DEPARTMENT OF REVENUE [701]

Notice of Intended Action

Pursuant to the authority of Iowa Code section 421.17(19) and section 423.42(1), 2003 Iowa Acts, First Extraordinary Session, chapter 2, section 135, the Department of Revenue hereby gives Notice of Intended Action to adopt Chapter 211, "Definitions"; Chapter 219, "Sales and Use Tax on Construction Activities"; and Chapter 231, "Exemptions Primarily of Benefit to Consumers", Iowa Administrative Code.

The proposed new chapters are intended to implement division XIV of chapter 2 of the 2003 Iowa Acts of the First Extraordinary Session of the Iowa Legislature, otherwise known as the Streamlined Sales and Use Tax Act. The newly-drafted rules are intended to accomplish three things: 1) To explain the changes to Iowa sales and use tax law made by the Streamlined Sales and Use Act; 2) To preserve the existing interpretation of portions of Iowa sales and use tax law which the Streamlined Sales and Use Tax Act does not change; and, 3) To remove from the new rules as many references as possible to sales and use tax law as it existed prior to July 1, 2004, the effective date of the Streamlined Sales and Use Tax Act.

The proposed amendments will not necessitate additional expenditures by political subdivisions or agencies and entities which contract with political subdivisions.

Any person who believes that the application of the discretion-

ary provisions of these amendments would result in hardship or injustice to that person may petition the Department for a waiver of the discretionary provisions, if any.

The Department has determined that these proposed amendments may have an impact on small business. The Department has considered the factors listed in Iowa Code section 17A.4A. The Department will issue a regulatory analysis as provided in Iowa Code section 17A.4A if a written request is filed by delivery or by mailing postmarked no later than _____, 2004, to the Policy Section, Compliance Division, Department of Revenue, Hoover State Office Building, P.O. Box 10457, Des Moines, Iowa 50306. The request may be made by the Administrative Rules Review Committee, the Administrative Rules Coordinator, at least 25 persons signing that request who each qualify as a small business or an organization representing at least 25 such persons.

Any interested person may make written suggestions or comments on these proposed amendments on or before _____, 2004. Such written comments should be directed to the Policy Section, Compliance Division, Department of Revenue, Hoover State Office Building, P.O. Box 10457, Des Moines, Iowa 50306.

Persons who want to convey their views orally should contact the Policy Section, Compliance Division, Department of Revenue, at (515)281-8036 or at the Department of Revenue offices on the fourth floor of the Hoover State Office Building.

Requests for a public hearing must be received by _____, 2004.

These amendments are intended to implement division XIV of

chapter 2 of the 2003 Iowa Acts of the First Extraordinary Session of the Iowa Legislature.

The following amendments are proposed.

_____

CHAPTER 211

DEFINITIONS

701-211.1(423) The definitions set out in this chapter are applicable wherever the terms they define appear in this title unless the context indicates otherwise.

"Agent" means a person appointed by a seller to represent the seller before the member states.

"Agreement" means the streamlined sales and use tax agreement authorized by Division XIV of Chapter 2 of the 2003 Iowa Acts of the First Extraordinary Session of the Iowa Legislature to provide a mechanism for establishing and maintaining a cooperative, simplified system for the application and administration of sales and use taxes.

"Agricultural production" is limited to what would ordinarily be considered a farming operation undertaken for profit. The term refers to the raising of crops or livestock for market on an acreage. See Bezdek's Inc. v. Iowa Department of Revenue (Linn County District Court, May 14, 1984). Included within the meaning of the phrase "agricultural production" is any feedlot operation whether or not the land upon which a feedlot operation is located is used to grow crops to feed the livestock in the feedlot, and regardless of whether or not the livestock fed are owned by persons conducting the feedlot operation; operations

growing and raising hybrid seed corn or other seed for sale to farmers; and nurseries, ranches, orchards, and dairies. "Agricultural production" includes the raising of flowering, ornamental, or vegetable plants in commercial greenhouse or elsewhere for sale in the ordinary course of business. The phrase also includes any kind of aquaculture; commercial greenhouses; and raising catfish. Logging; production of Christmas trees; beekeeping; and the raising of mink, other nondomesticated furbearing animals, and nondomesticated fowl (other than ostriches, rheas, and emus) continue to be excluded from the term. The above list of exclusions and inclusions within the term "agricultural production" is not exhaustive. "Agricultural products" includes flowering, ornamental, or vegetable plants and those products of aquaculture.

"Business" includes any activity engaged in by any person or caused to be engaged in by the person with the object of gain, benefit, or advantage, either direct or indirect.

