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## Wisconsin Tax Appeals Commission Rejects the "Look Through" Theory of Liability for Temporary Help Services

The Wisconsin Department of Revenue will no longer attempt to assess sales or use tax on temporary help services in Wisconsin. Attorneys Don Millis, Kristina Somers, and John Austin, of the Reinhart Tax Team, successfully defended Manpower Inc. against the Department of Revenue's efforts to tax these services and achieved a victory that benefits both temporary help service companies and those who use the services provided by these companies (as well as any others who provide or use services on a temporary basis, such as between related companies).

The victory grew out of *Manpower Inc. v. Wisconsin Department of Revenue*, a Wisconsin Tax Appeals Commission case in which Manpower challenged the Department of Revenue's assessment of sales tax on Manpower's temporary help services.

### Certain Services Are Subject To Wisconsin Sales/Use Tax

Wisconsin sales/use tax applies only to certain services. Section 77.52(2)(a) of the Wisconsin Statutes lists these services. Any service that does not appear on the list is not taxable. Temporary help services are not on the list.

In the *Manpower* case, the Wisconsin Department of Revenue asserted a "Look Through" theory to assess sales tax on Manpower. Essentially, the Department claimed that Manpower was performing a taxable service when its worker performed a task that was listed in the Wisconsin Statutes as a taxable service. For example, since landscaping appears on the list of taxable services, if a Manpower employee pruned bushes for a client of Manpower, the Department would treat Manpower's service as taxable.

### Sales Or Use Taxes On Temporary Help Services Potentially Affected Wide Range of Taxpayers

This type of tax could manifest as either a sales tax or a use tax. A company who engages in taxable services may choose to either pay the sales tax out of its own funds or collect the tax from its customer. Therefore, this decision affects both companies who paid sales tax to the Wisconsin Department of Revenue and customers who paid sales tax to temporary help agencies. In addition, this decision potentially benefits taxpayers who were audited and assessed either sales or use tax by the Wisconsin Department of Revenue.

### Temporary Help Services Are Not Subject To Wisconsin Sales/Use Tax

The Wisconsin Tax Appeals Commission concluded that Section 77.52(2)(a) does not tax temporary help services, even when the task being performed resembled a service that is listed in this statute. The Commission set forth four factors that most influenced its decision. First, the Commission emphasized that Manpower workers temporarily replace the regular employees of Manpower's clients, which services as employees would not be taxable. Second, the tasks Manpower workers perform may differ from the tasks they were originally hired to perform. Third, sellers normally are not burdened with the minute-by-minute record-keeping the Department suggested to impose this tax. Fourth, Manpower does not

guarantee results nor does it control the worker who actually performs the task. For these reasons, the court said "'temporary help services' is not listed in our statutes as a taxable service, and we find that such services are distinguishable from the services enumerated in Wis. Stat. § 77.52(2)." It therefore held that Wisconsin sales/use tax does not apply to temporary help services performed by companies like Manpower.

### **The Wisconsin Department of Revenue Concedes Sales/Use Tax Is Inapplicable—Refunds May Apply**

The Wisconsin Department of Revenue decided not to appeal this decision. Further, the Department did not file a notice of nonacquiescence. This means the Department will no longer assess sales/use tax on this type of service and that people who paid tax on this type of service may be eligible for refunds.

This potential refund applies in several different situations. First, it applies to refund claims that are currently pending, meaning claims that taxpayers have filed with the Wisconsin Department of Revenue. Second, it applies to refund claims that fall within the time period stated in Wis. Stat. § 77.59(4)(a), which is generally four years from the unextended due date of the seller's/buyer's Wisconsin income or franchise tax return. Finally, taxpayers who are within two years of the date that a notice assessing sales/use tax was issued may be eligible for a refund under Wis. Stat. § 77.59(4)(b). Practically, this final situation may apply to earlier years since the two-year period to file a refund claim is not based on the years subject to the assessment but is instead based only on the date that the Wisconsin Department of Revenue issued the assessment. Taxpayers who fall into one of these categories should consider pursuing a refund of tax paid.

This *Headlines in Tax Law* provides general information about tax issues. It should not be construed as legal advice or a legal opinion. Readers should seek legal counsel concerning specific factual situations confronting them.



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