new defined terms, it should be noted, have generated many questions. To take just one narrow example, questions have arisen as to whether certain breakfast cereals with a high sugar content are classified as "candy." The *Grocers* publication cited in the above paragraph says (somewhat unhelpfully, at p. 13) that "cereal" and "cereal products" are exempt food, "***provided they do not meet the definition of "candy," "dietary supplements," "soft drinks," or "prepared foods.'"*** (emphasis in original). And see Wis. Admin. Code § Tax 11.51(2)(b), providing the same caveat. A robust debate on the issue has taken place, with one person even filing a request with the Streamlined Sales Tax organization for a determination that certain cereals with high sugar content are "candy." The organization resisted the request, and seems to have settled on the conclusion that these types of cereals are food (and not candy) because they are not commonly understood to be candy, and more technically, because they do not meet one of the statutory requirements to be classified as candy (i.e., they are not sold in the "form of bars, drops, or pieces"). Copious materials on the issue can be found on the Streamlined organization's website, at http://www.streamlinedsalestax.org (type "cereal" in the search box).

A slightly broader example of issues arising with the term "candy" relate to the statutory exception that candy does not include anything that contains "flour." Some of the curiosities created by this exception are by now fairly well known; for example, Kit-Kat bars are not candy because they contain flour; certain types of licorice that contain flour are "food," but the types of licorice without flour are candy; many types of breakfast bars, and honey roasted nuts, are candy; but barbeque potato chips are "food" (but be careful, barbequed sunflower seeds are listed as "candy"). For a long listing of items, and the rationale for classification of each as "food" or "candy," see http://www.streamlinedsalestax.org/uploads/downloads/Rule%20Amendment/2010/RP10009_Appendix_1_Candy_Product_list_for_SLAC.pdf. A more recent debate focuses on the term "flour"; apparently, certain types of finely milled foods can be called "flour" for certain purposes (examples are "cocoa flour" and "peanut flour"), and the question is whether they will be treated as "flour" under the Streamlined rules. On this issue, one committee within the Streamlined organization initially opined that "flour" must be a *grain*-based flour. But on November 30, 2010, a Streamlined panel adopted (by a 22-1 vote) a broad definition of "flour" that does not require it to be grain based.

In part, these examples show that although the Streamlined effort will create a measure of uniformity across the adopting states, a very large number of interpretive issues remain and will continue.

Section 9.1. Machines, Tractors and Other Tangible Personal Property Used in Farming.

- In *Harlan Sprague Dawley, Inc. v. Dep't. of Revenue,* Docket No. 02-S-416, Wis. Tax Rep. (CCH) ¶ 401-144 (WTAC Nov. 3, 2008), the Tax Appeals Commission ruled that the breeding and raising of laboratory animals to sell for research purposes is not the "business of farming" within the meaning of the Wis. Stat. §§ 77.54(3)(a) or (3m) exemptions. See **Section 1.2**.

- The Department of Revenue has posted information to its website discussing its views with respect to when the sale of horses can qualify for the "farming" exemptions relating to the commercial breeding and raising of horses, or "farm work stock." With respect to non-qualifying activities, the Department says that "persons engaged only in boarding horses, giving lessons, and selling a horse occasionally are not engaged in the commercial breeding and raising of horses for sale, and are not engaged in farming." The Department also says that there is "no qualifying number of horses sold that determines whether a person is engaged in farming," and that the inquiry is based on all the facts and circumstances. The Department's posting is at: http://www.revenue.wi.gov/faqs/pcs/horses.html.

Section 9.2. Containers and Other Items Used in Farming.

In *Harlan Sprague Dawley, Inc. v. Dep't. of Revenue*, Docket No. 02-S-416, Wis. Tax Rep. ¶ 401-144 (WTAC Nov. 3, 2008), the Tax Appeals Commission ruled that the breeding and raising of laboratory animals to sell for research purposes is not the "business of farming" within the meaning of the Wis. Stat. §§ 77.54(3)(a) or (3m) exemptions. See **Section 1.2**.

Section 9.3. Other Exemptions Relating to Farming.

- The Department of Revenue has stated that animal waste containers (such a manure pit) and materials used to construct animal waste containers for a farmer are exempt from Wisconsin sales and use tax. See Wis. Tax. Bull. No 177, p. 5 (Oct. 2012) and Wis. Dep't. of Revenue Publ'n 221, *Farm Suppliers and Farmers*, p. 14 (July 2012). Thus, for example, the Department says that a contractor or a farmer may purchase materials (e.g., concrete) used to construct a manure pit on a tax-free basis.

- The Department of Revenue has issued guidance that certain "liquid nurse tanks" and "dry fertilizer tender units" are exempt under Wis. Stat. § 77.54(5)(d) because they are mobile units used for mixing and processing. The Department's guidance also states, however, that certain "fertilizer" and "chemical storage tanks" generally do not qualify for exemption. The guidance is available at http://www.dor.state.wi.us/taxpro/news/110624d.html (posted July 7, 2011).

- In *Harlan Sprague Dawley, Inc. v. Dep't. of Revenue*, Docket No. 02-S-416, Wis. Tax Rep. (CCH) ¶ 401-144 (WTAC Nov. 3, 2008), the Tax Appeals Commission ruled that the breeding and raising of laboratory animals to sell for research purposes is not the "business of farming" within the meaning of the Wis. Stat. §§ 77.54(3)(a) or (3m) exemptions. See **Section 1.2**.

Section 9.9. Other Exemptions Relating to Governmental and Non-profit Organizations.

- The Department of Revenue has issued a Tax Release with respect to the new foreign diplomatic tax exemption card design, as well as the levels of tax exemption authorized by a particular type of card. The Tax Release is available at:

http://www.dor.state.wi.us/taxpro/news/110624a.html (posted July 7, 2011). As noted in the Tax Release, the website of the Office of Foreign Missions (OFM) includes a database that allows retailers to verify the tax-exempt status of foreign officials. That database is available at: http://www.state.gov/ofm/resource/ihv/20290.htm. In its January, 2013 Tax Bulletin, the Department also says that, "effective immediately," the OFM has issued revised procedures for sales and leases of official and personal motor vehicles by eligible foreign missions and their members and dependents. The revised procedures state that exemptions for motor vehicles based on diplomatic status should only be granted once the seller or lessor has been issued a Motor Vehicle Tax Exemption Letter by the OFM (and that Diplomatic Tax Exemption Cards are not acceptable documentation for this purpose). The guidance explains how the seller or lessor applies to the OFM for an Exemption Letter. The guidance also says that the OFM procedures authorizing sales, use, occupancy, food, airline, gas and utility exemptions remain unchanged. Wis. Tax. Bull. No. 178, pp. 6-7 (Jan. 2013). And see *Sales and Use Tax Report*, p. 8 (July 2013).

- In a lengthy Tax Release, the Department of Revenue has stated its views with respect to purchases made by a person under contract with the federal government. One of the fact patterns involves a real property contract between a contractor and the federal government, where the contractor purchases materials incorporated into the real property as a "purchasing agent" for the federal government. The Department ruled that the federal government (and not the contractor) is treated as the purchaser of the materials if the contractor is a true "purchasing agent" under the "common law." The significance of this is that if the federal government is treated as the purchaser, sales and use tax would not apply to the materials; if the real property contractor is the purchaser, the transactions would be taxable. These are common arrangements and contractors are well advised to be familiar with the Department's views with respect to the requirements for a purchasing agency relationship, as set forth in detail in the Tax Release. Tax Release, Wis. Tax Bull. No. 161, pp. 11-14 (April 2009).

- Effective August 1, 2009, the Legislature created an exemption for sales to any federally recognized American Indian tribe or band in Wisconsin. 2009 Wis. Act 28, adding Wis. Stat. § 77.54(9a)(ed). For legislative background concerning this change, see "Sales Tax Exemption for Native American Purchases (General Fund Taxes — General Sales and Use Tax)," Legislative Fiscal Bureau Paper #378 (May 27, 2009), available at: http://legis.wisconsin.gov/lfb/publications/budget/2009-11-Budget/Documents/Budget%20Papers/378.pdf.

- In its September 2010 *Sales and Use Tax Report*, the Department of Revenue lists the 11 federally-recognized Indian Tribes in Wisconsin, as well as the various ways a retailer may document its exempt sales to a federally-recognized Indian Tribe (i.e., purchase order or similar document from the Tribe or band identifying the Tribe or band as purchaser; fully completed exemption certificate (e.g., Form S-211 or Form S-211-SST); or recording the Tribe or band's CES number on the invoice).

Section 9.10. Sales by Elementary or Secondary Schools.

In a recent Tax Release, the Department of Revenue has stated its views with respect to purchases made by a person under contract with the federal government. See **Section 9.9**.

Section 9.11. Sales of Tickets or Admissions to Elementary or Secondary School Activities.

In a recent Tax Release, the Department of Revenue has stated its views with respect to purchases made by a person under contract with the federal government. See **Section 9.9**.

Section 9.12. Exemptions Relating to Health Care.

Treatment of Corrective and Non-corrective Eyeglasses, Contact Lenses, and Related Accessories And Supplies

The Department of Revenue has published a Tax Release addressing the question of whether corrective and non-corrective eyeglasses, contact lenses, sunglasses and related items and supplies qualify for exemption as "prosthetic devices" under Wis. Stat. § 77.54(22b). Wis. Tax Bull. No. 175, p. 17 (April 2012). The general conclusions of the Tax Release are as follows:

- *"Corrective Versus Noncorrective."* Corrective sunglasses, corrective contact lenses, and corrective reading glasses are exempt as "prosthetic devices." However, *non-corrective* sunglasses and *non-corrective* contact lenses are not exempt prosthetic devices.

- *"Accessories Versus Supplies."* Neck cords, sunglasses designed to be worn over eyeglasses, repair parts and tools specifically for eyeglasses, cases for corrective eyeglasses, and non-disposable cleaning cloths purchased for corrective eyeglasses are exempt as "accessories" for prosthetic devices. In addition, contact lens cases purchased for corrective contact lenses are also exempt accessories. On the other hand, contact lens solution, eyeglass lens cleaning solution, and disposable cleaning cloths are "supplies" and therefore taxable.

- *Contact Lens Kits*. Contact lens kits may or may not be taxable, depending on application of the "bundling" rules discussed in the Tax Release.

- The Department has published guidance to the effect that walk-in bathtubs are "mobility-enhancing equipment" and are exempt from Wisconsin sales and use tax under Wis. Stat. §§ 77.51(7m) and 77.54(22b) if they generally are not used by a person who has normal mobility. The guidance also says that a real property contractor that installs walk-in bathtubs in a person's home (a) can purchase the walk-in bathtubs, pursuant to this exemption, if the applicable conditions are met; and (b) should not charge sales tax to the customer (for the sale and installation), since the walk-in bathtub, when installed, is a real property improvement. Wis. Tax Bull. No. 174, p. 13 (Jan. 2012).

- In two private letter rulings, the Department has concluded that a variety of injectible tissue implants and surgical adhesives qualify for exemption both prior to and on and after October 1, 2009 (i.e., the effective date of certain Streamlined Sales and Use Tax changes). See Private Letter Ruling W1020001 (Feb. 19, 2010), Wis. Tax Bull. No. 168, pp. 11-13 (July 2010) and Private Letter Ruling W1025002 (March 24, 2010), Wis. Tax Bull. No. 168, pp. 11-13 (July 2010).

- In Private Letter Ruling W1249001 (Sept. 18, 2012), Wis. Tax Bull. No. 178, pp. 14-17 (Jan. 2013), the Department concludes that, under the given facts, (a) sterile, synthetic, non-pyrogenic material intended for use in combination with autologous bone marrow for bone void filling and fracture repair of the pelvis and extremities is an exempt "prosthetic device" under Wis. Stat. § 77.54(22b); and (b) a kit containing an exempt "drug," a "prosthetic device," and a mixing apparatus is tax-exempt in its entirety pursuant to the "bundled transaction" rules. See **Section 6.1**.

Section 9.13. Food and Beverages.

- The Department has published guidance to the effect that "take and bake pizza" is "prepared food" that is subject to sales and use tax, unless it falls within the exceptions for (a) pizzas sold unheated by weight or volume; or (b) pizzas, no part of which were previously heated by the retailer, that are sold unheated, contain meat, fish, egg, or poultry in raw form, and that require cooking by the consumer, pursuant to Federal Food and Drug Administration regulations. Wis. Tax. Bull. No. 183, p. 8 (Jan. 2014).

- The Department has published guidance concerning ingredients used in the home brewing of beer that are exempt from sales and use tax as "food" or "food ingredients." The Department's guidance also identifies the types of equipment and supplies that are taxable, and the application of the "bundling" rules to the sale of home beer brewing kits that are sold for a single, nonitemized price and contain a combination of taxable and non-taxable products. Wis. Tax Bull. No. 174, p. 10 (Jan. 2012). With respect to the "bundling" rules, see **Section 6.1**.

- There was an important change in law, effective October 1, 2009, with respect to certain sales by restaurants to employees. See **Section 2.9.**

- Prior to October 1, 2009, Wis. Stat. § 77.54(20)(c)4 exempted the sales of meals, food, food products, and beverages sold by hospitals, sanatoriums, nursing homes, retirement homes, community-based residential facilities as defined in Wis. Stat. § 50.01(lg), or day care centers licensed under Wis. Stat. Ch. 48, *and served at* a hospital, sanatorium, nursing home, retirement home, community-based residential facility, or day care center. The statute also specifically exempted the sales of meals, food, food products, or beverages sold to the elderly or handicapped by persons providing "mobile meals on wheels," and provided a definition of "retirement home." Effective October 1, 2009, Wis. Stat. § 77.54(20)(c)4 has been repealed, and effectively replaced by Wis. Stat. § 77.54(20n)(b). One of the differences between the old and new statutes is that the listed

items no longer need to be "served at" the facility. Another difference is that the terms "meals, food, food products, and beverages" have been replaced with "food and food ingredients, except soft drinks." The exemption for "meals on wheels" is retained. For a Department of Revenue summary of this change, see http://www.revenue.wi.gov/taxpro/news/100119b.html.

- Effective May 6, 2010, the Wis. Stat. § 77.54(20n)(b) exemption discussed in the above bullet point has been expanded to include food and food ingredients, except soft drinks, sold by any facility certified or licensed under Chapter 48, Wis. Stats. According to the Department, such facilities include licensed child placement agencies, residential care centers, foster homes, treatment foster homes, group homes, and shelter care facilities. *Sales and Use Tax Report*, p. 2 (June 2010).

Section 9.16. Exemptions for Vessels, Aircraft, Motor Vehicles and Like Property.

In a major change, the Legislature has provided that, effective July 1, 2009, a single-owner entity that is disregarded as a separate entity for Wisconsin income and franchise tax purposes is disregarded as a separate entity for Wisconsin sales and use tax purposes. Prior to this change, disregarded entities for Wisconsin income and franchise tax purposes were treated as separate entities for Wisconsin sales and use tax purposes.

This Section 9.16 describes the significance of the change, a narrow transition rule that provides limited relief, and possible planning to deal with the change. We also discuss some confusion that appears to exist concerning the effective date of the provision, which is July 1, 2009, but some have thought (incorrectly) might be October 1, 2009. For further legislative background concerning this change, see "Sales and Use Tax Treatment of Disregarded Entities (General Fund Taxes — General Sales and Use Tax)," Legislative Fiscal Bureau Paper #375 (May 27, 2009), available at: http://legis.wisconsin.gov/lfb/publications/budget/2009-11-Budget/Documents/Budget%20Papers/375.pdf. For the Department of Revenue's views concerning this change, including the "transition" relief discussed below, see *Sales and Use Tax Report*, pp. 3-5 (July 2009). The statutory changes themselves are contained in Wis. Stat. §§ 77.51(10), 77.61(19m)(a) – (c) and 77.58(3)(a).

a. Significance. For many years, the Department of Revenue has issued private letter rulings and other guidance approving the use of multiple legal entities for sales and use tax planning purposes. For example, Wisconsin provides a sales and use tax exemption for trucks and certain other tangible personal property purchased by common and contract carriers. A company that owns or leases vehicles to carry its own products, however, generally cannot qualify for that exemption, since it is not principally engaged in the business of common or contract carriage. Thus, for sales tax and other business reasons, many companies have organized and own a separate legal entity, which conducts carriage activity for the taxpayer, allowing the separate entity to qualify for the common and contract carrier exemption on purchase and repair of trucks. There are many other examples, including related company leasing structures (where one entity purchases property or services and then leases or resells them to affiliates, achieving a sales tax

deferral), and "supply company" affiliates of construction contractors, which purchase and then resell building materials to exempt organizations with which the contractor performs real property construction.

The separate legal entities that conduct these activities typically are organized as corporations, partnerships, or limited liability companies. For income tax purposes, the simplest structure is that the entity be a "disregarded entity" (such as a single member LLC), since a separate income tax return does not need to be prepared for the LLC. Prior to the law change, however, these "disregarded" entities were treated as separate from their owner (and thus "regarded") for *sales and use tax purposes*, allowing the types of planning just noted. For these reasons, single member LLCs (and in some cases qualified subchapter S subsidiaries or "Q-Subs") became the preferred choice for these types of structures. In fact, it is our sense that single-owner entities were the *only* structure that many taxpayers would be willing to use; in other words, if the only choice was a "C" corporation (or partnership) many taxpayers would not have organized a separate entity. For an example of a transportation subsidiary that was operated as a single member LLC, and thus a "disregarded" entity for income tax purposes but "regarded" for sales tax purposes, see Priv. Ltr. Rul. W0420001 (Feb. 20, 2004), Wis. Tax Bull. No. 139, pp. 24-27 (July 2004).