"Certificate of title" means a certificate of title issued for a vehicle or for manufactured housing under chapter 321 of the Code.

"Certified automated system" means software certified under the agreement to calculate the tax imposed by each jurisdiction on a transaction, determine the amount of tax to remit to the appropriate state, and maintain a record of the transaction.

"Certified service provider" means an agent certified under the agreement to perform all of a seller's sales or use tax functions, other than the seller's obligation to remit tax on its own purchases.

"Chemical" is a substance which is primarily used for producing a chemical effect. A chemical effect results from a chemical process wherein the number and kind of atoms in a molecule are changed in form (e.g., where oxygen and hydrogen are combined to make water). A chemical process is distinct from a physical process wherein only the state of matter changes (e.g., where water is frozen into ice or heated into steam).

"Computer" means an electronic device that accepts information in digital or similar form and manipulates the information for a result based on a sequence of instructions.

"Computer software" means a set of coded instructions designed to cause a computer or automatic data processing equipment to perform a task.

"Delivered electronically" means delivered to the purchaser by means other than tangible storage media.

"Delivery charges" means charges assessed by a seller of personal property or services for preparation and delivery to a location designated by the purchaser of personal property or services including, but not limited to, transportation, shipping, postage, handling, crating, and packing charges.

"Department" means the department of revenue.

"Direct mail" means printed material delivered or distributed by United States mail or other delivery service to a mass audience or to addressees on a mailing list provided by the purchaser or at the direction of the purchaser when the cost of the items is not billed directly to the recipients. "Direct mail" includes tangible personal property supplied directly or indirectly by the purchaser to the direct mail seller for inclusion in the package containing the printed material. "Direct mail" does not include multiple items of printed material delivered to a single address.

"Director" means the director of revenue.

"Domesticated fowl" means any domesticated bird raised as a source of food, either eggs or meat. The word includes, but is not limited to, chickens, ducks, turkeys, pigeons, ostriches, rheas, and emus which are raised for meat rather than for racing or as pets. Excluded from the meaning of the word are nondomesticated birds, such as pheasants, raised for meat or any other purpose.

"Educational institution" means an institution which primarily functions as a school, college, or university with students, faculty, and an established curriculum. The faculty of an educational institution must be associated with the institution and the curriculum must include basic courses which are offered

every year. “Educational institution” includes an institution primarily functioning as a library.

“Electronic” means related to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

“Farm deer” means the same as defined in section 170.1.

“Farm machinery and equipment” means machinery and equipment used in agricultural production.

“First use of a service”. A “first use of a service” occurs when a service is rendered, furnished, or performed in Iowa or if rendered, furnished, or performed outside of Iowa, when the product or result of the service is used in Iowa.

“Goods, wares, or merchandise” means the same as tangible personal property.

“Governing board” means the group comprised of representatives of the member states of the agreement which is created by the agreement to be responsible for the agreement’s administration and operation.

“Implement of husbandry” is defined to mean any tool, equipment, or machine necessary to the carrying on of the business of agricultural production and without which the work could not be done. Reaves v. State, 50 S.W.2d 286 (Tex. Crim. App. Ct. 1932). An airplane or helicopter designed for and used primar-

ily in spraying or dusting of plants which are raised as part of agricultural production for market is an implement of husbandry.

"Installed purchase price" is the amount charged, valued in money whether paid in money or otherwise, by a building contractor to convert manufactured housing from tangible personal property into realty. "Installed purchase price" includes, but is not limited to, amounts charged for installing a foundation and electrical and plumbing hookups. "Installed purchase price" excludes any amount charged for landscaping in connection with the conversion.

"Lease or rental".

a. "Lease or rental" means any transfer of possession or control of tangible personal property for a fixed or indeterminate term for consideration. A "lease or rental" may include future options to purchase or extend.

b. "Lease or rental" includes agreements covering motor vehicles and trailers when the amount of consideration may be increased or decreased by reference to the amount realized upon sale or disposition of the property as defined in 26 U.S.C. } 7701(h)(1).

c. "Lease or rental" does not include any of the following:

(1) A transfer of possession or control of property under a security agreement or deferred payment plan that requires the transfer of title upon completion of the required payments.

(2) A transfer of possession or control of property under an agreement that requires the transfer of title upon completion of required payments, and payment of any option price does not exceed the greater of one hundred dollars or one percent of the total required payments.

(3) Providing tangible personal property along with an operator for a fixed or indeterminate period of time. A condition of this exclusion is that the operator is necessary for the equipment to perform as designed. For the purpose of this subparagraph, an operator must do more than maintain, inspect, or set up the tangible personal property.

d. This definition shall be used for sales and use tax purposes regardless of whether a transaction is characterized as a lease or rental under generally accepted accounting principles, the Internal Revenue Code, the Uniform Commercial Code, or other provisions of federal, state, or local law.

"Livestock" means domestic animals which are raised on a farm as a source of food or clothing, Van Clief v. Comptroller of State of Md., 126 A.2d 865 (Md. 1956) and In the Matter of Simonsen Mill Inc., Declaratory Ruling of the State Board, Docket No. 211, April 24, 1980. The term includes cattle, sheep, hogs, goats, chickens, ducks, turkeys, ostriches, rheas, emus, bison, and farm deer. "Farm deer" are defined as set forth in Iowa Code section 170.1 and commonly include animals belonging to the

cervidae family, such as fallow deer, red deer or elk and sika. However, “farm deer” does not include unmarked free-ranging elk. Fish and any other animals which are products of aquaculture are considered to be livestock as well.

Excluded from the term are horses, mules, other draft animals, dogs, cats, and other pets. Also excluded from the term are mink, bees, or other nondomesticated animals even if raised in captivity and even if raised as a source of food or clothing. Also excluded is any animal raised for racing.

“Manufactured housing” means “manufactured home” as defined in section 321.1.

“Manufacturer” means any person, firm, or corporation who purchases, receives, or holds personal property for the purpose of adding to its value by any process of manufacturing, refining, purifying, combining of different materials, or by packing of meats with an intent to sell at a gain or profit.

“Member state” is any state which has signed the agreement.

“Mobile home” means “manufactured or mobile home” as defined in section 321.1.

“Model 1 seller” is a seller that has selected a certified service provider as its agent to perform all the seller’s sales and use tax functions, other than the seller’s obligation to remit tax on its own purchases.

"Model 2 seller" is a seller that has selected a certified automated system to perform part of its sales and use tax functions, but retains responsibility for remitting the tax.

"Model 3 seller" is a seller that has sales in at least five member states, has total annual sales revenue of at least five hundred million dollars, has a proprietary system that calculates the amount of tax due each jurisdiction, and has entered into a performance agreement with the member states that establishes a tax performance standard for the seller. As used in this definition, a "seller" includes an affiliated group of sellers using the same proprietary system.

"Nonresidential commercial operations" means industrial, commercial, mining, or agricultural operations, whether for profit or not, but does not include apartment complexes or mobile home parks.

"Not registered under the agreement" means lack of registration by a seller with the member states under the central registration system referenced in section 423.11, subsection 4.

"Person" means an individual, trust, estate, fiduciary, partnership, limited liability company, limited liability partnership, corporation, or any other legal entity.

"Place of business" means any warehouse, store, place, office, building, or structure where goods, wares, or merchandise are offered for sale at retail or where any taxable amusement is

conducted, or each office where gas, water, heat, communication, pay television, or electric services are offered for sale at retail.

When a retailer or amusement operator sells merchandise by means of vending machines or operates music or amusement devices by coin-operated machines at more than one location within the state, the office, building, or place where the books, papers, and records of the taxpayer are kept shall be deemed to be the taxpayer's place of business.

"Plants" includes fungi such as mushrooms, crops commonly grown in this state such as corn, soybeans, oats, hay, alfalfa hay, wheat, sorghum, and rye. Also included within the meaning of the term are flowers, small shrubs, and fruit trees. Excluded from the meaning of the term are fir trees raised for Christmas trees and any trees raised to be harvested for their wood.

"Prewritten computer software" includes software designed and developed by the author or other creator to the specifications of a specific purchaser when it is sold to a person other than the purchaser. The combining of two or more prewritten computer software programs or prewritten portions of prewritten programs does not cause the combination to be other than prewritten computer software. "Prewritten computer software" also means computer software, including prewritten upgrades, which is not de-

signed and developed by the author or other creator to the specifications of a specific purchaser.

When a person modifies or enhances computer software of which the person is not the author or creator, the person shall be deemed to be the author or creator only of such person's modifications or enhancements. Prewritten computer software or a prewritten portion of the prewritten software that is modified or enhanced to any degree, when such modification or enhancement is designed and developed to the specifications of a specific purchaser, still is classified as prewritten computer software. However, when there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for such modification or enhancement, such modification or enhancement shall not constitute prewritten computer software.