The recent change generally eliminates the sales and use tax benefits for structures where the entity has one owner and is a "disregarded entity" for income tax purposes. See, e.g., *Sales and Use Tax Report*, p. 8 (Example 3) (Dec. 2010). Because the disregarded entity had come to be the entity of choice for these types of structures, the change is of considerable significance. Indeed, the fiscal estimate for the change is approximately $20 million per year in sales and use tax revenues.[1] It should also be noted that structures that utilized an entity that was not "disregarded" (such as a "C" corporation) are not impacted by this change, and should remain viable. This forms the basis for potential planning and restructuring ideas, summarized below.

Planning structures aside, the law change also impacts a wide variety of other situations. For example, a recent Department of Revenue Tax Release addresses situations concerning the application of the exempt status of an owner to purchases made by its disregarded entity. The Tax Release concludes that purchases by a "disregarded entity" that could not qualify for exempt status if it were not a disregarded entity would now qualify for exemption, as the disregard entity is now in effect treated as part of its owner (i.e., the exempt parent entity), assuming that the activities of the disregarded entity do not otherwise cause the parent to lose its exempt status. Wis. Tax Bull. No. 170, pp. 6-7 (Jan. 2011).

[1] See "Sales and Use Tax Treatment of Disregarded Entities (General Fund Taxes — General Sales and Use Tax)," Legislative Fiscal Bureau Paper #375, p. 4 (May 27, 2009), available at: http://legis.wisconsin.gov/lfb/publications/budget/2009-11-Budget/Documents/Budget%20Papers/375.pdf.

b. Limited Transition Rule. Without a transition rule, there would be a concern that owners of entities that suddenly were deemed "disregarded" for sales and use tax purposes as of July 1, 2009 would now own (or be deemed to own) property or services of the subsidiary that had been purchased on a tax free basis, due to the formerly "regarded" status of that subsidiary. Because the owner in many cases would not have been able to purchase the property or service in its own right on a non-taxable basis, the issue would arise as to whether the owner would now owe a use tax on those items – an extraordinarily harsh result. To avoid this problem, the Legislature has provided a limited transition rule, which says that a single-owner entity that is disregarded as a separate entity for Wisconsin sales and use tax purposes on July 1, 2009 is treated for Wisconsin sales and use tax purposes as an entity separate from its owner for purposes of the sale, lease, license, or rental of and the storage, use or other consumption of tangible personal property purchased by the single-owner entity or its owner prior to July 1, 2009. A similar transition rule applies for "supply company" affiliates of construction companies, which will be "grandfathered" with respect to certain building materials, generally provided that the written contract was irrevocably entered into prior to July 1, 2009, or that resulted from acceptance of a formal bid accompanied by a bond or performance guaranty that was irrevocably submitted before July 1. The Department discusses these transition rules in detail in its July 2009 *Sales and Use Tax Report*.

c. Planning. As noted above, the Legislature has provided that, effective July 1, 2009, a single-owner entity that is disregarded as a separate entity for Wisconsin income and franchise tax purposes is disregarded as a separate entity for Wisconsin sales and use tax purposes. The legislation specifically applies to "single owner entities that are disregarded for Wisconsin income and franchise tax purposes," but does not impact any entity that is not a disregarded single-owner entity. Thus, new or existing structures that utilize a "C" corporation, or a partnership, should be viable. This also raises the question of whether existing structures that are impacted by the law change (i.e., the disregarded single owner entities) can be changed to "regarded" entity structures that would not be impacted by the law change.

Some taxpayers with existing single-owner structures presumably will accept the law change, since they may not have used the structure in the first place unless it had entailed an entity that was "disregarded" for income tax purposes but "regarded" for sales tax purposes. For those interested in restructuring, however, it should be possible to find a workable alternative, even using the existing legal entity. For example, with disregarded entities that are single member LLCs, taxpayers might consider filing an income tax election to treat the entity as a "C" corporation.[2] As another example, the LLC might

[2] The election is made on IRS Form 8832, available at: http://www.irs.gov/pub/irs-pdf/f8832.pdf. Consideration might even be given as to whether it is possible to make that election only for Wisconsin income tax purposes, leaving the federal income tax disregarded entity status (and presumably the status in other states where the taxpayer may file) in place. The Department has acknowledged, for example, that taxpayers can be an S corporation for federal but not Wisconsin purposes, or make a "Section 338(h)(10) election" for federal but not Wisconsin purposes (or vice versa). With respect to § 338 elections, see Wis. Tax Bull No. 71, p. 16 (question and answer 1) (April 1991).

admit another member, or the sole member might sell or transfer a part of its LLC interest to another party, effectively turning the LLC into an income tax partnership (and thus not a disregarded single owner entity). For disregarded entities that are Q-Subs, the owner might consider revoking the initial Q-Sub election. The Department, in fact, has recently approved these types of restructuring steps. See Private Letter Ruling W1008005 (Dec. 1, 2009), Wis. Tax Bull. No. 166, pp. 13-16 (May 2010) (revocation of a QSSS election) and Private Letter Ruling W1008006 (Dec. 1, 2009), Wis. Tax Bull. No. 166, pp. 16-18 (May 2010) (involving a single member LLC becoming an income tax partnership by admitting a related party as a 5% member). Of course, taxpayers are strongly advised to consult a tax advisor before taking any of these steps, as they could have a variety of material tax and other consequences.[3] Taxpayers might also consider requesting a letter ruling from the Department of Revenue with respect to sales and use tax consequences of the restructuring.

Note with regard to taxpayers that did not restructure prior to the July 1, 2009 effective date: It generally should be possible to restructure after July 1, 2009, although the taxpayer may lose sales and use tax benefits with respect to the structure on or after July 1, 2009 and before the effective date of the restructuring – *unless* the limited transition rule (discussed above) applies.

d. Confusion Concerning the Effective Date. There has been some confusion concerning the effective date of the law change. The correct effective date is July 1, 2009, although some believed (in error) that the effective date is October 1, 2009. The confusion arose (understandably) due to the wording of the effective date provisions in 2009 Wis. Act 28, particularly § 9443 of the Act, which says that "the repeal and recreation of sections 77.51(10) and 77.61(19m)(b) of the statutes take effect on October 1, 2009."

The general effective date of the Act (July 1, 2009) is contained in Act § 9400. The key provision relating to the change in the treatment of single-owner disregarded entities is contained in Act § 1855, creating Wis. Stat. § 77.61(19m)(a), (b) and (c). Section 77.61(19m)(a) contains the key language, providing that "a single owner entity that is disregarded as a separate entity under ch. 71 is disregarded as a separate entity under this subchapter." Sections 77.61(19m)(b) and (c) are the special transition rules, discussed above. Again, all of §§ 77.61(19m)(a), (b) and (c) are contained in Act § 1855, which is effective July 1, 2009. Act § 1855b then says that "77.61(19m)(b) of the statutes, as created by 2009 Wisconsin Act …. (this act) is repealed and recreated to read …." (emphasis added). The repealed and recreated language thus relates solely to the transition rule under Wis. Stat. § 77.61(19m)(b), which as repealed and recreated on October 1, 2009 makes only minor language changes in the transition rule to comport with the Streamlined Sales and Use Tax provisions, which also generally become

[3] To take just one example, making an election to "check to box" is an incorporation transaction for income tax purposes. If the liabilities of the LLC exceed the income tax basis in its assets, the owner might have gain under IRC § 357(c). The entity will also presumably need to apply for a seller's permit, and obtain a federal EIN. The point here is not to list all the issues involved in "checking the box," but to point out that there are issues that should be considered.

effective October 1, 2009. Thus, the October 1, 2009 effective date in Act § 9443 relates only to the § 77.61(19m)(b) transition rule which initially became effective July 1, and then only to make minor (and for this purpose immaterial) language changes as of that date.

e. Miscellaneous – Tax Filings and Compliance. 2009 Wis. Act 28 also makes some changes in filing and compliance matters with respect to "disregarded entities." Prior to these changes, the owners of disregarded entities (even if they were regarded for sales and use tax purposes) were supposed to report the disregarded entity's gross receipts on the owner's sales and use tax return. Effective September 1, 2009, a single-owner entity that is disregarded for Wisconsin income and franchise tax purposes has the option to (a) include the information from the disregarded entity on the owner's return; or (b) file a separate electronic sales and use tax return for the disregarded entity. Further, if an owner that owns more than one disregarded entity files a separate return for one of the disregarded entities, the owner is required to file separate returns for all of the disregarded entities.

The Department has asked that owners of disregarded entities that hold or are required to hold a seller's permit contact the Department (at 608-266-2776 or sales10@revenue.gov) if (a) the owner elects to file a separate electronic return for the disregarded entity; (b) the owner and one or more disregarded entities have the same business location; or (c) the owner and/or one or more of its disregarded entities are currently improperly registered.

- The Department has published guidance with respect to the purchase by nonresidents of *non-motorized* campers in Wisconsin. Wis. Tax Bull. No. 179, pp. 7-8 (April 2013). The Department's guidance covers two categories of sellers: (a) dealers and other retailers; and (b) "private parties."

  Sales by Dealers and Other Retailers

  The Department says that a retailer is required to collect the 5% state sales tax if the nonresident takes possession of the camper in Wisconsin. The Department also says that the retailer is required to collect the 0.5% county, 0.5% football stadium and 0.1% baseball stadium taxes, depending on the type of camper, as follows:

Type of Camper Sold by Dealer or Other Retailer	Applicable County & Stadium Taxes to be Collected
Recreational Vehicle (as defined in Wis. Stat. § 340.01(48r), means a vehicle that is designed to be towed upon a highway by a motor vehicle, that is equipped	Retailer must collect county and stadium taxes *based on where the nonresident will customarily keep the camper in Wisconsin.* If the nonresident will not customarily keep the

and used, or intended to be used, primarily for temporary or recreational human habitation, that has walls of rigid construction, and that does not exceed 45 feet in length)	camper in Wisconsin, the retailer is not required to collect the county and stadium taxes.
Camping Trailer or Truck Camper (means a vehicle with a collapsible or folding structure designed for human habitation and towed upon a highway by a motor vehicle)	The retailer must collect county and stadium taxes *based on where the nonresident takes possession of the camper from the retailer in Wisconsin*. If the nonresident takes possession in a Wisconsin county that does not impose a county or stadium tax, the retailer is not required to collect the county or stadium taxes. *Note*: the Department says that the nonresident purchaser owes county or stadium use tax if, after taking possession, the camper is transported and used/stored by the nonresident in a taxable county. The Department says that the retailer may voluntarily collect the county or stadium use tax due by the nonresident.

Sales by Private Parties

The Department says that an individual is not required to collect the Wisconsin state, county or stadium taxes when selling his/her personal camper. The nonresident, however, owes the applicable state, county, or stadium use taxes if the camper is first stored or used in Wisconsin. The Department also says that a nonresident does not owe these taxes if the nonresident does not register or title, and is not required to register or title, the camper with the Wisconsin Department of Transportation.

Section 9.19. Exemptions Relating to Waste Treatment and Recycling Activities.

- In Priv. Ltr. Rul. W0848002 (Sept. 5, 2008), Wis. Tax Bull. No. 159, pp. 13-15 (Jan. 2009), the Department of Revenue held that a front-end loader, back-hoe and roll-off containers did not qualify for the Wis. Stat. § 77.54(26m) exemption under the given facts because they were used *prior* to the actual waste reduction or recycling activities, thus not meeting the statutory requirement that they be used "directly" in the waste reduction or recycling process.

- In its June 2009 revisions to Publication 207, *Sales and Use Tax Information for Contractors*, the Department of Revenue updated (at pp. 9-10) its discussion of the "waste treatment facilities" exemption under Wis. Stat. § 77.54(26) to take into account the narrowing changes to that statute, effective October 1, 2007, and the changes made to

the underlying property tax statute referenced in the exemption (Wis. Stat. § 70.11(21)). Prior to October 1, 2007, the definition of an "industrial waste treatment facility" stated by the Department was:

> … any property taxed under ch. 70, Wis. Stats., that is built, constructed or installed as a unit used for the treatment of liquid or other wastes resulting from any process of industry, manufacture, trade, business or the development of any natural resource.

On and after October 1, 2007, the definition of "industrial waste treatment facility" is:

> … a facility that is purchased or constructed as a waste treatment facility and that is used exclusively and directly to remove, store, or cause a physical or chemical change in industrial waste or air contaminants for the purpose of abating or eliminating pollution of surface waters, the air or waters of the state, if that property is not used to grow agricultural products for sale.

The Department also has published (as part of a broader set of rules) certain revisions to Wis. Admin. Code § Tax 11.11, to take into account certain of the October 1, 2007 changes to the Wis. Stat. § 77.54(26) exemption. Changes to the rule include (a) the new definition of "industrial waste treatment facility" noted above and (b) that "used "exclusively" means "to the exclusion of all other uses" except other use not exceeding 5% of total use, and the production of heat or steam for a manufacturing process from certain industrial waste or wood residue from the paper and woods manufacturing process, under the conditions and limitations stated in Wis. Stat. § 70.11(21)(ab)3.b.

Section 9.20. Fuel, Electricity and Natural Gas.

- The Department has issued guidance to the effect that separate and optional charges for motor vehicle fuel (including the cost of the fuel, mark-up and overhead) by a rental car company to a person who rents a motor vehicle are not subject to Wisconsin sales and use tax if the proper excise taxes were paid by the rental car company to the motor vehicle fuel supplier. Wis. Tax Bull. No. 174, p. 13 (Jan. 2012).

- On December 23, 2010, the Department of Revenue posted a Tax Release to its website, setting forth its views on when a vendor of propane is required to obtain an exemption certificate from residential customers with respect to propane sales. The Department says that (a) if 100 percent of the propane sold to a customer in Wisconsin is for use in the person's permanent residence or for farm use, an exemption certificate is not required; but (b) if for any reason the propane is not 100 percent exempt from Wisconsin sales and use tax, an exemption certificate must be completed by the customer and kept on file by the seller. The Tax Release lists non-inclusive examples of "residential" and "non-residential" use. The Tax Release also says that, even in those situations where an exemption certificate is not required, the seller must keep adequate records to identify which sales are exempt. For this purpose, "adequate records" include asking each

customer if the propane is being purchased for use in the person's permanent residence, and then recording the response in one of several specified manners. The Tax Release is available at: http://www.dor.state.wi.us/taxpro/news/101220b.html. See also *Sales and Use Tax Report*, p. 2 (March 2011).

- The Department has published a reminder that if the motor vehicle fuel or alternate fuel tax under Wis. Stat. Ch. 78 is refunded because the buyer does not use the fuel to operate a motor vehicle upon public highways, the fuel becomes subject to Wisconsin use tax unless another exemption applies (e.g., use in farming). *Sales and Use Tax Report*, p. 4 (Sept. 2009).

- Effective August 1, 2012, the Department of Revenue adopted Wis. Admin. Code § Tax 11.10, addressing the Wis. Stat. § 77.54(56) exemption for certain wind, solar and gas powered products, to the Department's website. The Rule defines the term "product," provides examples of items that are and are not considered products, and addresses certain other aspects of the exemption's requirements and scope. For background information, see https://docs.legis.wisconsin.gov/code/chr/2011/cr_11_052.

Section 9.21. Packaging and Shipping Materials.

The Department of Revenue has ruled that the charge for the "rental" of a cylinder used to transfer gas that is tax-exempt is also exempt if the cylinder is retained by the customer for a period of 30 days or less. The Department considers the "rental charge" – even if it is separately stated and invoiced on a different date – to be part of the seller's gross receipts from the sale of the natural gas. The Department's guidance cautions that this treatment only applies to cylinders that are used to transfer exempt gas from the vendor's location to the customer's location. The ruling also discusses certain situations where the "rental" will be considered separate from the sale of the gas. *Sales and Use Tax Report*, p. 2 (Dec. 2008).

Section 9.22. Miscellaneous Exemptions.

- The Department of Revenue has issued guidance that certain "liquid nurse tanks" and "dry fertilizer tender units" are exempt under Wis. Stat. § 77.54(5)(d) because they are mobile units used for mixing and processing. The Department's guidance also states, however, that certain "fertilizer" and "chemical storage tanks" generally do not qualify for exemption. The guidance is available at http://www.dor.state.wi.us/taxpro/news/110624d.html (posted July 7, 2011).

- On July 1, 2013, a sales and use tax exemption became available for "advertising and promotional direct mail." 2011 Wis. Act 32, creating Wis. Stat. § 77.54(59).

- On July 1, 2013, a sales and use tax exemption became available for snowmaking and snow-grooming machines and equipment, including accessories, attachments and parts for the machines and equipment and the fuel and electricity used to operate such machines and equipment, that are used exclusively and directly for snowmaking and

snow grooming at ski hills, ski slopes, and ski trails. 2011 Wis. Act 32, creating Wis. Stat. § 77.54(58).

- Effective September 1, 2011, a sales and use tax exemption was enacted for vegetable oil or animal fat that is converted by an individual into motor vehicle fuel that is exempt under Wis. Stat. § 78.01(2n) from the taxes imposed under Wis. Stat. § 78.01(1). 2011 Wis. Act 32, creating Wis. Stat. § 77.54(11m). Wis. Stat. § 78.01(2n), in turn, exempts "the first 1,000 gallons of renewable fuel produced or converted from another purpose each year by an individual and used by that individual in his or her personal motor vehicle, if the individual does not sell any such renewable fuel during that year." On March 23, 2012, the Department posted guidance to its website concerning this exemption. The guidance is available at: http://www.revenue.wi.gov/taxpro/news/120323a.html.