"Property purchased for resale in connection with the performance of a service" means property which is purchased for resale in connection with the rendition, furnishing, or performance of a service by a person who renders, furnishes, or performs the service if all of the following occur:

a. The provider and user of the service intend that a sale of the property will occur.

b. The property is transferred to the user of the service in connection with the performance of the service in a form or quantity capable of a fixed or definite price value.

c. The sale is evidenced by a separate charge for the identifiable piece of property.

"Purchase" means any transfer, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever, for a consideration.

"Purchase price" means the same as "sales price" as defined in this section.

"Purchaser" is a person to whom a sale of personal property is made or to whom a service is furnished.

"Reagent" is a substance used for various purposes, (as in detecting, examining, or measuring other substances, in preparing materials, in developing photographs) because it takes part in one or more chemical reactions or biological processes. A reagent is also a substance used to convert one substance into another by means of the reaction which it causes. To be a reagent for purpose of the exemption, a substance must be primarily used as a reagent.

"Receive" and "receipt" mean any of the following:

a. Taking possession of tangible personal property.

b. Making first use of a service.

c. Taking possession or making first use of digital goods, whichever comes first.

"Receive" and "receipt" do not include possession by a shipping company on behalf of a purchaser.

"Registered under the agreement" means registration by a seller under the central registration system referenced in section 423.11, subsection 4 of the Code.

"Relief agency" means the state, any county, city and county, city, or district thereof, or any agency engaged in actual relief work.

"Retailer" means and includes every person engaged in the business of selling tangible personal property or taxable services at retail, or the furnishing of gas, electricity, water, pay television, or communication service, and tickets or admissions to places of amusement and athletic events or operating amusement devices or other forms of commercial amusement from which revenues are derived. However, when in the opinion of the director it is necessary for the efficient administration of this chapter to regard any salespersons, representatives, truckers, peddlers, or canvassers as agents of the dealers, distributors, supervisors, employers, or persons under whom they operate or from whom they obtain tangible personal property sold by them irrespective of whether or not they are making sales on their own behalf or on behalf of such dealers, distributors, supervi-

sors, employers, or persons, the director may so regard them, and may regard such dealers, distributors, supervisors, employers, or persons as retailers for the purposes of this chapter. "Retailer" includes a seller obligated to collect sales or use tax.

"Retailer maintaining a place of business in this state" or any like term includes any retailer having or maintaining within this state, directly or by a subsidiary, an office, distribution house, sales house, warehouse, or other place of business, or any representative operating within this state under the authority of the retailer or its subsidiary, irrespective of whether that place of business or representative is located here permanently or temporarily, or whether the retailer or subsidiary is admitted to do business within this state pursuant to chapter 490.

"Retailers who are not model sellers" means all retailers other than model 1, model 2, or model 3 sellers.

"Retail sale" or "sale at retail" means any sale, lease, or rental for any purpose other than resale, sublease, or subrent.

"Sales" or "sale" means any transfer, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever, for consideration.

"Sales price" applies to the measure subject to sales tax.

a. "Sales price" means the total amount of consideration, including cash, credit, property, and services, for which personal property or services are sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for any of the following:

(1) The seller's cost of the property sold.

(2) The cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expenses of the seller.

(3) Charges by the seller for any services necessary to complete the sale, other than delivery and installation charges.

(4) Delivery charges.

(5) Installation charges.

(6) The value of exempt personal property given to the purchaser where taxable and exempt personal property have been bundled together and sold by the seller as a single product or piece of merchandise.

(7) Credit for any trade-in authorized by section 423.3, subsection 58 of the Code.

b. "Sales price" does not include:

(1) Discounts, including cash, term, or coupons that are not reimbursed by a third party that are allowed by a seller and taken by a purchaser on a sale.

(2) Interest, financing, and carrying charges from credit extended on the sale of personal property or services, if the amount is separately stated on the invoice, bill of sale, or similar document given to the purchaser.

(3) Any taxes legally imposed directly on the consumer that are separately stated on the invoice, bill of sale, or similar document given to the purchaser.

(4) The amounts received for charges included in paragraph "a", subparagraphs (3) through (7), if they are separately contracted for and separately stated on the invoice, billing, or similar document given to the purchaser.

(5) Trade discounts given or allowed by manufacturers, distributors, or wholesalers to retailers or by manufacturers or distributors to wholesalers and payments made by manufacturers, distributors, or wholesalers directly to retailers or by manufacturers or distributors to wholesalers to reduce the sales price of the manufacturer's, distributor's, or wholesaler's product or to promote the sale or recognition of the manufacturer's, distributor's, or wholesaler's product. This subparagraph does not apply to coupons issued by manufacturers, distributors, or wholesalers to consumers.

c. For the purposes of this definition, the sales price from a rental or lease includes rent, royalties, and copyright and license fees.