- Effective September 1, 2011, a sales and use tax exemption was enacted for certain modular homes and manufactured homes used in real property construction activities outside Wisconsin. 2011 Wis. Act 32, creating Wis. Stat. § 77.54(5)(am). The Department of Revenue has issued guidance concerning transactions that straddle the effective date. See http://www.revenue.wi.gov/taxpro/news/110726.html (posted on July 27, 2011. And see Wis. Dep't. of Revenue Publ'n 231, *Sales and Use Tax Treatment of Manufactured and Modular Homes* (June 2012).

- The Department has published guidance concerning application of the Streamlined "bundling" rules in the context of the Wis. Stat. § 77.54(46) exemption for the American flag or Wisconsin flag when the flags are sold as part of flag "kits." The guidance is available at http://www.revenue.wi.gov/taxpro/news/101108b.html; *Sales and Use Tax Report*, pp. 5-6 (Dec. 2010); and Wis. Tax Bull. No. 170, pp. 7-8 (Jan. 2011). The guidance supersedes the Tax Release titled "Exemptions for United States Flags and Wisconsin State Flags", Wis. Tax Bull. No. 127, p. 28 (Oct. 2001).

- In its September 2008 *Sales and Use Tax Report* (p. 3), the Department of Revenue issued a reminder that sales to certain foreign officials are exempt (pursuant to federal law) from Wisconsin sales and use taxes. The *Tax Report* provides information on how to determine and verify which foreign officials qualify for the exemption, and the information the Department says a seller must obtain to document that the sales are exempt.

- The Department of Revenue has issued a statement that the nonrefundable income and franchise tax credit for certain sales and use tax paid with respect to film production in Wisconsin is limited to the 5% state sales and use tax and is not allowed for any local taxes or fees. *Sales and Use Tax Report*, pp. 3-4 (Sept. 2008).

- The Department of Revenue has held that the sale of corn used in a corn burner that is used for residential heating qualifies for exemption pursuant to Wis. Stat. § 77.54(30)(a)1m. (which statute was effective December 1, 2007), provided the corn is

used to heat a person's "permanent principal residence." *Sales and Use Tax Report*, p. 4 (March 2008).

- The Department of Revenue has published guidance with respect to the Wis. Stat. § 77.54(25m) exemption (which was effective April 1, 2009) for certain catalogs and envelopes in which they are mailed. The primary issue addressed by the Department is the meaning of "catalog." The Department notes that the statutes define a "catalog" for this purpose as a "printed and bound, stitched, sewed, or stapled book containing a list and description of property or services for sale, regardless of whether a price is specified." The statute, however, does not define a "book," and the Department thus looks to a dictionary definition of a book as "[a] set of written, printed, or blank pages fastened along one side and encased between protective covers." The Department then gives several helpful examples:

  (a) a brochure that is folded, but not bound, stitched, sewed, or stapled does not qualify for exemption (as the Department believes it is not a catalog);

  (b) a multi-page description of property for sale that is stapled in the corner qualifies as a catalog "if it has a front and back cover and at least two sheets that are enclosed between the front and back cover";

  (c) a cover letter or insert that is mailed with or inserted in a catalog, but does not become part of the catalog, is not exempt "unless the cover letter or insert is a catalog in itself"; and

  (d) an envelope that is used to mail both an exempt catalog and other items that are not exempt catalogs qualifies for exemption as "the exemption does not require that the envelope be used exclusively" to mail an exempt catalog.

  Sales and Use Tax Report, p. 2 (June 2009); and see Wis. Dep't. of Revenue Publ'n 245, *Advertising Companies: How Do Wisconsin Sales and Use Taxes Affect Your Operations?* (April 2012), available at: http://www.revenue.wi.gov/pubs/pb235.pdf.

  Comment: the Department's examples show that very slight variations in how the advertising material is prepared can make a difference in whether the exemption is available. Taxpayers should plan accordingly.

- The Department has also published guidance with respect to the purchase of paper and printing services used in the production of catalogs before and after the enactment of Wis. Stat. § 77.54(25m), effective April 1, 2009. These questions frequently arise in the case of companies that purchase paper and provide it to a printer, which then prints the company's catalogs.

  a. Paper Used For Catalogs. The Department says that the purchase of paper used in producing catalogs is the same both before and after April 1, 2009 – i.e., paper used in

the manufacture of catalogs that are *sold* to customers is exempt under Wis. Stat. § 77.54(2), but the purchase of paper used in the manufacture of catalogs that are *given away* (and not sold) does not qualify for that particular (§ 77.54(2)) exemption. The purchase of paper used in printed items that are given away is, however, exempt if it qualifies for the § 77.54(15) exemption for "shoppers guides, newspapers and periodicals" (because that exemption applies regardless of whether those specific items are sold or given away). In addition, the purchase of paper is exempt if it qualifies for the § 77.54(43) exemption for use in the manufacture of catalogs *transported and used solely outside the state*. Again, the law changes effective April 1, 2009 do not impact the Wisconsin sales and use tax treatment of paper purchases.

b. Printing Services for Catalogs. The tax treatment of these services changes somewhat effective April 1, 2009. Prior to that time, tax did not apply (pursuant to Wis. Stat. § 77.52(2)(a)11) to the printing or imprinting of tangible personal property which was subsequently transported outside the state for use outside the state by the consumer for advertising purposes. As of April 1, 2009, tax does not apply to (pursuant to Wis. Stat. § 77.52(2)(a)11, as amended) to "producing, fabricating, processing, printing, or imprinting" that results in printed material, catalogs, or envelopes that are exempt under § 77.54(25) or (25m), if the consumer furnishes the materials (e.g., paper).

Sales and Use Tax Report, p. 2 (June 2009) ; and see Wis. Dep't. of Revenue Publ'n 245, *Advertising Companies: How Do Wisconsin Sales and Use Taxes Affect Your Operations?* (April 2012), available at: http://www.revenue.wi.gov/pubs/pb235.pdf.

Comment: the Wisconsin sales and use tax treatment of paper and printing services used in the production of advertising has long been complex and confusing. The statutory changes effective April 1, 2009 expand the range of non-taxable items and somewhat simplify the area, but complexities remain. The issues relating to the purchase of paper and printing services, and other advertising services and materials, are discussed in detail in Chapter 11 of *The Complete Guide*.

- The Legislature enacted "police and fire protection fees," effective September 1, 2009. 2009 Wis. Act 28. See **Section 1.1**.

- Effective July 1, 2009, the Legislature created Wis. Stat. § 77.54(30)(a)7., adding an exemption for fuel sold for use in motorboats that are regularly employed in carrying persons for hire for sport fishing in and upon the "outlying waters" as defined in Wis. Stat. § 29.001(63) and the rivers and tributaries specified in § 29.2285(2)(a)1. and 2. if the owner and all operators are licensed under § 29.514 to operate the boat for that purpose. 2009 Wis. Act 28.

- Effective August 1, 2009, the Legislature created an exemption for sales to any federally recognized American Indian tribe or band in Wisconsin. 2009 Wis. Act 28, adding Wis. Stat. § 77.54(9a)(ed). For legislative background concerning this change, see "Sales Tax Exemption for Native American Purchases (General Fund Taxes — General Sales and

Use Tax)," Legislative Fiscal Bureau Paper #378 (May 27, 2009), available at: http://legis.wisconsin.gov/lfb/publications/budget/2009-11-Budget/Documents/Budget%20Papers/378.pdf.

- Effective July 1, 2009, exemptions were enacted for purchases by the Wisconsin Home Care Authority (Wis. Stat. § 77.54(9a)(a)) and the Regional Transit Authorities (§ 77.54(9a)(er)). 2009 Wis. Act 28.

- The Legislature delayed the effective date of Wis. Stat. § 77.54(56) (relating to wind, solar and gas from agricultural waste) from July 1, 2009 to July 1, 2011. 2009 Wis. Act 28. Effective August 1, 2012, the Department of Revenue adopted Wis. Admin. Code § Tax 11.10, addressing the Wis. Stat. § 77.54(56) exemption for certain wind, solar and gas powered products. The Rule defines the term "product," provides examples of items that are and are not considered products, and addresses certain other aspects of the exemption's requirements and scope.

Significant New Exemptions for Certain Property Used in "Qualified Research" and in Raising Animals Sold for Use in Biotechnology

Effective January 1, 2012, Wis. Stat. § 77.54(57) exempts purchases of:

(a) machinery and equipment, including attachments, parts and accessories, that are sold to persons primarily engaged in manufacturing or biotechnology in Wisconsin and are used exclusively and directly in "qualified research";

(b) tangible personal property or item or property that is sold to persons who are engaged primarily in manufacturing or biotechnology in Wisconsin, if the property or item or property 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; and

(d) the items listed in §§ 77.54(3m)(a) to (m), 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.

For these purposes, the term "qualified research" means "qualified research as defined under section 41(d)(1) of the Internal Revenue Code." The terms "animals," "biotechnology," "biotechnology business," "machinery," "primarily," and "used exclusively" are all defined by statute. The Department has published detailed guidance concerning its views on these new exemptions. See "Fact Sheet: Sales and Use Tax Exemption for Qualified Research"; and "Fact Sheet: Sales and Use Tax Exemptions Relating to Animals Sold for Use in Qualified Research and Manufacturing." The Fact Sheets are available at: http://www.revenue.wi.gov/taxpro/news/120419.html. In addition, the Department has published a detailed administrative rule, Wis. Admin. Code § Tax 11.20, with regard to these new exemptions. Information concerning the development of the rule (including the Department's responses to comments received during the rule development process) is available at https://docs.legis.wisconsin.gov/code/chr/2012/cr_12_015. For further legislative background concerning these provisions, see "Sales and Use Tax Exemption for Qualified Research in Biotechnology and Manufacturing (General Fund Taxes — General Sales and Use Tax), Legislative Fiscal Bureau Paper #377 (May 27, 2009), available at: http://legis.wisconsin.gov/lfb/publications/budget/2009-11-Budget/Documents/Budget%20Papers/377.pdf.

Chapter 10

The Manufacturing Exemptions

Section 10.0. Overview of Chapter.

- The Department of Revenue has stated that digital products cannot be "manufactured." Wis. Dep't. of Revenue Publ'n 245, *Advertising Companies: How Do Wisconsin Sales and Use Taxes Affect Your Operations?,* p. 4 (April 2012), available at: http://www.revenue.wi.gov/pubs/pb235.pdf. This statement could have significant implications for companies that produce digital products. In an increasing number of situations, items that had been manufactured "tangible personal property" are now produced as digital products, potentially making certain exemptions (such as those under Wis. Stat. §§ 77.54(2) and 77.54(6)) unavailable and increasing overall sales and use tax expense. It is doubtful whether this is wise as a matter of tax policy. In some cases, it may be possible to plan around this problem by producing the product as tangible personal property, rather than as a digital product.

- The Department of Revenue has revised its Publication 203 ("*Sales and Use Tax Information for Manufacturers*") to state its views with respect to whether certain equipment related to wind power generation qualifies for exemption under Wis. Stat. § 77.54(6a). Based on the facts in the example, the Department concludes as follows:

> *Property qualifying for exemption*: The generator unit, wind turbine blade assembly, wind turbine tower, and associated equipment which is used exclusively and directly in the operation and control of the wind turbine blade assembly and the generator unit.
>
> *Property not qualifying for exemption*:
>
> > (a) Tangible personal property used to monitor and control the flow of electricity from the generator unit to the point where the electricity is transferred to the facilities of the independent transmission company as defined in Wis. Stat. § 196.485(1)(ge). This includes the conductors from the generator to the pad mount transformer, junction boxes, collector system grounding transformers, 34.5 kilovolt circuit breakers, substation transformers, high voltage (grid voltage) circuit breakers, double ended breaker switches, and any equipment used to monitor such property as well as the wind turbine blade assembly and the generator unit for purposes of repair or maintenance of such property.
> >
> > (b) Real property improvements such as foundations for any of the equipment mentioned above, components of the underground collection

system, roads which provide access to wind farm facilities and real property improvements to the substation and switch yard.

See Publication 203, at p. 27 (Appendix A, Example 14) available at: http://www.dor.state.wi.us/pubs/pb203.pdf. For a ruling dealing with these types of issues under Indiana's sales and use tax law, see Indiana Revenue Ruling #2009-06 ST (June 10, 2009), available at: http://www.in.gov/legislative/iac/20090624-IR-045090463NRA.xml.html.

Section 10.1. Machinery and Equipment—Introduction.

In *Engel and Summit Ski Corp. v. Dep't. of Revenue*, Docket Nos. 07-S-168, 07-S-169, Wis. Tax Rep. (CCH) ¶ 401-104 (WTAC May 27, 2008) the Tax Appeals Commission rejected the taxpayer's argument that certain snow-grooming tractors and related equipment were exempt manufacturing machinery and equipment under Wis. Stat. § 77.54(6)(a). Although the parties agreed that the taxpayer's production of snow constituted manufacturing tangible personal property (and that certain equipment qualified for the exemption), there was disagreement about whether the snow grooming equipment qualified. The Department's position was that the manufacturing process ended when the taxpayer deposited snow on the slopes of its facilities, and that the grooming equipment was used after that point. The taxpayer, however, argued that the manufacturing process did not end until the later production by the grooming tractors of a "corduroy groomed surface condition" composed of natural and man-made snow. The Commission rejected the taxpayer's argument, holding that (a) the taxpayer had not proven that the production of the groomed surface is "manufacturing" within the meaning of the statute; (b) the production of snow ended when the snow was stored in piles on slopes; (c) the taxpayer was not selling snow to its customers and (d) even if the taxpayer was selling snow, the "sales" of the snow would be incidental to the taxpayers' sales of skiing, snowboarding or snowtubing services. The Commission also noted (in footnote 3) that, pursuant to Wis. Stat. § 77.54(6r), the Wis. Stat. § 77.54(6)(a) exemption must be "strictly construed." Please note that, effective July 1, 2013, a sales and use tax exemption is available for snowmaking and snow-grooming machines and equipment, including accessories, attachments and parts for the machines and equipment and the fuel and electricity used to operate such machines and equipment, that are used exclusively and directly for snowmaking and snow grooming at ski hills, ski slopes, and ski trails. 2011 Wis. Act 32, creating Wis. Stat. § 77.54(58).

Section 10.6. Machinery and Equipment—Use in "Manufacturing"—General Principles.

"Frac Sand"

On August 1, 2012, the Department of Revenue posted guidance to its website concerning the sales and use tax treatment of transactions involving "frac sand." The guidance is available at: http://www.revenue.wi.gov/faqs/ise/fracsand.html. The Department's basic conclusions are:

- There are no Wisconsin sales and use tax exemptions that apply to the purchase of equipment used to extract frac sand from the earth.

- Washing, cleaning, grading and drying of extracted material to produce frac sand is "manufacturing." Thus, in certain situations, machinery and equipment, and certain property used or consumed in the manufacturing process, can be purchased tax-free. The Department provides some guidance on these circumstances, including its views as to when the manufacturing process begins and ends.

- The sale of frac sand in Wisconsin generally is subject to Wisconsin sales or use tax. However, the acquisition of frac sand is not taxable when a business purchases real property and then extracts the frac sand from the purchased real property, or leases real property and extracts frac sand from the leased real property (as sales and leases of real property are not subject to Wisconsin sales and use tax).

Effective August 1, 2009, the Legislature made several changes to the statutory definition of manufacturing, presumably in an attempt to reduce or eliminate common disputes, such as those relating to when the manufacturing process begins and ends; what is included within the scope of manufacturing; whether research and development can fall within the scope of manufacturing; whether storage of work in process is within the scope of manufacturing; and what is a "plant." In many cases, the legislation generally tracks language in the Department's already existing administrative regulations. The changes are as follows:

- The scope of manufacturing is expressly defined as "beginning with conveying raw materials and supplies from plant inventory to the place where work is performed in the same plant and ends with conveying finished units of tangible personal property to the point of first storage in the same plant." See Wis. Stat. § 77.54(6a), which as amended becomes new § 77.51(7h)(a)(intro.). This language roughly tracks the language in the Department's already existing administrative rule on manufacturing, Wis. Admin. Code § Tax 11.39(2)(a).

- "Manufacturing" is defined to include "Conveying work in progress directly from one manufacturing process to another in the same plant; testing or inspecting, throughout the manufacturing process, the new article of tangible personal property that is being manufactured; storing work in progress in the same plant where the manufacturing occurs; assembling finished units of tangible personal property …; and packaging a new article of tangible personal property …, if the manufacturer, or another person on the manufacturer's behalf, performs the packaging and if the packaging becomes part of the new article as it is customarily offered for sale by the manufacturer." Wis. Stat. § 77.51(7h)(a)3. This language roughly tracks the language in the Department's already-existing Rule on manufacturing, Wis. Admin. Code § Tax 11.39(2)(a) and (b); however, the new language "storing work in progress in the same plant where the manufacturing occurs" does not seem to have an express analog in the Rule.

- "Manufacturing" is expressly defined to not include "storing raw materials or finished units of tangible personal property, research or development, delivery to or from the plant, or repairing or maintaining plant facilities." Wis. Stat. § 77.51(7h)(b). This

language roughly tracks the language in the Department's already-existing Rule on manufacturing, Wis. Admin. Code §§ Tax 11.39(2)(b) and 11.40(3)(d) (example).