"Sales tax" means the tax levied under subchapter II of this chapter.

"Seller" means any person making sales, leases, or rentals of personal property or services.

"Services" means all acts or services rendered, furnished, or performed, other than services used in processing of tangible personal property for use in retail sales or services, for an employer, as defined in the Code, section 422.4, subsection 3, for a valuable consideration by any person engaged in any business or occupation specifically enumerated in section 423.2 of the Code. The tax shall be due and collectible when the service is rendered, furnished, or performed for the ultimate user of the service.

"Services used in the processing of tangible personal property" includes the reconditioning or repairing of tangible personal property of the type normally sold in the regular course of the retailer's business and which is held for sale.

"Solvent" is a substance in which another substance can be dissolved, and which is primarily used for that purpose.

"Sorbent" is a solid material, often in a powder or granular form, which acts to retain another substance, usually on the sorbent's surface, thereby removing the other substance from the gas or liquid phase. The sorbent and the second material bond together at the molecular or atomic scale via physio-chemical

interactions. A substance is not a sorbent based on an ability to absorb heat or thermal energy.

"State" means any state of the United States and the District of Columbia.

"System" means the central electronic registration system maintained by Iowa and other states which are signatories to the agreement.

"Tangible personal property" means personal property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses. "Tangible personal property" includes electricity, water, gas, steam, and prewritten computer software.

"Tax" means the tax upon retail sales or use of tangible personal property or taxable services.

"Taxpayer" includes any person who is subject to a tax imposed by this chapter, whether acting on the person's own behalf or as a fiduciary.

"Trailer" shall mean every trailer, as is now or may be hereafter so defined by chapter 321, which is required to be registered or is subject only to the issuance of a certificate of title under chapter 321 of the Code.

"Use" means and includes the exercise by any person of any right or power over tangible personal property incident to the ownership of that property. A retailer's or building contrac-

tor's sale of manufactured housing for use in this state, whether in the form of tangible personal property or of realty, is a use of that property for the purposes of this chapter.

"Use tax" means the tax levied under subchapter III of this chapter for which the retailer collects and remits tax to the department.

"User" means the immediate recipient of the services who is entitled to exercise a right of power over the product of such services.

"Value of services" means the price to the user exclusive of any direct tax imposed by the federal government or by this chapter.

"Vehicles subject to registration" means any vehicle subject to registration pursuant to section 321.18 of the Code.

This Chapter is intended to implement Division XIV of Chapter 2 of the 2003 Iowa Acts of the First Extraordinary Session of the Iowa Legislature.

CHAPTER 219

SALES AND USE TAX ON CONSTRUCTION ACTIVITIES

701—219.1 (423) General information. Iowa Code subsection 423.2(1) imposes a tax upon the sales price from the sales of tangible personal property, consisting of goods, wares or merchandise sold at retail in this state to consumers and users. Also subject to tax are certain enumerated services. Those relating to the construction industry include carpentry; roof, shingle and glass repair; electrical repair and installation; excavating and grading; house and building moving; laboratory testing; landscaping; machinery operator services; machine repair of all kinds; oilers and lubricators; painting, papering, and interior decorating; pipe fitting and plumbing; wood preparations; termite, bug, roach, and pest eradicators; tin and sheet metal repair; welding; well drilling; and wrecking services. Under Iowa law, contractors are consumers or users of certain tangible personal property. Contractors may also be retailers of tangible personal property and taxable enumerated services. It should be noted that these services are exempt from taxation when performed on or in connection with new construction, reconstruction, alteration, expansion, or remodeling of a building or structure. The services of a general building contractor, architect or engineer are exempt from tax when performed on or in connection with new construction, reconstruc-

tion, alteration, expansion, or remodeling of a building or structure. For the purposes of this exemption, a structure is defined as that which is artificially built up or composed of parts joined together in some definite manner and which also has some obvious or apparent functional use or purpose. Nonexclusive examples of structures include: buildings; roads, whether paved or otherwise; dikes; drainage ditches; and ponds. See rule 219.12(423) relating to structures.