- The term "plant" is defined to mean "a parcel of property or adjoining parcels of property, including parcels that are separated only by a public road, and the buildings, machinery, and equipment that are located on the parcel, that are owned by or leased to the manufacturer." Wis. Stat. § 77.51(10b).

These changes were made by 2009 Wis. Act 28.

Section 10.8. Machinery and Equipment—Use in "Manufacturing"—Specific Applications.

In *Engel and Summit Ski Corp. v. Dep't. of Revenue*, Docket Nos. 07-S-168, 07-S-169, Wis. Tax Rep. (CCH) ¶ 401-104 (WTAC May 27, 2008) the Tax Appeals Commission rejected the taxpayer's argument that certain snow-grooming tractors and related equipment were exempt manufacturing machinery and equipment under Wis. Stat. § 77.54(6)(a). See **Section 10.1**.

Section 10.9. Machinery and Equipment—"Direct" Use in Manufacturing—General Principles.

Effective August 1, 2009, the Legislature made several changes to the statutory definition of manufacturing. See **Section 10.6**.

Section 10.10. Machinery and Equipment—"Direct" Use in Manufacturing—Specific Applications.

- Effective August 1, 2009, the Legislature made several changes to the statutory definition of manufacturing. See **Section 10.6**.

- In a property tax case, the Tax Appeals Commission has addressed the question of when the process of manufacturing ends (and storage begins) with respect to the aging of cheese. The Department argued that the end point should be based on a federal labeling regulation, which indicates that each type of cheese must be aged at least a minimum amount of time to be labeled as such. The taxpayer argued that the standard should be based on the totality of the facts and circumstances, including the conditions under which the cheese is kept, the degree and direction and control exercised by the cheese owner, and the general basis upon which the cheese owner is charged for the taxpayer's services. The Commission rejected the Department's argument and opted for the more flexible approach. *Sekely, LLC v. Dep't of Revenue*, Docket Nos. 11-M-322 *et al* (WTAC Dec. 5, 2013).

Section 10.13. Ingredients, Consumables and Component Parts—Introduction.

- On May 14, 2012, the Department of Revenue posted a Tax Release to its website which discusses the sales and use tax treatment of clean towel and uniform providers. See **Section 8.9** of this Update.

- Effective August 1, 2009, the Legislature made several limiting changes to the "consumables" exemption under Wis. Stat. § 77.54(2). The statute now provides that the tangible personal property must be "exclusively and directly used" by a "manufacturer" in "manufacturing" an article of tangible personal property. It is our understanding that the Department suggested these changes, at least in part, to reverse the *Cherney Microbiological* and *Oscar Mayer* cases discussed in Section 10.13 to 10.16 of *The Complete Guide.* And see the Department's December 7, 2010 posting to its website, at http://www.revenue.wi.gov/taxpro/news/101207a.html, where the Department confirms its view that the legislation reversed the *Cherney* and *Oscar Mayer* cases; see also *Sales and Use Tax Report*, pp. 8-9 (Dec. 2010). In any event, the "destined for sale" requirement in the statute remains (in fact, is repeated twice) in the amended version of the statute. The full text of the amended statute is as follows (underscoring shows the added language; strikethroughs show the deleted language):

  The sales price ~~gross receipts~~ from the sales of and the storage, use or other consumption of tangible personal property … ~~becoming~~ that is used exclusively and directly by a manufacturer in manufacturing an article of tangible personal property … that is destined for sale and that becomes an ingredient or component part of ~~an~~ the article of tangible personal property … destined for sale or ~~which~~ is consumed or destroyed or loses its identity in ~~the manufacture~~ manufacturing the article of tangible personal property … ~~in any form~~ destined for sale, except as provided in sub. (30) (a) 6.

  These changes were made by 2009 Wis. Act 28.

- In a Tax Release posted to its Website on October 27, 2011, the Department says that items that are no longer exempt due to the August 1, 2009 law change noted above include (a) consumables used by nonmanufacturers in performing a service for a manufacturer; (b) chemicals and cleaning agents used by a manufacturer to clean walls, ceilings, floors, drains, windows, and doors, where manufacturing takes place to meet sanitation standards required by state and federal regulatory agencies; and (c) cardboard placed under manufacturing machines to collect waste, raw materials and supplies used in manufacturing a product. The Department notes, however, that its May 2011 version of Publication 203, *Sales and Use Tax Information for Manufacturers*, erroneously stated that items (b) and (c) were exempt. Due to the error, the Department says that tax "does not apply to purchases of such chemicals, cleaning agents, and cardboard, as described above, prior to November 1, 2011." See http://www.dor.state.wi.us/taxpro/news/111027b.html.

Section 10.14. Ingredients, Consumables and Component Parts—Resale Requirement.

- In *Engel and Summit Ski Corp. v. Dep't. of Revenue*, Docket Nos. 07-S-168, 07-S-169, Wis. Tax Rep. (CCH) ¶ 401-104 (WTAC May 27, 2008) the Tax Appeals Commission rejected the taxpayer's argument that certain snow-grooming tractors and related equipment were exempt manufacturing machinery and equipment under Wis. Stat. § 77.54(6)(a). See **Section 10.1**.

- With respect to the separate entity planning idea mentioned in the final paragraph of Section 10.14 of *The Complete Guide*, please see the important legislative development discussed at **Section 9.16**.

- Effective August 1, 2009, the Legislature made several limiting changes to the "consumables" exemption under Wis. Stat. § 77.54(2). See **Section 10.13**.

Section 10.15. Ingredients, Consumables and Component Parts—"Essentiality" Requirement.

Effective August 1, 2009, the Legislature made several limiting changes to the "consumables" exemption under Wis. Stat. § 77.54(2). See **Section 10.13**.

Section 10.16. Ingredients, Consumables and Component Parts—Other Issues.

Effective August 1, 2009, the Legislature made several limiting changes to the "consumables" exemption under Wis. Stat. § 77.54(2). See **Section 10.13**.

Section 10.17. Manufacturing Fuel Exemption.

The Department has ruled that certain "facilities," "customer," or "fixed" charges made by utilities when selling fuel and electricity to customers are includible in the "gross receipts" and "sales price" of the fuel and electricity for Wisconsin sales and use tax purposes. According to the ruling, these charges are made by the utilities to collect their "fixed" costs (including a return on the utilities' investments in their meters), are not for the rental of equipment (as the customer "does not have control of the equipment"), and are separately stated on the bills. The significance of the ruling is that the specified charges are includible in the sales and use tax base from the sale of electricity and fuel and thus are eligible for the Wis. Stat. § 77.54(30)(a)6 exemption, which became effective January 1, 2006, for the sale of "fuel and electricity consumed in manufacturing tangible personal property…." In addition, these charges would have qualified (as part of the sale of fuel and electricity) for the Wis. Stat. § 71.28(3)(b) income or franchise tax credit as it existed for taxable years beginning before January 1, 2006. Wis. Tax. Bull. No. 158, pp. 12-13 (Oct. 2008).

Chapter 11

Advertising, Marketing and Printing Services and Products

- In April 2012, the Department of Revenue released a new publication, Wis. Dep't. of Revenue Publ'n 245, *Advertising Companies: How Do Wisconsin Sales and Use Taxes Affect Your Operations?* (April 2012), available at: http://www.revenue.wi.gov/pubs/pb235.pdf. The publication covers a wide variety issues, including some of the more complex questions involving production of advertising material, catalogs and direct mail; production of television and radio commercials; and the production and distribution of newer products, such as text-based marketing, mass e-mails, and certain types of digital products, including e-newsletters. Common questions involving sourcing of multi-state sales and distribution are also discussed. Much of the material in the publication is discussed in detail in Chapter 11 of *The Complete Guide*. There is, however, some new material, corresponding to recent developments. For instance, the new publication covers the tax treatment of certain digital products, which generally became taxable in Wisconsin on October 1, 2009. This is a significant change for many advertising agencies, as certain products that may have been non-taxable may now be subject to tax, including such things as electronic newsletters and digitally produced videos that are part of an otherwise non-taxable website design (see pp. 16-19). Further, the Department's statement that digital products cannot be "manufactured" (p. 4) may mean that certain exemptions that had applied with respect to the sale of tangible property will not be available if the same item is produced in a digital format. It should also be noted that, as technology evolves, certain inputs into the production process may no longer be exempt. For example, the Department considers video shot by a third-party directly on the hard drive of an advertising agency to be a non-exempt photographic service, even though the same material sold on a videotape by the third party would be considered tangible personal property, potentially eligible for exemption under Wis. Stat. § 77.54(2) (p. 21, Examples 2, 3). In some cases, planning alternatives may be available to reduce the sales tax impact. Advertising agencies are strongly encouraged to review the Department's publication.

Important Streamlined Sales and Use Tax Change
Effective October 1, 2010
(as amended effective May 27, 2010)

"Direct Mail"

The Streamlined Sales Tax Provisions include detailed statutes relating to "direct mail." The applicable provisions (a) define "direct mail" in considerable detail; (b) set forth detailed rules for determining the location (sourcing) of the transaction for sales and use tax purposes; (c) provide a special rule that postage is not part of the tax base for the sale of direct mail, if certain conditions are met; and (d) provide a penalty for purchasers of direct mail (of $250 per invoice or bill of sale) who tender an exemption certificate or direct pay permit to a seller claiming direct mail status (thus relieving the seller of obligation to collect tax) "in a manner that is prohibited by or inconsistent with" Wisconsin's sales and use tax law.

The direct mail provisions are of primary interest to printers and mailers, as well as businesses that purchase direct mail products. Generally, in the case of direct mail, if the purchaser provides the printer with a direct pay permit or exemption certificate claiming direct mail, the seller (typically, a printer) is not required to collect or remit sales tax with respect to that transaction, and use tax compliance in the destination and other states becomes the responsibility of the purchaser. If a direct pay permit or exemption certificate is not tendered, other sourcing rules apply. See Wis. Stat. § 71.522(1)(c) and Wis. Admin. Code § Tax 11.945(3).

The Department has published guidance to the effect that if the purchaser does not provide an exemption certificate claiming direct mail, a seller is required to collect sales or use tax based on the location from which the shipment occurs, unless the purchaser provides each recipient's tax jurisdiction information (i.e., county), in which case the seller must collect Wisconsin, state, county and stadium tax based on the recipient's jurisdiction. The Department's guidance also addresses situations where the purchaser provides information that is insufficient to determine the correct county of the recipient (e.g., by providing only the 5-digit zip code – rather than the 9-digit code). The Department says that, in those cases, the seller should collect and remit Wisconsin *state* sales or use tax on advertising and promotional direct mail sent to recipients with Wisconsin addresses, but collect county and stadium taxes based on the Wisconsin county from which the shipment is made. Wis. Tax Bull. No. 174, pp. 13-14 (Jan. 2012).

There are basically two types of "direct mail": "advertising and promotional direct mail" and "other direct mail." The primary practical difference between the two is a difference in sourcing in situations where the purchaser does not provide a direct pay permit or exemption certificate claiming direct mail. See Wis. Stat. § 71.522(1)(c) and Wis. Admin. Code § Tax 11.945(3). In addition, effective July 1, 2013, a sales and use tax exemption will be available for advertising and promotional direct mail. 2011 Wis. Act 32, creating Wis. Stat. § 77.54(59).

The rule providing that separately stated delivery charges are not part of the tax base for "direct mail" is contained in Wis. Stat. §§ 77.51(12m)(b)4 and 77.51(15b)(b)4.

The provision providing for the penalty noted above for purchasers who tender offending direct pay permits or exemption certificates is contained in Wis. Stat. § 77.60(13).

Note: Under Wisconsin law, the purchase of certain types of advertising and promotional items (such as "catalogs," pursuant to Wis. Stat. § 77.54(25m)) is exempt from sales and use tax in any event, and these exemptions always need to be considered in the direct mail context. Of course, many types of direct mail will not qualify for an exemption, making the direct mail provisions directly relevant.

Section 11.4. Printed Materials and Printing Services—Exemption for Advertising Materials Distributed Free of Charge Outside Wisconsin.

The Department of Revenue has published guidance with respect to the Wis. Stat. § 77.54(25m) exemption (which was effective April 1, 2009) for certain catalogs and envelopes in which they are mailed. See **Section 9.22**.

Section 11.5. Printed Materials and Printing Services—Non-taxability of Materials Printed Outside the State.

The Department of Revenue has published guidance with respect to the Wis. Stat. § 77.54(25m) exemption (which was effective April 1, 2009) for certain catalogs and envelopes in which they are mailed. See **Section 9.22**.

Important Streamlined Sales and Use Tax Change
Effective October 1, 2009

The Wisconsin courts have held that where a Wisconsin-based company purchases printed material from an out-of-state printer that ships the printed materials by common carrier directly to the purchaser's Wisconsin customers, the purchaser has not "used" the printed advertisements in Wisconsin, and thus owes neither a sales or use tax on those items. See e.g., *Dep't. of Revenue v. J.C. Penney, Inc.*, 108 Wis. 2d 662, 323 N.W.2d 168 (Ct. App. 1982); *J.C. Penney, Inc. v. Dep't. of Revenue*, Case No. 84-CV-3978, Wis. Tax Rep. (CCH) ¶ 202-692 (Wis. Cir. Ct. Dane County May 21, 1985). The same concept should have applied equally with respect to the purchase of products other than printed materials.

The Streamlined provisions appear to repeal this result. See 2009 Wis. Act 2, § 342, creating Wis. Stat. § 77.51(22)(bm), defining "exercise of any right or power" as including "distributing, selecting recipients, determining mailing schedules, or otherwise directing the distribution, dissemination, or disposal of tangible personal property … regardless of whether the purchaser … owns or physically possesses, in this state, the property, terms, goods or services."

Section 11.10. Newspapers, Advertising Supplements, Shoppers Guides, Periodicals and Controlled Circulation Publications.

The Department of Revenue has published guidance concerning the sales and use tax treatment of charges for "advertising supplements" that are included in newspapers. Citing Wis. Stat. § 77.51(8), the Department says that an advertising supplement that is distributed as a component part of a newspaper's publications is an exempt "newspaper" if either (a) the advertising supplement is printed by the newspaper or (b) the advertising supplement is printed by a newspaper or commercial printer and sold to a newspaper for inclusion in that newspaper. With respect to (b), the Department emphasizes that the advertising supplement must be *sold to the newspaper*. The Department cautions that, in its view, supplements are not considered as sold to the newspaper "when the newspaper merely bills and pays the printer (or other newspaper) on behalf of its customer for the advertising supplements." As indicated by example 2, below, the Department says the newspaper must "independently" contract with the printer to satisfy the "sold to" the newspaper requirement. The word "independently" is not defined, but in example 4, the Department says that standard is not satisfied when (a) the customer selects the printer and negotiates the printing price, and (b) if the newspaper did not pay the printer, the customer would have ultimate responsibility to pay the printer. The Department says this is true even if the printer invoices the newspaper and the newspaper's charge to the customer includes the cost of printing. It is not clear in example 4 if the "sold to" requirement is not met if *either* (a) or (b) exist. Thus, for example, it is unclear what position the Department would take if the customer selects the printer and negotiates the price, but the newspaper (and not the customer) has ultimate responsibility to pay the printer.

Example	**Facts**	**Department Conclusion (taxable versus non-taxable)**
1	Customer contracts with newspaper for advertising services. Newspaper prints the advertising supplement and inserts it into the newspaper prior to distribution.	The newspaper is selling non-taxable advertising services to its customer.
2	Customer contracts with a newspaper for advertising services. Newspaper "independently" contracts with a printer to print and deliver advertising supplements to the newspaper. Newspaper will insert the supplements into the newspaper prior to distribution.	The newspaper is selling a non-taxable advertising service to its customer. The printer's charge to the newspaper is not taxable. The advertising supplements are sold to the newspaper and are a component part of the newspaper.

3	Customer contracts with newspaper for advertising services. Customer contracts with printer to print the advertising supplements and send them directly to a newspaper, which will insert the supplements into the paper prior to distribution.	The newspaper is selling non-taxable advertising services to its customer. The printer's charge to the customer will not qualify for exemption under the "newspaper" exemption because the supplements are not printed by a newspaper, and are not sold to a newspaper. Thus, the Department says the charge is taxable unless some other exemption applies.
4	Customer contracts with a printer for advertising services. Customer selects a printer to print advertising supplements and negotiates a price with printer. The printer sends the advertising supplements directly to the newspaper and sends an invoice to the newspaper for the advertising supplement. The newspaper pays the invoice, which is reflected in the newspaper's charge to the customer for the advertising services. If the newspaper did not pay the invoice, the customer would have ultimate responsibility to pay the invoiced amount.	The newspaper is selling non-taxable advertising services to its customer; however, the Department says that the portion of the charge relating to the printing does not qualify for the newspaper exemption because the "Customer (rather than the newspaper) is purchasing the advertising inserts from the printer." [the Department notes that the charge for the supplements may be non-taxable if they meet the definition of a "catalog" pursuant to Wis. Stat. §§ 77.54(25m) and 77.51(1fr).]

Section 11.11. Newspapers, Advertising Supplements, Shoppers Guides, Periodicals—Exemption for Materials and Supplies Consumed or Destroyed in Printing.

Effective August 1, 2009, the Legislature made a potentially limiting change to the Wis. Stat. § 77.54(2m) exemption. The statute now provides that the tangible personal property must be "exclusively and directly used" by a "manufacturer" in manufacturing the shoppers guides, newspapers or periodicals. The full text of the amended statute is as follows (underscoring shows the added language; strikethroughs show the deleted language):

> The gross receipts from the sales of and the storage, use or other consumption of tangible personal property or services <u>that are used exclusively and directly by a manufacturer in manufacturing shoppers guides, newspapers, or periodicals and</u> that become an ingredient or component of shoppers guides, newspapers, or periodicals or that are consumed or lose their identity in the manufacture of shoppers guides, newspapers, or periodicals, whether or not the shoppers guides,

> newspapers, or periodicals are transferred without charge to the recipient. In this subsection, "shoppers guides",~~,~~" "newspapers~~,~~" and "periodicals" have the meanings under sub. (15). The exemption under this subdivision does not apply to advertising supplements that are not newspapers.

These changes were made by 2009 Wis. Act 28.

Section 11.16. Promotional Items Including Displays and Dispensers.

The enactment of the Streamlined Sales and Use Tax statutes has resulted in an important change with respect to situations where a product is provided "free" to a purchaser in conjunction with the required purchase of another product. See **Section 4.11**.

Chapter 12

Non-profit Organizations, Government Agencies and Native Americans

Section 12.0. Overview.

The Department of Revenue has revised Publication 206 to "clarify" that individuals cannot be nonprofit organizations. Wis. Dep't. of Revenue Publ'n 226, *Sales Tax Exemptions for Nonprofit Organizations*, p. 3 (Oct. 2012).

Section 12.1. Sales to and by Government Agencies.

- The Department of Revenue has issued a Tax Release with respect to the new foreign diplomatic tax exemption card design, as well as the levels of tax exemption authorized by a particular type of card. The Tax Release is available at: http://www.dor.state.wi.us/taxpro/news/110624a.html (posted July 7, 2011). As noted in the Tax Release, the website of the Office of Foreign Missions includes a database that allows retailers to verify the tax-exempt status of foreign officials. That database is available at: http://www.state.gov/ofm/resource/ihv/20290.htm.

- In a recent Tax Release, the Department of Revenue states its views with respect to purchases made by a person under contract with the federal government. See **Section 9.9**.

- The Department of Revenue has again stated that, in order for sales to the U.S. government or any of its agencies or instrumentalities to be exempt from sales or use tax, the government, agency or instrumentality must provide the seller with one of the following: (a) an exemption certificate (e.g., Form S-211 or Form S-211-SST); (b) a completed purchase order or similar document clearly identifying the purchaser; or (c) a CES number to be recorded by the seller on its invoice. *Sales and Use Tax Report*, p. 2 (Sept. 2010).

- The Department of Revenue has published guidance to the effect that sales to employees of the federal government holding U.S. Government Bankcards (e.g., GSA SmartPay cards) are exempt from Wisconsin sales and use tax, provided that one of the three forms of proof set forth in the above paragraph are obtained by the seller. *Sales and Use Tax Report*, p. 2 (Sept. 2010).

- *Correction*. On p. 368 of the 2008 edition of *The Complete Guide to Wisconsin Sales and Use Taxes* (second column, first paragraph), it is erroneously stated that the Department of Revenue does not issue Certificates of Exempt Status to governmental

entities described in Wis. Stat. § 77.54(9a)(a) to (i). See the Department's "Application for Wisconsin Sales and Use Tax Certificate of Exempt Status (CES)," available at http://www.revenue.wi.gov/forms/sales/s-103.pdf.

Section. 12.4. Sales to Buyer Without a Certificate of Exempt Status.

The Department of Revenue has stated that a Wisconsin non-profit organization cannot claim the exemption under Wis. Stat. § 77.54(9a)(f) unless it has a CES number issued by the Department. The Department says that an out-of-state organization that meets the requirements of § 77.54(9a)(f) qualifies for the exemption to the same extent that a Wisconsin organization would qualify. The out-of-state organization does not need a Wisconsin CES number, but must provide the seller with a fully completed exemption certificate (Form S-211 or Form S-211-SST). Tax Release, Wis. Tax Bull. No. 179, p. 8 (April 2013).

Section 12.6. Obtaining a Certificate of Exempt Status—Procedures.

In a recent Tax Release, the Department of Revenue states its views with respect to purchases made by a person under contract with the federal government. See **Section 9.9**.

Section 12.7. Construction Contracts and the Non-Profit Organization.

With respect to the separate entity planning idea noted in Example XII-F of *The Complete Guide*, please see the important legislative development discussed in **Section 9.16**.

Section 12.12. Sales by Non-Profit Organizations—Admissions and Dues.

On May 5, 2010, the Wisconsin Supreme Court, applying the "due deference" standard of review, held that the Tax Appeals Commission reasonably concluded that symphony concerts, including high school and youth concerts, are primarily "entertainment" (and not educational) events within the meaning of Wis. Stat. § 77.52(2)(a)2. *Milwaukee Symphony Orchestra, Inc. v. Dep't. of Revenue*, 2010 WI 33, 781 N.W.2d 674.

Section 12.14. Sales Taxes and Native Americans.

- The Department of Revenue has posted guidance to its website concerning the Wisconsin sales and use tax treatment of certain sales to Native American tribal members. The Department says that, in general, (a) sales to a Native American that takes place on the Native American's tribal reservation are not subject to Wisconsin sales or use tax if the Native American also resides on that reservation; but (b) sales to Native Americans that take place off the Native American's tribal reservation or which are sold to a Native American who does not reside on his or her tribal reservation generally are subject to Wisconsin sales or use tax. The guidance is available at: http://www.revenue.wi.gov/taxpro/news/120227.html.

- In its September 2010 *Sales and Use Tax Report*, the Department of Revenue lists the 11 federally-recognized Indian Tribes in Wisconsin, as well as the various ways a retailer may document its exempt sales to a federally-recognized Indian Tribe (i.e., purchase order or similar document from the Tribe or band identifying the Tribe or band as purchaser; fully completed exemption certificate (e.g., Form S-211 or Form S-211-SST); or recording the Tribe or band's CES number on the invoice).

- Effective August 1, 2009, the Legislature created an exemption for sales to any federally recognized American Indian tribe or band in Wisconsin. 2009 Wis. Act 28, adding Wis. Stat. § 77.54(9a)(ed). For legislative background concerning this change, see "Sales Tax Exemption for Native American Purchases (General Fund Taxes — General Sales and Use Tax)," Legislative Fiscal Bureau Paper #378 (May 27, 2009), available at: http://legis.wisconsin.gov/lfb/publications/budget/2009-11-Budget/Documents/Budget%20Papers/378.pdf.

Chapter 13

Construction Contractors

13.0. Overview of Chapter.

A Tax Release discusses the Department of Revenue's views on the sales and use tax treatment of home warranty contracts. The Tax Release addresses the sales and use tax treatment of (a) the initial charge for the contract; (b) the amount paid to a contractor to perform repairs under the contract; (c) the contractor's charge to the homeowner for any deductible; and (d) the amounts paid by the contractor for materials that it purchases in performing the contract. Tax Release, Wis. Tax Bull. No. 181, pp. 4-5 (August 2013).

Section 13.1. Definition of a "Contractor."

- The Department has published guidance to the effect that walk-in bathtubs are "mobility-enhancing equipment" and are exempt from Wisconsin sales and use tax under Wis. Stat. §§ 77.51(7m) and 77.54(22b) if they generally are not used by a person who has normal mobility. The guidance also says that a real property contractor that installs walk-in bathtubs in a person's home (a) can purchase the walk-in bathtubs, pursuant to this exemption, if the applicable conditions are met; and (b) should not charge sales tax to the customer (for the sale and installation), since the walk-in bathtub, when installed, is a real property improvement. Wis. Tax Bull. No. 174, p. 13 (Jan. 2012).

- In *Chula Vista, Inc. v. Dep't. of Revenue*, Docket Nos. 09-S-247 and 09-P-248 (August 5, 2011), the Tax Appeals Commission held that large steel beams used to support the "flumes" of a water slide, together with related engineering services, were real property (as opposed to tangible property) improvements. In so ruling, the Commission applied the 3-part test stated in *Dep't. of Revenue v. A.O. Smith Harvestore Prods., Inc.*, 72 Wis. 2d 60, 67-68, 240 N.W.2d 357 (1976); i.e., (a) actual physical annexation to the real estate; (b) application or adaptation to the use or purpose to which the realty is devoted; and (c) an intention on the part of the person making the annexation to make a permanent accession to the freehold. The parties agreed that the first two tests were met, so the Commission addressed what courts consider the most important prong, i.e., "intent" – which is determined based on "an objective and presumed intention of that hypothetical ordinary reasonable person, to be ascertained in the light of the nature of the article, the degree of annexation, and the appropriateness of the article to the use to which the realty is put." Based on the evidence of record, the Commission concluded that the items in question were intended to become a permanent accession to the property. The Commission rejected various arguments made by the Department to the contrary, including that (a) there was a market for used items of the type in question; and (b) the taxpayer had depreciated the items for income tax purposes as tangible personal property. The Commission also rejected the Department's arguments that other aspects of its

administrative rules and the statutes supported classification as tangible personal property. One of the Department's other arguments was that under Wis. Stat. § 77.52(2)(a)10 and (2)(ag)38, water slides are deemed to be tangible personal property after they are installed. The Commission noted that while that may be true, those statutes apply only for purposes of determining whether the services listed in § 77.52(2)(a)10 (repair, cleaning, inspection, etc.) performed on the property *after* installation are taxable. That statute, in other words, does not apply for purposes of classification of the installation of the property.

- Effective September 1, 2011, a sales and use tax exemption has been enacted for certain modular homes and manufactured homes used in real property construction activities outside Wisconsin. 2011 Wis. Act 32, creating Wis. Stat. § 77.54(5)(am). The Department of Revenue has issued guidance concerning transactions that straddle the effective date. See http://www.revenue.wi.gov/taxpro/news/110726.html (posted on July 27, 2011 and Wis. Dep't. of Revenue Publ'n 231, *Sales and Use Tax Treatment of Manufactured and Modular Homes* (June 2012).

Section 13.2. Contractor as a Consumer.

- The Department has published guidance to the effect that walk-in bathtubs are "mobility-enhancing equipment" and are exempt from Wisconsin sales and use tax under Wis. Stat. §§ 77.51(7m) and 77.54(22b) if they generally are not used by a person who has normal mobility. The guidance also says that a real property contractor that installs walk-in bathtubs in a person's home (a) can purchase the walk-in bathtubs, pursuant to this exemption, if the applicable conditions are met; and (b) should not charge sales tax to the customer (for the sale and installation), since the walk-in bathtub, when installed, is a real property improvement. Wis. Tax Bull. No. 174, p. 13 (Jan. 2012).

- On July 7, 2011, the Department of Revenue posted guidance to its website, discussing the sales and use tax consequences of the sale, installation and repair of dishwashers. The guidance is available at: http://www.dor.state.wi.us/taxpro/news/110624b.html. With respect to remedying potentially erroneous sales tax treatment by contractors (e.g., if a contractor treats a sale as taxable when it should have been treated as a non-taxable real property improvement, or *vice versa*), see Section 13.12 of *The Complete Guide*. With respect to potential customer remedies for erroneous treatment, see **Section 16.14** of *The Complete Guide* and this *Interim Update*.

Section 13.3. Contractor as a Retailer.

- The Department has published advice to the effect that the removing of snow and clearing ice dams from roofs is not taxable, because these are services to real property. *Sales and Use Tax Report*, p. 5 (March 2011).

- The Department has published advice to the effect that swimming pool cleaning and maintenance services are taxable, regardless of whether the pool is above-ground or in-

ground. The Department's rationale is that, for purposes of Wis. Stat. §§ 77.52(2)(a)10 and 77.52(2)(ag)38f., swimming pools are deemed to be tangible personal property, regardless of the extent to which they are fastened to, connected with, or built into real property. *Sales and Use Tax Report*, p. 5 (March 2011).

Section 13.4. Distinguishing Between a Contractor and a Consumer and as a Retailer.

The Department of Revenue has published its views as to whether a variety of appliances (such as dishwashers, microwaves, refrigerators, ranges and wine coolers) are considered tangible property or real property improvements, under a variety of circumstances. *Sales and Use Tax Report*, pp. 1 – 3 (July 2013).

Section 13.12. Remedying Erroneous Sales Tax Charges by Contractors.

On July 7, 2011, the Department of Revenue posted guidance to its website, discussing the sales and use tax consequences of the sale, installation and repair of dishwashers. The guidance is available at: http://www.dor.state.wi.us/taxpro/news/110624b.html. With respect to remedying potentially erroneous sales tax treatment by contractors (e.g., if a contractor treats a sale as taxable when it should have been treated as a non-taxable real property improvement, or *vice versa*), see Section 13.12 of *The Complete Guide*. With respect to potential customer remedies for erroneous treatment, see **Section 16.14** of *The Complete Guide* and this *Interim Update*.

Section 13.13. Transfers of Minor Amounts of Personal Property.

- In its June 2009 version of Publication 207, *Sales and Use Tax Information for Contractors*, the Department of Revenue discusses (at pp. 8-10) the sales tax treatment of the sale of "minor" amounts of tangible property or taxable services as part of a real property construction contract. Among other things, the Department defines "minor" as "based on a reasonable allocation, the selling price of the taxable services and/or taxable tangible personal property provided in the contract is less than 10% of the total contract amount." The Department includes several examples, setting forth its views on the issue.

- Effective for contracts entered into on or after October 1, 2013, 2013 Wis. Act 20 creates § 77.54(60), which provides an exemption for "lump sum contracts," as defined. The basic idea is that if a real property contractor sells tangible personal property or otherwise taxable services as part of a "lump sum contract," those otherwise taxable items are not taxable, and the contractor is deemed the consumer, as long as the total sales price of all such taxable products is less than 10% of the total amount of the lump sum contract. This is true, moreover, even if the lump sum contract itemizes the charges for the taxable products. Thus, the difference between the new exemption and the Department's prior administrative position on "minor" amounts of taxable products is that the exemption applies *even if there is itemization of charges for the taxable products*. Previously, the Department's position was that if the contractor itemized the charges for the taxable products in "any document provided to the customer," the contractor was generally treated as selling those items, even if they otherwise were a "minor" component of the

contract. *Sales and Use Tax Report*, pp. 10-11 (July 2013). *Note*: the new exemption also provides that if a "lump sum contract" is entered into with an entity that is exempt under Wis. Stat. § 77.54(9a), the contractor may purchase without tax, for resale, taxable products that are sold by the contractor as part of the lump sum contract with the exempt entity and that are not consumed by the contractor in real property construction activities. The contractor is, however, treated as the consumer of all taxable products used by it in real property construction activities. For examples of the application of the rules to septic system installers, for contracts entered into both prior to and on and after the October 1, 2013 effective date, see the guidance posted by Department to its website at http://www/revenue.wi.gov/taxpro/news/101220.html.

- The Department has posted a Tax Release to its website which addresses the sales and use tax consequences of the transfer of relatively minor amounts of landscaping services in connection with real property contracts involving the installation of septic systems, under a variety of fact patterns. The Tax Release is available at http://www.dor.state.wi.us/taxpro/news/101220.html (posted December 23, 2010).

Section 13.14. Quarries/Gravel.

On August 1, 2012, the Department of Revenue posted guidance to its website concerning the sales and use tax treatment of transactions involving "frac sand." The guidance is available at: http://www.revenue.wi.gov/faqs/ise/fracsand.html. The Department's basic conclusions are:

- There are no Wisconsin sales and use tax exemptions that apply to the purchase of equipment used to extract frac sand from the earth.

- Washing, cleaning, grading and drying of extracted material to produce frac sand is "manufacturing." Thus, in certain situations, machinery and equipment, and certain property used or consumed in the manufacturing process, can be purchased tax-free. The Department provides some guidance on these circumstances, including its views as to when the manufacturing process begins and ends.

- The sale of frac sand in Wisconsin generally is subject to Wisconsin sales or use tax. However, the acquisition of frac sand is not taxable when a business purchases real property and then extracts the frac sand from the purchased real property, or leases real property and extracts frac sand from the leased real property (as sales and leases of real property are not subject to Wisconsin sales and use tax).

Section 13.15. Construction Contracts with Tax-Exempt Organizations.

- In a recent Tax Release, the Department of Revenue states its views with respect to purchases made by a person under contract with the federal government. See **Section 9.9**.

Sullivan Brothers v. Dep't. of Revenue

In August 2012, the Wisconsin Tax Appeals Commission decided a case, *Sullivan Brothers v. Dep't. of Revenue*, that may have important implications for construction contractors that engage in real property contracts for tax-exempt entities, under certain circumstances. The Commission's decision was affirmed by the Dane County Circuit Court on February 13, 2013 (Case No. 2012-CV-3663), and by the Wisconsin Court of Appeals on January 30, 2014 (Appeal No. 2013AP000818). The Commission's decision is potentially important for two reasons. First, the Commission concluded that the specific planning structure that the contractor used did not avoid sales and use tax on certain materials used in real property contracts with tax exempt entities. That said, as discussed below, there are alternative planning structures that the Department *has* approved, and taxpayers are encouraged to consider using those to avoid disputes with the Department on this issue. Second, although *Sullivan Brothers* dealt with a narrow issue involving a real property contractor, some of the reasoning used by the Commission (dealing with a "substance and realities" analysis) might have broader implications for sales and use tax planning in general.