This chapter details the obligation of contractors, contractor-retailers, retailers, and repairpersons to pay or collect sales tax on the sales price from sales of building materials, supplies, equipment, and other tangible personal property and the obligation of these parties to collect tax or claim exemption for their performances of taxable services. How one is classified, whether as a contractor, contractor-retailer, retailer, or repairperson is the basis for determining many of those obligations. It can be very difficult for a person starting a business to determine if that business will be engaged in contracting, retailing, a combination of the two, or providing repair services. However, one status must be chosen. Any reasonable assessment of a new business's status will be honored by the department. A status, once chosen, should not be changed, unless it has become clear from an extended course of dealing that the business has become something other than what it was

established to be. For instance, if a business is founded to engage in contracting and purchases construction materials based on the fact that it is a contractor, but the founder must sell construction materials at retail if the business is to survive, and after two years' operation half the revenue is from construction contracts and half from retail sales, then the business has become a contractor–retailer and henceforth should purchase construction materials based on that status. Changing the status of a business from job to job to avoid the obligation to pay or collect tax is not a lawful activity.

Iowa Code section 423.5 imposes a tax that is assessed upon tangible personal property purchased for use in this state and on taxable services which are rendered, furnished or performed in Iowa or where the product or result of such service is used in Iowa. "Use" of tangible personal property in Iowa is defined to mean and include the exercise by any person of any right or power over tangible personal property incident to the ownership of that property.

701—219.2 (423) Contractors are consumers of building materials, supplies, and equipment by statute. Iowa Code subsection 423.2(1)"b" provides that sales of building materials, supplies and equipment to owners, contractors, subcontractors or builders for the erection of buildings or the alteration, repair or improvement of real property are retail sales in whatever quantity

sold. This means that a contractor, subcontractor, or builder cannot claim an exemption for resale when purchasing building materials or supplies even if the contractor, subcontractor, or builder later separately itemizes material and labor charges for construction contracts. Building materials and supplies would generally consist of items which are incorporated into real property, lose their identity as tangible personal property and cannot be removed without altering the realty, or which are consumed by the contractor during the performance of the construction contract. See subrules 219.3(1), 219.3(2) and 219.3(3). Building equipment would ordinarily consist of machinery and tools. See subrule 219.3(4). The fact that a contractor, subcontractor or builder holds an Iowa retail sales tax permit and has a tax number does not entitle that person to purchase building materials, supplies and equipment without paying sales tax to the vendor. See rule 219.3(423) and rule 219.4(423).

A contractor (general, special or subcontractor) when bidding on a contract should anticipate that sales or use taxes will increase the cost of materials by the tax unless the sponsor is a designated exempt entity; see old subrule 701-19.12(5). The necessary allowance should be made in figuring the bid inasmuch as the contractor will be held responsible for paying the tax on building supplies, materials and equipment. The tax should not

be identified as a separate item in the formal bid since the contractor cannot charge sales tax.

701—219.3 (423) Sales of building materials, supplies, and equipment to contractors, subcontractors, builders or owners. Suppliers or dealers who sell materials and supplies to contractors, subcontractors, builders or owners are required to collect Iowa sales tax from those persons based upon the sales price from such sales. One of the few exceptions to this is explained in old subrule 19.12(5) which deals with construction contracts with designated exempt entities. The fact that a contractor, subcontractor, or builder holds an Iowa retail sales tax permit and has a tax number does not entitle that person to purchase building materials, supplies and equipment without paying sales tax to the vendor. See rules 219.2(423) and 219.4(423). Materials purchased out of state for use in Iowa are subject to the Iowa use tax which is payable in the quarter the materials are delivered into the state.

219.3(1) Building materials. The term "building materials" as used in this rule means materials used in construction work, and is not limited to materials used in constructing a building with sides and covering. The term may also include any type of materials used for improvement of the premises or anything essential to the completion of a building or structure for the use in-

tended. State v. James A. Head & Company, Inc., 306 So. 2d 5 (Ala. 1974).

219.3(2) Building supplies. The term "building supplies" as used in this rule means anything that is furnished for, and used directly in the carrying on of the work of an owner, contractor, subcontractor or builder and which is used or consumed by said contractor. Such items do not have to enter into and become a physical part of the structure like materials, but they do become as much a part of the structure as the labor which is performed on it. United States Fidelity & Guaranty Co. v. Feenaughty Machinery Co., 85 P.2d 1085, 197 Wash. 569.