The following discussion summarizes the *Sullivan Brothers* case.

1. As discussed in Section 13.15 of *The Complete Guide*, a real property contractor in Wisconsin generally is deemed to be the consumer of tangible property, items or goods purchased by it and used by it in real property construction. This is true even if the construction contract is with an exempt organization that otherwise is eligible to purchase the materials tax free. Moreover, there are cases which say that a real property contractor is not eligible to purchase the materials "for resale" to the tax exempt entity for which it performs real property construction.

2. In real property contracting with tax exempt organizations, it is common to engage in planning to utilize the sales and use tax exemption available to the exempt entity. The Department of Revenue, in fact, has approved a variety of structures that, under the given facts, were respected for this purpose. See Tax Release, Wis. Tax Bull. No. 115 (Oct. 1999) (approving various types of contracts between an exempt entity and a real property contractor whereby the exempt entity can elect to submit a change order to purchase some or all of the material directly from suppliers, with the contract price with the contractor being reduced accordingly); Tax Release, Wis. Tax Bull. No. 161, pp. 11-14 (April 2009) (approving an arrangement whereby the real property contractor was a "purchasing agent" for the exempt entity); Private Letter Rulings W1008005 and W1008006 (subsidiary of real property contractor purchases materials from vendors and resells them to the exempt entity for which parent contractor performs construction).

3. *Sullivan Brothers* involved a structure that the Department did not respect for this purpose. In *Sullivan Brothers*, the taxpayer, a real property contractor, incorporated a wholly-owned subsidiary. The taxpayer purchased property used in certain real property contracts with tax exempt organizations, which the taxpayer claimed it then sold (at its cost) to its subsidiary, which then sold the property to the exempt entities for which the taxpayer performed real property construction. The taxpayer's argument was that its purchase from the vendors was tax-free (as a purchase for resale to the subsidiary) and that the subsidiary's sale to the exempt organization was tax free because the exempt entity was eligible to make purchases on a tax-free basis. The taxpayer claimed that under Wis. Stat. § 77.51(2), a contractor may use a resale certificate with respect to property which it has "sound reason to believe the contractor will sell to customers for whom the contractor will not perform real property construction activities involving the use of such" property. The taxpayer's argument was that its subsidiary was a customer for which it did not perform real property construction activities.

4. On the taxpayer's books and records, journal entries were made at year end to document the transfer of inventory that had occurred throughout the year. The income and sales and use tax returns originally filed by the taxpayer and subsidiary did not fully reflect the claimed form, and the taxpayer filed amended returns to correct that reporting.

5. The Department argued that the taxpayer (the real property contractor) owed use tax on its purchase of the materials. The Department contested the taxpayer's position on multiple grounds, including an argument that at the time the contracts were performed, the taxpayer owned the materials in question (as the journal entries were not made until year end). In addition, the Department argued that, under Wis. Stat. § 77.51(2), the subsidiary was not a "customer" under the "sound reason to believe" standard.

6. The Commission sided with the Department, for three reasons.

a. The Commission concluded that the subsidiary was not a "customer" under the facts of the case ("… the simple fact is that a wholly owned corporate subsidiary is not commonly understood to be a 'customer.'") and that "the taxpayer's willful imposition of a wholly owned intermediary to create a "customer" to avoid the sales tax is not, in our view, 'sound reason.'"

b. The Commission said that the taxpayer's structure failed a "substance and realities" test, pointing to (in its view) the following:

- There was "little or no independent substance to the subsidiary." The ownership, location and employees were identical, and the subsidiary was set up as a "device" for sales tax planning purposes.

- Transactions between the taxpayer and the subsidiary were at cost.

- There were indications that the "necessary entries" between the two corporations were made "at the end of the year, and not contemporaneously."

- Amended returns were filed to support the taxpayer's views of the transactions.

- The "transactions can be described as indirect." The Commission said that, in general, a taxpayer may not secure, "by a series of contrived steps," different tax treatment for a transaction than if he or she had carried out the transaction directly.

c. The Commission found that its conclusion was supported by prior cases on the question of a contractor's responsibility for sales tax on sales of materials to tax-exempt entities.

Section 13.16. Construction Contracts on Native American Reservations.

In its June 2009 revision of Publication 207, *Sales and Use Tax Information for Contractors*, the Department of Revenue discusses (at pp. 18-19) the exemption that applies to building materials used in real property construction activities for a Tribe, on the Tribe's reservation. Among other things, the Department says that the "federal preemption" doctrine generally will apply to preclude sales and use taxation if "(1) the construction contract is performed for the Tribe, (2) the construction occurs on the tribal reservation and (3) the construction project will benefit the Tribe." Examples of construction projects that benefit a tribe are schools, administration buildings, casinos, hotels, wastewater treatment plants, convenience stores, and "other construction projects that increase tribal revenue or allow the tribe to perform functions it would hire others to perform." See also Publ'n 405, *Wisconsin Taxation of Native Americans*, p. 11 (Dec. 2001) (same as to statement of preemption doctrine in this context). This is a more detailed and helpful statement of the preemption doctrine than that cited in *The Complete Guide* (at p. 411) and stated by the Department in an October 1990 Tax Release (see Wis. Tax Bull. No. 69, p. 31).

Section 13.17. Multistate Construction Contracts.

- Effective September 1, 2011, a sales and use tax exemption has been enacted for certain modular homes and manufactured homes used in real property construction activities outside Wisconsin. 2011 Wis. Act 32, creating Wis. Stat. § 77.54(5)(am). For a discussion of this change, as well as a detailed discussion of the sales and use tax treatment of modular and manufactured homes generally, see Wis. Dep't. of Revenue

Publ'n 231, *Sales and Use Tax Treatment of Manufactured and Modular Homes* (June 2012).

- The Department of Revenue has again published guidance to the effect that materials are subject to Wisconsin sales or use tax if purchased or stored *in* Wisconsin, even if the materials are subsequently used in the construction of real property *outside* Wisconsin. The Department says that the classification of an improvement as the sale of real property or tangible personal property is determined under Wisconsin law. *Sales and Use Tax Report*, p. 9 (Dec. 2009). For planning ideas to avoid this problem, see the discussion at pp. 413-414 of *The Complete Guide*.

- On April 11, 2011, the Department posted two Tax Releases to its website, relating to the Wis. Stat. § 77.53(16) credit for sales or use taxes paid to another state. One of the Tax Releases relates to a situation where a Wisconsin customer brings tangible personal property (a computer) to a retailer in another state to have the computer repaired, and the customer then brings the repaired computer back to Wisconsin. In the Tax Release, the other state imposes sales tax on the repair parts, but not the labor. The Department concludes that the sales tax paid to the other state on the parts is creditable against the Wisconsin use tax, which is due on the total price paid for the parts and labor. In the other Tax Release, the Department addresses a situation where a non-Wisconsin contractor purchases and stores materials in its home state, and then performs a contract with those materials in Wisconsin. The contractor's home state considers the activity to be a real property construction activity, and requires the contractor to pay sales or use tax on its purchase of the materials (the contractor being considered to be the end of the selling chain). Wisconsin, on the other hand, considers the activity to be a tangible property improvement and requires the contractor to charge sales tax based on the total charge made to its customer. The Department concludes that the contractor may claim a credit against its Wisconsin tax due the sales tax paid to the contractor's home state with respect to purchase of the materials. The Tax Releases are available at http://www.dor.state.wi.us/taxpro/news/110411.html and http://www.dor.state.wi.us/taxpro/news/110411a.html.

Section 13.19. Other Issues Affecting Contractors.

The enactment of the Streamlined Sales and Use Tax statutes has resulted in some important changes with respect to the provision of equipment along with the operator of the equipment. See **Section 3.3**.

Section 13.20. Exhibit–Department of Revenue Chart Distinguishing Real vs. Personal Property Activities.

- In *Chula Vista, Inc. v. Dep't. of Revenue*, Docket Nos. 09-S-247 and 09-P-248 (August 5, 2011), the Tax Appeals Commission held that large steel beams used to support the "flumes" of a water slide, together with related engineering services, were real property (as opposed to tangible property) improvements. In so ruling, the Commission applied

the 3-part test stated in *Dep't. of Revenue v. A.O. Smith Harvestore Prods., Inc.*, 72 Wis. 2d 60, 67-68, 240 N.W.2d 357 (1976); i.e., (a) actual physical annexation to the real estate; (b) application or adaptation to the use or purpose to which the realty is devoted; and (c) an intention on the part of the person making the annexation to make a permanent accession to the freehold. The parties agreed that the first two tests were met, so the Commission addressed what courts consider the most important prong, i.e., "intent" – which is determined based on "an objective and presumed intention of that hypothetical ordinary reasonable person, to be ascertained in the light of the nature of the article, the degree of annexation, and the appropriateness of the article to the use to which the realty is put." Based on the evidence of record, the Commission concluded that the items in question were intended to become a permanent accession to the property. The Commission rejected various arguments made by the Department to the contrary, including that (a) there was a market for used items of the type in question; and (b) the taxpayer had depreciated the items for income tax purposes as tangible personal property. The Commission also rejected the Department's arguments that other aspects of its administrative rules and the statutes supported classification as tangible personal property. One of the Department's other arguments was that under Wis. Stat. § 77.52(2)(a)10 and (2)(ag)38, water slides are deemed to be tangible personal property after they are installed. The Commission noted that while that may be true, those statutes apply only for purposes of determining whether the services listed in § 77.52(2)(a)10 (repair, cleaning, inspection, etc.) performed on the property *after* installation are taxable. That statute, in other words, does not apply for purposes of classification of the installation of the property.

- The Department of Revenue has revised its chart to add several new items, and to "clarify" and "change" the treatment of certain other items. Wis. Dep't. of Revenue Publ'n 207, *Sales and Use Tax Information for Contractors*, pp. 32-37 (March 2012).

Chapter 14

Use Taxes and Multistate Sales

Section 14.2. Wisconsin Retailers Selling Into Other States.

- The Department of Revenue has published extensive guidance with respect to determining the location of a sale or use of computer software, software maintenance contracts, and computer repair services. See "Sales and Use Tax Treatment: Computer Hardware, Software, Services (updated January 25, 2013): http://www.revenue.wi.gov/faqs/pcs/computerc.html.

- On June 28, 2011, the Department of Revenue posted a Tax Release to its website, addressing the question of *where* a multistate sale of tangible personal property takes place, under the law in effect both before and after the adoption of the Streamlined sourcing provisions, effective October 1, 2009. The Tax Release includes six examples, addressing a variety of situations where the buyer or seller hires either a common or contract carrier to perform the delivery and where a buyer's own employee picks up the property from the seller's location. In the examples involving the use of a *common carrier* (regardless of whether retained by the seller or buyer), or a *contract carrier* retained by seller, or the buyer's own employees, the results are the same before and after the adoption of the Streamlined provisions. The result is different, however, in the examples involving delivery by a "contract carrier" retained by the buyer. In those situations, prior to October 1, 2009, the sale occurred at the location where the contract carrier took possession of the property from the seller. On and after October 1, 2009, however, the sale occurs where the buyer receives the property from the contract carrier, even when the contract carrier is retained by the buyer. See Examples 1 & 2. The Tax Release is available at http://www.dor.state.wi.us/taxpro/news/110620.html. It should be emphasized that these examples deal with the question of *where* a sale takes place, and do not deal with the issue of when *delivery charges* are includible in the sales price or purchase price for property. With respect to delivery charges, see Wis. Admin. Code § Tax 11.94 and Section 6.11 of *The Complete Guide*.

- The Department of Revenue has again published guidance to the effect that materials are subject to Wisconsin sales or use tax if purchased or stored *in* Wisconsin, even if the materials are subsequently used in the construction of real property *outside* Wisconsin. The Department says that the classification of an improvement as the sale of real property or tangible personal property is determined under Wisconsin law. *Sales and Use Tax Report*, p. 9 (Dec. 2009). For planning ideas to avoid this problem, see Section 13.17 (at pp. 413-414) of *The Complete Guide*.

- On April 11, 2011, the Department posted two Tax Releases to its website, relating to the Wis. Stat. § 77.53(16) credit for sales or use taxes paid to another state. One of the Tax Releases relates to a situation where a Wisconsin customer brings tangible personal property (a computer) to a retailer in another state to have the computer repaired, and the customer then brings the repaired computer back to Wisconsin. In the Tax Release, the other state imposes sales tax on the repair parts, but not the labor. The Department concludes that the sales tax paid to the other state on the parts is creditable against the Wisconsin use tax, which is due on the total price paid for the parts and labor. In the other Tax Release, the Department addresses a situation where a non-Wisconsin contractor purchases and stores materials in its home state, and then performs a contract with those materials in Wisconsin. The contractor's home state considers the activity to be a real property construction activity, and requires the contractor to pay sales or use tax on its purchase of the materials (the contractor being considered to be the end of the selling chain). Wisconsin, on the other hand, considers the activity to be a tangible property improvement and requires the contractor to charge sales tax based on the total charge made to its customer. The Department concludes that the contractor may claim a credit against its Wisconsin tax due the sales tax paid to the contractor's home state with respect to purchase of the materials. The Tax Releases are available at http://www.dor.state.wi.us/taxpro/news/110411.html and http://www.dor.state.wi.us/taxpro/news/110411a.html.

- The Department has published guidance with respect to the purchase by nonresidents of *non-motorized* campers in Wisconsin. Wis. Tax Bull. No. 179, pp. 7-8 (April 2013). The Department's guidance covers two categories of sellers: (a) dealers and other retailers; and (b) "private parties."

  Sales by Dealers and Other Retailers

  The Department says that a retailer is required to collect the 5% state sales tax if the nonresident takes possession of the camper in Wisconsin. The Department also says that the retailer is required to collect the 0.5% county, 0.5% football stadium and 0.1% baseball stadium taxes, depending on the type of camper, as follows:

Type of Camper Sold by Dealer or Other Retailer	Applicable County & Stadium Taxes to be Collected
Recreational Vehicle (as defined in Wis. Stat. § 340.01(48r), means a vehicle that is designed to be towed upon a highway by a motor vehicle, that is equipped and used, or intended to be used, primarily for temporary or recreational human habitation, that has walls of rigid construction, and that does not exceed 45 feet in length)	Retailer must collect county and stadium taxes *based on where the nonresident will customarily keep the camper in Wisconsin*. If the nonresident will not customarily keep the camper in Wisconsin, the retailer is not required to collect the county and stadium taxes.
Camping Trailer or Truck Camper (means a vehicle with a collapsible or folding structure designed for human habitation and towed upon a highway by a motor vehicle)	The retailer must collect county and stadium taxes *based on where the nonresident takes possession of the camper from the retailer in Wisconsin*. If the nonresident takes possession in a Wisconsin county that does not impose a county or stadium tax, the retailer is not required to collect the county or stadium taxes. *Note*: the Department says that the nonresident purchaser owes county or stadium use tax if, after taking possession, the camper is transported and used/stored by the nonresident in a taxable county. The Department says that the retailer may voluntarily collect the county or stadium use tax due by the nonresident.

Sales by Private Parties

The Department says that an individual is not required to collect the Wisconsin state, county or stadium taxes when selling his/her personal camper. The nonresident, however, owes the applicable state, county, or stadium use taxes if the camper is first stored or used in Wisconsin. The Department also says that a nonresident does not owe

these taxes if the nonresident does not register or title, and is not required to register or title, the camper with the Wisconsin Department of Transportation.

Section 14.4. Nexus—Retailers Selling into Wisconsin.

Pending Federal Legislation
Concerning Mail Order and Internet Sales

On May 6, 2013, the U.S. Senate passed the "Marketplace Fairness Act of 2013" (S.743) and it has moved on to the House of Representatives for consideration. As of the date of this *Interim Update* (February 11, 2014), the House had not voted on the Bill, and it remains pending. If ultimately enacted in its current form, it would give states the authority to require all sellers to collect and remit sales and use taxes on sales into their state, provided the destination state has adopted the Streamlined Sales and Use Tax Agreement, or alternative simplification measures. The Bill also contains a "small seller" exception, which provides that a state is authorized to require sales or use tax collection under the Bill only if the remote seller has "gross annual receipts in total remote sales in the United States in the preceding calendar year exceeding $1,000,000," as defined. If enacted, the Bills would, subject to the small seller exception, effectively reverse the decision of the U.S. Supreme Court in *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992). For a discussion of *Quill*, see Section 14.4 of *The Complete Guide*. The text of S.743 can be reviewed at: http://www.gpo.gov/fdsys/pkg/BILLS-113s743rfh/pdf/BILLS-113s743rfh.pdf.

Wis. Stat. § 73.03(71), enacted as part of 2013 Wis. Act. 20, provides that, if federal legislation is enacted that expands the state's authority to require out-of-state sellers to collect and remit Wisconsin use tax, the Department is required to (a) determine the amount of increased revenues and (b) determine how much the individual income tax rates may be reduced in order to eliminate the Wisconsin alternative minimum tax under Wis. Stat. § 71.08, and decrease individual income tax revenue by the increased tax collections. The Department would then be required to issue a certification concerning its findings and the elimination of the alternative minimum tax and new tax rates would take effect thereafter.

- The Department of Revenue says that a winery holding a direct wine shipper's permit is required to collect and remit sales or use tax on its sales of wine shipped to Wisconsin addresses. Further (and as noted in **Section 1.1** and **Section 15.3** of this *Interim Update*), effective October 1, 2009, all retailers (including wineries) that are registered to collect the 5% Wisconsin state sales and use tax are also required to collect and remit the applicable county and stadium sales and use taxes. *Sales and Use Tax Report*, pp. 10-11 (Dec. 2009).