219.3(3) Typical items. While not intended to be inclusive, the following is a list of typical items regarded as building materials and supplies:

Asphalt	Lubricants	Roofing
Bricks	Lumber	Rope
Builders' hardware	Macadam	Sand
Caulking material	Millwork	Sheet metal
Cement	Modular and mobile homes	Steel
Central air conditioning	Mortar	Stone
Cleaning compounds	Oil	Stucco
Conduit	Paint	Tile
Doors	Paper	Wallboard
Ducts	Piping, valves, and pipe fittings	Wall coping
Electric wiring, connections, and switching devices	Plaster	Water conditioners
	Plates and rods used to anchor masonry foundations	Weather stripping
		Windows
		Window screens
		Wire netting and screen
		Wood preserver

Fencing materials Flooring* Glass Gravel Insulation Lath Lead Lighting fixtures Lime Linoleum*	Plumbing supplies Polyethylene covers Power poles, towers, and lines Putty Reinforcing mesh Rock salt	

*Floor coverings which are shaped to fit a particular room or area and which are attached to the supporting floor with cement, tacks or tack strips or by some other method making a permanent attachment are considered to be building materials. See old rule 701—16.48(422,423) for an exception concerning carpeting. Carpeting (whether attached to the floor or not) is not treated as a building material for the purposes of this chapter. Rugs, mats and linoleum types of floor coverings which are not attached but which are simply laid on finished floors are also not considered to be building materials.

219.3(4) Building equipment. The term "building equipment" as used in this rule means any vehicle, machine, tool, implement or other device used by a contractor in erecting structures for others, or reconstructing, altering, expanding or remodeling property of others which does not become a physical component part of the property upon which work is performed, and which is not necessarily consumed in the performance of such work.

"Building equipment" includes, but is not limited to, such items as:

Compressors Drill presses Electric generators Forms Hand tools Lathes	Replacement parts for equipment Scaffolds Tools Vehicles including grading, lifting and excavating vehicles

Construction equipment purchased by a contractor which is intended for use in the performance of an Iowa construction contract is subject to the Iowa sales or use tax. Equipment which is rented for use on or in connection with an Iowa construction contract would normally be rented subject to tax. See rule 701-219.21(423) for an explanation of the existing exemption in favor of rented machinery used by a contractor on a jobsite.

701—219.4 (423) Contractors, subcontractors or builders who are retailers. In some instances, contractors, subcontractors and builders are in a dual business which includes reselling to the general public on a recurring "over-the-counter" basis, the same type of building materials and supplies which are used by them in their own construction work. A person operating in such a manner is referred to in this rule as a contractor-retailer. Any person who is engaged in the performance of construction contracts and who also sells building materials or other items at retail is obligated to examine the person's business and de-

termine if it is that of a contractor or a contractor-retailer. A sale by a contractor-retailer of building materials, supplies and equipment which does not provide for installation of the merchandise sold is considered a retail sale and subject to sales tax. Conversely, a sale by a contractor-retailer of building supplies, materials and equipment which provides for installation of the merchandise is considered a construction contract and tax shall be paid by the contractor-retailer based upon the cost of materials at the time the materials are withdrawn from inventory for use in a construction contract performed in Iowa. When a contractor-retailer does repair work, the contractor-retailer is acting as a retailer and not a contractor and must collect tax on the sales price charged for materials used in the repair and on the sales price charged for any labor used in the repair which is a taxable service or on the entire charge if materials and labor are not separately invoiced. See old rule 701—18.31(422,423) and rule 219.13(423). The following is a list of the characteristics of the usual contractor-retailer:

1. A contractor-retailer is a business which makes frequent retail sales to the public or to other contractors and also engages in the performance of construction contracts (see rule 701—219.8(423)). In determining whether a business is a contractor-retailer or a retailer only, the department looks to the

totality of business activity and not only to one portion of the business's activity. Thus, the maintenance of a small retail outlet does not automatically transform a contractor-retailer into a retailer, and a large number of retail sales without a retail outlet can qualify a business as a contractor-retailer.

2. A business cannot claim the status of a contractor-retailer unless the business is in possession of a valid sales tax permit to report tax due from retail sales and from withdrawals of materials or supplies from inventory for use in construction contracts.

3. A contractor-retailer must purchase building materials, supplies, and equipment placed in its inventory for resale; the contractor-retailer should not pay sales or use tax to its suppliers for these items. Instead, the contractor-retailer should provide suppliers with valid resale exemption certificates. When a valid certificate is furnished, the vendor is relieved from the responsibility of collecting the tax if the purchaser has demonstrated that the purchaser is a contractor-retailer under the provisions of this rule. See old rule 701—15.3(422,423) and rule 219.19(423) for a detailed explanation of this matter.

4. A contractor-retailer purchasing construction material which will not be placed in its inventory must purchase that material subject to Iowa sales or use tax. For example, if a con-

tractor-retailer purchases wet concrete for use in a construction project, that purchase is taxable.

5. A contractor-retailer usually has a retail outlet, but if not, frequent sales to individuals or other contractors qualify a business as a contractor-retailer.

6. Contractor-retailers do not pay tax on materials withdrawn from inventory for use in construction projects performed outside Iowa. See Iowa Code subsection 423.2(1)"b".