- Effective October 1, 2009, new Wis. Stat. § 77.51(13g)(c) provides that a "retailer engaged in business in the state" includes any retailer selling tangible personal property, or items, property, or goods under Wis. Stat. §§ 77.52(1)(b), (c) or (d), or taxable services for storage, use, or other consumption in this state, unless otherwise limited by federal law.

- Effective July 1, 2009, the Legislature has created Wis. Stat. § 77.51(13g)(d), which expands the definition of "retailer engaged in business in this state" (i.e., when a retailer has "nexus" with the state) to include:

  > Any person who has an affiliate in this state, if the person is related to the affiliate and if the affiliate uses facilities or employees in this state to advertise, promote, or facilitate the establishment of or market for sales of items by the related person to purchasers in this state or for providing services to the related person's purchasers in this state, including accepting returns of purchases or resolving customer complaints.

  The statute then describes when persons are considered to be "related" for this purpose. The statute is complex, but generally provides that the "person" and "affiliate" are related if a person (or sufficiently related parties) own(s) "directly, indirectly, beneficially or constructively" at least 50 percent of the "outstanding stock value" (in the case of a corporation) or at least 50 percent of the profits, capital, stock, or value of the other person (in the case of a partnership) of the entities.

  This provision was added to the statutes by 2009 Wis. Act 28. For further legislative background concerning this change, including certain nexus developments in other states, see "Economic Nexus Definition (General Fund Taxes — General Sales and Use Tax), Legislative Fiscal Bureau Paper #376 (May 29, 2009), available at: http://legis.wisconsin.gov/lfb/publications/budget/2009-11-Budget/Documents/Budget%20Papers/376.pdf. Among the information set forth in this Paper is that (a) the new Wisconsin provision is aimed most specifically at unregistered online companies that have no physical presence in the state, but that have in-state "brick and mortar" affiliates that may accept returns, etc. with respect to the online company's products (the Paper specifically mentions the 2005 California *Borders Online* decision); (b) the Wisconsin law is different and narrower than the so-called New York "Amazon" law that now has also been adopted by some other states; and (c) the revenue increase expected from the Wisconsin legislation is relatively small – i.e., about $1.5 million for each of the State's next two fiscal years.

Section 14.6. Nexus—Drop Shipments.

Important Streamlined Sales and Use Tax Change
Effective October 1, 2009

Drop Shipments

Under pre-Streamlined law, if a Wisconsin purchaser placed an order for otherwise taxable property from an out-of-state seller that was not registered to collect Wisconsin sales or use tax, which in turn notified a Wisconsin seller to ship the product directly from its inventory (a "drop shipment"), the Department treated the in-state seller as the retail seller, liable for the tax. See Wis. Admin. Code § Tax 11.94(1)(e) (as in effect prior to October 1, 2009). This was true even though the Wisconsin seller was in economic effect selling the property for resale, and often did not know the retail selling price. Under the Streamlined provisions, the Wisconsin seller is no longer treated as the taxable retailer. See 2009 Wis. Act 2, § 305, repealing Wis. Stat. § 77.51(14)(d). The Wisconsin purchaser, however, remains liable for use tax (as applicable) on the property. For a Department of Revenue summary of this change, see http://www.revenue.wi.gov/taxpro/news/100119.html.

Section 14.11. When a Service is "Sold," "Performed," or "Furnished" in Wisconsin.

- Effective October 1, 2009, the sales and use tax has been extended to the sale, lease, license or rental of certain digital goods. See **Section 1.1**.

- On July 7, 2011, the Department of Revenue posted extensive guidance to its website, setting forth the Department's views on when and where a sale of an admission to amusement, athletic, entertainment or recreational events or places occurs. The Department says that a sale of an admission takes place "at the time the retailer agrees to sell the admission to the consumer", and that the location of the sale is "where the event takes place." Thus, for instance, the sale of admission to an event or place outside Wisconsin would not be subject to Wisconsin sales or use tax. The guidance contains 20 examples, several involving ticket brokers and travel agents, and situations where the Department believes they are the actual retailer of the admission. The guidance applies for sales and purchases on and after October 1, 2009. For transactions prior to October 1, 2009, the Department says that guidance published in its July 1999 Tax Bulletin (which is discussed in *The Complete Guide*) applies. The guidance is available at: http://www.dor.state.wi.us/taxpro/news/admissions.html.

Section 14.12. Multistate Sales—Other Issues.

The Department has published extensive guidance as to whether and when sales and use taxes paid to other states and their local units of government are creditable against Wisconsin state and local sales and use taxes. See **Section 7.11**.

Chapter 15

County & Stadium Taxes

Section 15.1. Counties Imposing Taxes, Rates, Effective Dates and Transitional Rules.

- Effective January 1, 2011, the 2.0% local exposition basic room tax in Milwaukee County will increase to 2.5%. Note: if the lodging is furnished in the City of Milwaukee, the local exposition basic room tax *and* the additional 7.0% room tax apply. *Sales and Use Tax Report*, p. 2 (Sept. 2010).

- Effective January 1, 2009, the 0.5% county tax took effect in Clark County.

- Effective April 1, 2010, the 0.5% county sales and use tax took effect in Fond du Lac County. As of that date, only 10 of Wisconsin's 72 counties had not adopted the 0.5% county tax – Brown, Calumet, Kewaunee, Manitowoc, Menominee, Outagamie, Racine, Sheboygan, Waukesha and Winnebago. *Sales and Use Tax Report*, pp. 1-2 (Dec. 2009).

Section 15.3. Requirements for Imposition of County Sales Tax—"Engaged in Business."

Important Streamlined Sales and Use Tax Change
Effective October 1, 2009

Effective October 1, 2009, retailers that are registered to collect and remit the 5% Wisconsin state sales and use tax are also required to collect and remit the applicable county and stadium sales and use taxes for any sales sourced to a county or stadium district that has such taxes. This applies even if the retailer is not "engaged in business" in the county or stadium district in question. Wis. Stat. § 77.73(3). Prior to the effective date, a retailer was required to collect and remit the county and stadium taxes only if the retailer was "engaged in business" in the applicable county and/or stadium district. See http://www.revenue.wi.gov/taxpro/news/090930a.html and *Sales and Use Tax Report*, pp. 2-3 (Dec. 2009).

Section 15.5. Imposition of County Use Tax—General Rules.

The Department has published extensive guidance as to whether and when sales and use taxes paid to other states and their local units of government are creditable against Wisconsin state and local sales and use taxes. See **Section 7.11**.

Section 15.8. Imposition of County Use Tax – Motor Vehicles, Boats, and Similar Property.

The Department has published guidance concerning the applicability of the county and stadium taxes to boats, trailers and "boat packages." The Department says that (a) for a boat that must be registered or titled in Wisconsin, county and stadium sales and use taxes are imposed based on where the boat is customarily kept; (b) for trailers, the county and stadium taxes are imposed based on the location where the sale of the trailer takes place (and, if the sale is not subject to county or stadium tax based on where the sale takes place, then the county or stadium tax is imposed based on where the trailer is stored or used). The Department also says that (a) a "boat" for this purpose includes all accessories affixed or attached to the boat when in use (e.g., anchors, boat cushions, marine radios, radar equipment, and other similar accessories) and (b) for boat "packages" involving the sale of a boat and trailer for a single price, a reasonable allocation must be made between the boat and trailer, with the different jurisdictional taxing rules for the boat and trailer following from that application. The guidance includes several examples, illustrating the Department's views under a variety of fact patterns. Tax Release, Wis. Tax Bull. No. 174, pp. 11-12 (Jan. 2012).

Chapter 16

Administration, Compliance and Audits

Section 16.1. Sales Tax Permit Application Requirements.

The Department of Revenue has revised the Business Tax Application (BTR-101) and instructions to specifically deal with Qualified Subchapter S Subsidiaries and single member LLCs that are disregarded entities for income and franchise tax purposes. The revised form BTR-101 and instructions are available at: http://www.revenue.wi.gov/forms/sales.

Section 16.2. Sales Tax Permit Renewal and Revocation.

Wis. Stat. § 73.03(64), as created by 2009 Wis. Act 28, requires the Department of Revenue to post on the Internet a list of every person who has had their Wisconsin seller's permit revoked, together with certain other information. The posting is at http://www.revenue.wi.gov/delqlist/revoke.htm. For further information, see *Sales and Use Tax Report*, pp. 9-10 (Dec. 2009).

Section 16.5. Exemption Certificates and Direct Pay Permits.

- The legislative adoption of the Streamlined Sales and Use Tax provisions has resulted in some important changes with respect to exemption certificates. See **Section 5.6**.

- Effective July 2, 2013, 2013 Wis. Act 20 creates § 77.585(10), which provides that when a retailer receives a valid exemption certificate *after* reporting a sale to Department of Revenue, the retailer may claim a deduction on its return (rather than being required to file an amended return) for the reporting period in which the exemption certificate is received. The deduction may be claimed, however, only if (a) the retailer has already paid the tax to the Department; (b) the retailer has returned the tax to the buyer in cash or as a credit; and (c) the exemption certificate is received during the taxable year (for income tax purposes) of the retailer in which the sale covered by the exemption certificate occurred.

Section 16.6. Tax Returns and Due Dates.

- Effective for tax years beginning on or after January 1, 2014, a retailer's reporting period for sales and use taxes will be monthly if the amount due in any one calendar quarter is more than $1,200. The standard had been $600. 2013 Wis. Act 20, amending Wis. Stat. § 77.58(1)(a). In its December 2013 *Sales and Use Tax Report*, the Department states that in November 2013, it notified approximately 20,000 taxpayers that they were eligible (but not required) to reduce their filing frequency in 2014. Specifically, for many retailers with less than $1,200 of tax in each calendar quarter, the return frequency will

change from monthly to quarterly; and for retailers with less than $600 in tax for each calendar quarter, the return filing frequency will change from quarterly to annual. The *Sales and Tax Report* includes instructions for those taxpayers who may wish to keep a more frequent filing status.

- The Department of Revenue has issued guidance to the effect that a nonresident who registers a snowmobile or ATV in Wisconsin is required to pay Wisconsin sales or use tax due on the purchase at the time the snowmobile is registered or titled in Wisconsin, including those that are registered or titled for the purpose of obtaining a trail pass from the Department of Natural Resources. The Department also says, however, that if the person has previously paid a sales or use tax that was legally due and owing to another state, the sales or use tax paid to the other state may be used as a credit against the Wisconsin tax due. The Tax Release is posted at http://www.dor.state.wi.us/taxpro/news/101220a.html (posted December 23, 2010). See also *Sales and Use Tax Report*, p. 2 (March 2011).

- The Department's September 2008 *Sales and Use Tax Report* contains (at p. 4) a summary of various options with respect to electronic sales and use tax filings and payments.

- The Department discontinued the Sales Internet Process filing option in June 2009. The TeleFile application and XML e-file transmission process for filing and paying remain available, and the Department is encouraging use of a new filing alternative, "My Tax Account." Information concerning "My Tax Account" is set forth in the Department's June 2009 *Sales and Use Tax Report*, and on the Department's website at http://www.dor.state.wi.us/faqs/my_tax_account/. Taxpayers without Internet access or email can authorize a third party to access the taxpayer's tax account and file returns on My Tax Account by signing a Form A-777a. A copy of Form A-777a can be obtained at http://www.revenue.wi.gov/forms/mytaxacct/a-777af.pdf. The Form is signed and retained by the taxpayer and its representative (it is not filed with the Department).

- As of January 5, 2010, the "EFT" registration and payment system for sales and use tax, withholding tax, business tax registration renewal fee, premier resort area tax and rental vehicle fee was no longer available. Taxpayers who used the EFT system for these taxes and fees were required to transition to My Tax Account by January 5, 2010. EFT continues to be available for income and certain other taxes. See *Sales and Use Tax Report*, p. 10 (Dec. 2009).

Section 16.7. Administrative Expense Allowance.

The retailer's discount is limited to $1,000 per reporting period, first applicable to taxes payable on October 1, 2009. 2009 Wis. Act 28, amending Wis. Stat. § 77.61(4)(c).

Section 16.10. Penalties.

November 2011 Tax Legislation
Relating to Important Administrative Matters

On November 16, 2011, the Legislature enacted 2011 Wis. Act 68, which makes numerous changes with respect to tax administration generally, including with respect to sales and use taxes. The Legislation generally becomes effective March 1, 2012. For an extensive discussion of many of the impacted areas prior to adoption of these provisions, see *The Complete Guide*, Sections 1.2, 16.10 and 16.14. The text of the legislation, as well as certain legislative background papers, can be reviewed at: https://docs.legis.wisconsin.gov/2011/proposals/se1/sb23

The provisions include the following:

- A more detailed "declaratory ruling" procedure, pursuant to which "any interested person" or "group or association of interested persons" can apply for a declaratory (and binding) ruling from the Department.
- A provision that specifically allows the Tax Appeals Commission to award a "successful party" (including taxpayers) the costs and attorneys' fees that are "directly attributable" to responding to a "frivolous petition, claim, or defense."
- Detailed provisions concerning the circumstances where taxpayers can rely on published advice, rules, and specific written advice of and from the Department.
- A provision that limits the extent to which Department rule changes can be retroactive.
- A provision that when the Department of Revenue issues a "Notice of Nonacquiescence" with respect to a decision or order of the Tax Appeals Commission, the Commission's decision may nevertheless be cited by the Commission or the courts. This eliminates the argument sometimes made by the Department that when it issues a Notice of Nonacquiescence, the Commission's decision is (except with respect to the parties to the litigation) effectively rendered a nullity and of no precedential or persuasive value.
- Change in the burden of proof with respect to negligence and certain other penalties, so that *the Department* must show that the taxpayer's action or inaction was due to the taxpayer's willful neglect and not to reasonable cause.
- Prohibition of "class action" tax refund suits against either the Department or any other party.
- An anti-"browsing" provision that prohibits Department of Revenue personnel from reviewing sales or use tax returns or claims, or information derived therefrom, unless it is done in "performing the duties of [their] position."

Reliance on Past Audits

2013 Wis. Act 20 creates new Wis. Stat. § 73.16(3), "relying on past audits." It first applies to audit determinations issued on January 1, 2014, regardless of when a prior audit determination was made. See 2013 Wis. Act 20, § 9337 (Initial applicability; Revenue). It will apply to all "determinations of the department," including for all members of a combined income tax group. Thus, it presumably applies to all taxes administered by the Department, including sales and use taxes. All of the following conditions must be satisfied to block an assessment/liability on an issue:

- The liability asserted is the result of a "tax issue" during the period associated with a "prior determination" for which the person is subject to and the tax issue is the "same" as the tax issue during the period associated with the current determination.
- A Department employee who was involved in the prior determination identified or reviewed the tax issue before completing the prior determination, as shown by "any schedules, exhibits, audit reports, documents, or other written evidence pertaining to the determination, and the schedules, exhibits, reports, documents and other written evidence show" that the department did not adjust the person's treatment of the issue.
- The liability asserted in the new audit was not asserted in the prior determination.
- The new provision does not apply to any period associated with a determination if the period begins after promulgation of a rule, dissemination of written guidance to the public or the person subject to the determination, the effective date of a statute, or the date on which the Tax Appeals Commission or court decision becomes final and conclusive and the rule, guidance, statute, or decision imposes the liability asserted by the Department.
- The new provision does not apply if the taxpayer did not give the Department employee adequate and accurate information or if the issue is settled by a written agreement between the Department and the taxpayer.

Comment: It will be particularly important for the payers to keep comprehensive records of prior audits, perhaps indefinitely.

- Effective June 8, 2011, the Legislature repealed § 77.52(4), which had provided that it was a misdemeanor for a retailer to advertise it would assume or absorb the sales tax. 2011 Wis. Act 18. A retailer that advertises that the sales tax will be assumed by the retailer or not added to the sales price is still responsible for paying the applicable sales tax to the Department.

- *Correction.* On p. 500 of the 2008 edition of *The Complete Guide to Wisconsin Sales and Use Taxes* (second column, second full paragraph), it is erroneously stated that 2005 legislation changed the rule that refunds scheduled during an audit, but for which no formal refund claim had been filed by the seller, do not need to be returned to the

customers from which they were collected. In fact, the 2005 legislation did not change that rule. An early version of the Bill that ultimately became law, 2005 Senate Bill 218, would have made the change to also require sellers to return those amounts to customers. During the legislative process, however, the language that would have made the change was removed, leaving the law on that point as it had been since 1994, and as it remains. Accordingly, sellers under these circumstances are well advised to not file formal claims for refund of tax, but to instead raise the issue informally with the Department auditor. See also Wis. Tax Bull. No. 146, p. 11 (Feb. 2006) ("Clarification of New Sales and Use Tax Law Regarding a Seller's Requirement to Refund Sales or Use Tax to its Customer").

- Effective July 1, 2009, the Legislature authorized the Department of Revenue to impose certain penalties for the failure to produce records or documents. 2009 Wis. Act 28, creating Wis. Stat. § 77.61(19). The penalties include (a) the disallowance of deductions, credits, exemptions, or inclusion of additional taxable sales or additional taxable purchases to which the requested records relate; and (b) a penalty "for each violation" equal to the *greater* of $500 or 25 percent of the amount of the additional tax on any adjustment made by the Department that results from the person's failure to produce the records. The Department may not impose these penalties, however, if the person shows that, under all the facts and circumstances, the person's response (or failure to respond) was "reasonable" or justified by factors "beyond the person's control." For further background on this change, see "Penalties for Failure to Produce Records (DOR — Tax Administration)," Legislative Fiscal Bureau Paper #686 (April 23, 2009), available at: http://legis.wisconsin.gov/lfb/publications/budget/2009-11-Budget/Documents/Budget%20Papers/686.pdf. The Department of Revenue has adopted a detailed administrative rule concerning this new penalty. See Wis. Admin. Code § Tax 2.85 and 11.90.

Section 16.11. Personal Liability of Corporate Officers, Partners, Employees and Other Representatives.

- In *Sandberg v. Dep't. of Revenue*, Docket No. 08-W-143(P-II) (WTAC Nov. 18, 2011), the Tax Appeals Commission held that the petitioner was not a responsible person under Wis. Stat. § 71.83(1)(b)2. The Commission concluded that even though the petitioner had some role in the company's financial affairs (including check writing), he was not a responsible person because another person (his father) was the sole owner and by himself controlled all aspects of the business' financial dealings, including which creditors to pay and when to pay them. After prevailing in that action, the petitioner then filed a motion, asking the Commission to order the Department to pay the petitioner's costs in the action. The Commission rejected the petitioner's request, finding that although the Department did not prevail in the underlying litigation, its position was "substantially justified," within the meaning of Wis. Stat. § 227.485(3). For this purpose, the Commission said "substantially justified" means having "a reasonable basis in law or fact," and that an agency meets this test if its position has "arguable merit." After reviewing the evidence, the Commission said those standards were met. *Sandberg v. Dep't. of Revenue*, Docket

No. 08-W-143(P-III) (WTAC Feb. 8, 2012). The petitioner then filed a motion, asking the Commission to reconsider its decision denying costs, but the Commission denied the motion. *Sandberg v. Dep't. of Revenue*, Docket No. 08-W-143 (WTAC March 29, 2012).

- *In Smith v. Dep't. of Revenue*, Docket Nos. 10-S-110, 10-W-111 (WTAC Feb. 16, 2012), the Tax Appeals Commission found the petitioner to be a "responsible person" for a portion of the periods in question. The Commission rejected the petitioner's argument that he was not responsible because he had delegated the tax compliance function; the Commission said that even if he had, petitioner had remained the president and sole director of the company, and thus had a non-delegable duty. The Commission also concluded, however, that "questions of fact" remained for a later portion of the period, for which petitioner was no longer president and had expressly delegated authority, although he remained a director and shareholder. The Commission said further briefing would be required to resolve that issue.

- In *Jones v. Dep't. of Revenue*, Docket Nos. 10-S-210, 10-W-211 (WTAC March 16, 2012), the Commission concluded that, based on the record before it, the petitioner (the Treasurer and an owner of the business) was a "responsible person."

- In *Field v. Dep't. of Revenue*, Docket No. 06-S-240, Wis. Tax. Rep. (CCH) ¶ 401-102 (WTAC March 19, 2008), the Tax Appeals Commission concluded that the officer and member of a limited liability company was personally liable for the LLC's unpaid Wisconsin sales tax.

- In *Rashaed v. Dep't. of Revenue*, Docket No. 10-S-071 (WTAC July 13, 2011), the petitioner questioned the Department's authority to make a "responsible person" assessment approximately ten years after the Department had assessed the underlying business for the amount at issue. The Commission said that (a) there is no statute of limitations on responsible person assessments; and (b) although the Department may have an internal policy of attempting to complete responsible person investigations within four years, this is not required by law, and the Department was not "equitably estopped" from making the assessment, even ten years later. The Commission declined to address the petitioner's argument that the "responsible person" statute violates the Equal Protection Clause of the United States Constitution, saying "the Commission does not generally have the authority to declare a statute unconstitutional." On appeal, The Dane County Circuit Court affirmed the Commission, and did address the constitutional issue, finding no Equal Protection violation. *Rashaed v. Dep't. of Revenue*, Case No. 2011-CV-5206 (Nov. 14, 2012). On further appeal, the Court of Appeals agreed with the Circuit Court that there was no Equal Protection violation (Appeal No. 2013AP366 Dec. 27, 2013).

- In *Marxer v. Dep't. of Revenue*, Docket No. 09-S-175 (WTAC July 15, 2011), the Commission found the petitioner to be a "responsible person," and rejected the petitioner's argument that he should not be liable because another person may have been at fault for not paying the taxes. The Commission said that "in effect," the petitioner argues "that he delegated his duty …[however, while] a corporate officer may delegate authority," he "may not delegate responsibility." The Dane County Circuit Court affirmed the decision of the Tax Appeals Commission. Case No. 2011-CV-4783 (Sept. 19, 2012).

Section 16.12. Successor Liability/Discontinuance of Business.

In *Villager Food Mart/Beer & Liquor v. Dep't. of Revenue*, Docket No. 10-S-276 (WTAC April 4, 2012), the Tax Appeals Commission held that the petitioner was a "successor" under Wis. Stat. § 77.52(18) and thus liable for the seller's unpaid sales taxes.

Section 16.13. Recordkeeping Requirements.

- Effective July 1, 2009, the Legislature authorized the Department of Revenue to impose certain penalties for the failure to produce records or documents. See **Section 16.10**.
- In *Elmakias Construction Inc. & Yehuda Elmakias v. Dep't. of Revenue*, Docket Nos. 10-S-131 & 10-I-132 (WTAC June 7, 2013), the Tax Appeals Commission upheld the Department's assessment on the basis that the taxpayers did not meet their burden of proof and repeatedly violated Commission orders.

Section 16.14. Tax Refunds.

- In *Enviro Quip, LLC v. Dep't. of Revenue*, Docket No. 11-S-354 (WTAC June 10, 2013), the Tax Appeals Commission held that the taxpayer's sales tax refund claim was untimely because it was filed after the 4-year period specified in Wis. Stat. § 77.59(4)(a). The claim was filed on November 2, 2010. The refund claim period was July 2000 – December 2005. The Commission held that the deadline for filing a refund claim under Wis. Stat. § 77.59(4)(a) was April 15, 2010, which was the due date of the taxpayer's 2005 income or franchise tax return (April 15, 2006), plus 4 years. *Note*: it is not clear from the decision why the Commission said that the claim deadline was April 15, 2010 for each of the years 2000 – 2005, as opposed to only 2005. Ordinarily, the deadline for each of the prior years would have been one year prior (e.g., for 2004, the deadline would have been April 15, 2009; for 2003, April 15, 2008, etc.).

- Wis. Stat. § 77.59(4)(a) has long said that, with certain exceptions, sellers have 4 years after the "due date" and buyers have 4 years from the "unextended due date" of the person's corresponding income or franchise tax return to file a refund claim. 2013 Wis. Act 20 amends § 77.59(4)(a) to make the deadline the same for buyers as for sellers – i.e., 4 years after the "due date" of a person's corresponding income or franchise tax return, for both sellers and buyers. The Department calls this a clarification. *Sales and Use Tax Report*, p. 13 (July 2013).

- The Department of Revenue has announced that sales tax refund claims filed by purchasers may now be filed electronically, through "My Tax Account" on the Department's website. The Department says that it will continue to process "paper" claims filed on Form S-220. *Sales and Use Tax Report*, pp. 4-5 (July 2011).

- The Department of Revenue has again published guidance to the effect that buyers who believe they have overpaid sales or use taxes may not simply claim a credit on their next sales and use tax return, but should instead either (a) contact the seller to request a refund or (b) file a buyer's claim for refund (on Form S-220). See the guidance posted at http://www.revenue.wi.gov/taxpro/news/120827.html (Example 3).

- The Department has updated and reissued Publication 216, *Filing Claims for Refund of Sales or Use Tax* (Oct. 2012).

Important Sales and Use Tax Change
Effective October 1, 2009

Buyer-Seller Tax Collection Disputes

From time to time, a seller will collect sales tax from a customer, and the customer will later contend that the tax should not have been collected. The buyer will usually have recourse by filing a refund claim with the Department of Revenue, but in certain cases that option is not available, and in any event, sometimes the buyer does not want to pursue that alternative. As a result, disputes sometimes arise between sellers and buyers, where the buyer attempts to obtain the tax from the sellers. For a recent example of protracted litigation on this issue, see *Butcher v. Ameritech Corp*., 2007 WI App 5, 727 N.W.2d 546.

A new statute partially addresses this situation by providing a dispute settlement procedure. Buyers who believe tax has been improperly collected can send a written notice to the seller, requesting review. The seller then has 60 days to determine the validity of the buyer's claim. If the seller believes no error has been made, it must explain its findings to the buyer. If the seller finds that an error has been made, it must refund the tax, together with applicable interest. A buyer is not permitted to take any other action against the seller (including filing a lawsuit) unless the buyer has exhausted its remedies under this procedure. See Wis. Stat. § 77.59(9p)(b).

November 2011 Tax Legislation
Relating to Important Administrative Matters

On November 16, 2011, the Legislature enacted 2011 Wis. Act 68, which makes numerous changes with respect to tax administration generally, including with respect to sales and use taxes. The Legislation generally becomes effective March 1, 2012. For an extensive discussion of many of the impacted areas prior to adoption of these provisions, see *The Complete Guide*, Sections 1.2, 16.10 and 16.14. The text of the legislation, as well as certain legislative background papers, can be reviewed at: https://docs.legis.wisconsin.gov/2011/proposals/se1/sb23

The provisions include the following:

- A more detailed "declaratory ruling" procedure, pursuant to which "any interested person" or "group or association of interested persons" can apply for a declaratory (and binding) ruling from the Department.
- A detailed procedure by which a person can submit a petition to the Department, seeking to show that the Department has "established a [unpublished] standard by which it is construing a state tax statute," and forcing the Department to begin a rulemaking process with respect to that standard.
- A provision that specifically allows the Tax Appeals Commission to award a "successful party" (including taxpayers) the costs and attorneys fees that are "directly attributable" to responding to a "frivolous petition, claim, or defense."
- Detailed provisions concerning the circumstances where taxpayers can rely on published advice, rules, and specific written advice of and from the Department.
- A provision that limits the extent to which Department rule changes can be retroactive.
- A provision that when the Department of Revenue issues a "Notice of Nonacquiescence" with respect to a decision or order of the Tax Appeals Commission, the Commission's decision may nevertheless be cited by the Commission or the courts. This eliminates the argument sometimes made by the Department that when it issues a Notice of Nonacquiescence, the Commission's decision is (except with respect to the parties to the litigation) effectively rendered a nullity and of no precedential or persuasive value.
- Change in the burden of proof with respect to negligence and certain other penalties, so that *the Department* must show that the taxpayer's action or inaction was due to the taxpayer's willful neglect and not to reasonable cause.
- Prohibition of "class action" tax refund suits against either the Department or any other party.
- An anti-"browsing" provision that prohibits Department of Revenue personnel from reviewing sales or use tax returns or claims, or information derived therefrom, unless it is done in "performing the duties of [their] position."

Reliance on Past Audits

2013 Wis. Act 20 creates new Wis. Stat. § 73.16(3), "relying on past audits." It first applies to audit determinations issued on January 1, 2014, regardless of when a prior audit determination was made. See 2013 Wis. Act 20, § 9337 (Initial applicability; Revenue). It will apply to all "determinations of the department," including for all members of a combined income tax group. Thus, it presumably applies to all taxes administered by the department, including sales and use taxes. All of the following conditions must be satisfied to block an assessment/liability on an issue:

- The liability asserted is the result of a "tax issue" during the period associated with a "prior determination" for which the person is subject to and the tax issue is the "same" as the tax issue during the period associated with the current determination.
- A Department employee who was involved in the prior determination identified or reviewed the tax issue before completing the prior determination, as shown by "any schedules, exhibits, audit reports, documents, or other written evidence pertaining to the determination, and the schedules, exhibits, reports, documents and other written evidence show" that the Department did not adjust the person's treatment of the issue.
- The liability asserted in the new audit was not asserted in the prior determination.
- The new provision does not apply to any period associated with a determination if the period begins after promulgation of a rule, dissemination of written guidance to the public or the person subject to the determination, the effective date of a statute, or the date on which the Tax Appeals Commission or court decision becomes final and conclusive and the rule, guidance, statute, or decision imposes the liability asserted by the department.
- The new provision does not apply if the taxpayer did not give the department employee adequate and accurate information or if the issue is settled by a written agreement between the department and the taxpayer.

Comment: It will be particularly important for taxpayers to keep comprehensive records of prior audits, perhaps indefinitely.

Section 16.15. Tax Audits and Assessments.

- The Department of Revenue has released a new publication that addresses statistical sampling in field audits of sales and use taxes. Publication No. 516, *Statistical Sampling* (July 2013), available at: http://www.dor.state.wi.us/pubs/pb516.pdf

- In a major change, 2013 Wis. Act 20 reduces the interest rate on refunds and returns of deposits from 9% to 3%. The change first applies to amounts paid on July 2, 2013, regardless of the taxable periods to which the refunds pertain. See http://www.revenue.wi.gov/faqs/ise/interest.html. The interest rates of 12% (and in certain cases, 18%) on deficiencies remain unchanged.

- In *Cellar Door North Central, Inc. v. Dep't. of Revenue*, Docket No. 08-S-067 (WTAC Jan. 22, 2013), the Tax Appeals Commission concluded that, based on the record before it, the petitioner was a "co-promoter" of concerts, and thus liable for sales tax that had been collected (but not remitted to the Department) on the sale of admissions to concerts at issue in the case. The Department had made alternative assessments under Wis. Stat. § 77.59(9m) to Cellar Door and the "co-promoter," but determined that the tax was uncollectible from the co-promoter, and thus pursued Cellar Door. The Dane County Circuit Court has affirmed the Commission's decision. Case No. 13-CV-617 (Aug. 26, 2013).

- On November 23, 2010, the Department posted a short notice on its website, to the effect that "the gross receipts on the franchise/income tax return should equal total sales on Form ST-12," with the taxpayer then removing any non-taxable and exempt receipts on other lines of the Form ST-12. See http://www.dor.state.wi.us/taxpro/news/101123.html.

Section 16.16. Appealing a Tax Determination.

- Wis. Stat. § 77.59(6)(b) has been amended, effective July 2, 2013, to provide that sales and use tax decisions of the Tax Appeals Commission may be appealed to the circuit court for Dane County or the circuit court for the county where the taxpayer's "commercial domicile" (as defined) is located, where the taxpayer owns other property, or where the taxpayer transacts business in Wisconsin. Previously, appeals in sales and use tax cases could only be taken to the circuit court for Dane County. 2013 Wis. Act 20.

- In a major change, 2013 Wis. Act 20 reduces the interest rate on refunds and returns of deposits from 9% to 3%. The change first applies to amounts paid on July 2, 2013, regardless of the taxable periods to which the refunds pertain. See http://www.revenue.wi.gov/faqs/ise/interest.html. The interest rates of 12% (and in certain cases, 18%) on deficiencies remain unchanged.

- A new statute has made an important change with respect to potential buyer remedies when a seller may have erroneously collected tax. See **Section 16.14**.

- The Department of Revenue has issued guidance concerning a law change, effective September 1, 2010, relating to powers of attorney (POAs) in Wisconsin, including use in representing taxpayers before the Department. The guidance says that taxpayers dealing with the Department can use either the Department's pre-printed form (Form A-222), or another form of POA. The Form A-222 does not have to be notarized, but any other form of POA must be. The Department also notes that, unlike Form A-222 (which provides for the designation of individual representatives), alternative forms may designate an entity (such as a corporation or a partnership) as a representative. The Department also addresses other questions concerning the law change. The Department's guidance, dated November 8, 2010, is posted to its website at: http://www.revenue.wi.gov/taxpro/news/101103.html.

Section 16.17. Collection of Delinquent Taxes.

- Effective October 1, 2009, Wis. Stat. § 73.03(64) requires the Department of Revenue to post on the Internet a list of every person who has had a seller's permit revoked. The list must include the revocation date, the type of tax and amount due, including interest and penalties. 2009 Wis. Act 28. The posting is at http://www.revenue.wi.gov/delqlist/revoke.htm. For further information, see *Sales and Use Tax Report*, pp. 9-10 (Dec. 2009).

- Wisconsin tax amnesty (***note*: the application period expired September 30, 2010**). If a business applied during a lengthy amnesty application period (July 1, 2009 through September 30, 2010) and satisfied certain eligibility requirements (set forth below), the business would not have been liable for *any* Wisconsin sales tax on *sales* made prior to registration. A business was automatically eligible for the amnesty unless it (a) was currently registered to collect Wisconsin sales tax, or was so registered at any time during the previous 12 months; (b) had received notice of commencement of an audit, unless that audit is finally resolved; or (c) had "committed or been involved in a fraudulent act or intentional misrepresentation of a material fact." The amnesty, however, did not apply to any Wisconsin taxes that were owed in the applicant's capacity as a *purchaser* (e.g., *use tax* on *purchases*) or any Wisconsin sales taxes that had previously been collected from customers, regardless of whether the taxes have been remitted to the Department. An applicant was also required to register to collect sales tax for all of the other Streamlined Sales and Use Tax Agreement (SSUTA) member states using the Streamlined Sales Tax Central Registration System, and agree to collect and remit sales tax to Wisconsin and all of the other SSUTA member states (including those states that join the SSUTA after it registered) for at least 36 months after the date of registration. *Sales and Use Tax Report*, pp. 1-2 (June 2009).