The business records of a contractor-retailer must clearly reflect the use made of items purchased and the records must be in such form that the director can readily determine that the proper sales and use tax liability is being reported and paid.

The following examples are offered to illustrate the responsibility for paying and remitting sales tax under this rule:

Example 1. ABC Company operates a retail outlet that sells lumber and other building materials and supplies. ABC Company is also a contractor which builds residential and commercial structures. ABC Company would be considered a contractor-retailer and would, therefore, purchase all inventory items for resale. Those items which are used in the performance of a construction contract would be subject to tax in the period that they are withdrawn from inventory. The tax would be computed on the cost of the items withdrawn from inventory. Those items which are sold over-the-counter in the retail outlets would be

subject to tax at the time of sale. The tax would be computed on the over-the-counter sales price.

Example 2. EFG Company is a mechanical contractor and has no retail outlets. EFG Company rarely sells any of its inventory to other persons or to other contractors. EFG Company would not be considered a contractor-retailer under this rule. However, EFG Company would be considered a contractor and must pay tax to its vendor at the time it purchases any building materials, supplies and equipment. However, on those rare occasions, when an inventory item is sold to another person or to another contractor, tax must be collected at the time of sale, therefore, EFG Company should have a sales tax permit. An adjustment can be made to the sales tax report by taking a credit for tax previously paid on the item sold.

Example 3. Home Town Construction Company is owned and operated by two individuals in a rural Iowa farming community. They do not have a retail outlet but they frequently make sales of building materials which are in their inventory to local residents. Home Town Construction Company would be a contractor-retailer and could purchase all inventory items for resale. Those items which are used in the performance of a construction contract would be subject to tax in the period they are withdrawn from inventory. The tax would be computed on the cost of the items withdrawn from inventory. Those items which are sold

to residents would be subject to the tax at the time of sale. The tax would be computed on the sales price of the items.

Example 4. Down Home Construction Company is operated by two individuals in a rural Iowa farming community. They do not have a retail outlet and rarely make sales of building materials from their inventory to local residents. Down Home Construction Company would not be considered a contractor-retailer under this rule. Rather, Down Home Construction Company would be considered a contractor and must pay tax to its vendor at the time it purchases any building materials, supplies and equipment. When sales are made to local residents, tax must be collected at the time of sale; therefore, Down Home Construction Company should have a sales tax permit. However, Down Home Construction Company can adjust its sales tax report by taking a credit for tax paid to its vendor on the item sold to the local resident.

Example 5. Intown Home Construction Company places modular homes on slabs or basement foundations, makes electrical, plumbing and other connections, and otherwise prepares the modular homes for sale as real estate. Intown also has a sales tax permit, maintains an inventory of modular homes for sale, and sells homes from the inventory as tangible personal property to owners who later convert the property to real estate. Intown is a contractor-retailer and is obligated to pay or collect sales tax, respectively, at the time a modular home is withdrawn from in-

ventory for use as material in a construction contract or at the time a modular home is withdrawn from inventory for sale to an owner. See rule 701—231.11(423) for an explanation of the basis on which tax is computed.

Example 6. Smith's Plumbing has a retail store in Davenport, but it also installs plumbing fixtures and lines in new construction and remodeling projects. Plumbing supplies that are taken from an inventory in Davenport for a new home being built in Rock Island, Illinois, are withdrawn exempt from Iowa sales tax because the construction contract is performed outside Iowa. However, those supplies may be subject to Illinois sales or use tax.

701—219.5 (423) Building materials, supplies, and equipment used in the performance of construction contracts within and outside Iowa.

219.5(1) The use of building materials, supplies, or equipment in the performance of construction contracts by the manufacturer outside Iowa is not a sale of tangible personal property and, therefore, is not a taxable event. The use of tangible personal property as building materials, supplies, or equipment by the manufacturer in the performance of construction contracts in Iowa is a sale at retail and a taxable event. The tax is computed on the manufacturer's fabricated cost or cost of produc-

tion. See rule 701—219.6(423) for a characterization of the term manufacturer's "fabricated cost."

219.5(2) A contractor-retailer's withdrawal of materials from inventory for use in construction contracts outside this state is not a taxable event.

219.5(3) A contractor is a consumer by statute. A contractor's purchase of materials for use in a construction contract is subject to tax whether the materials are purchased for use in construction contracts performed in Iowa or outside this state.

219.5(4) A manufacturer's purchase of tangible personal property consumed as building material in the manufacturer's or the manufacturer's subcontractor's performance of construction contracts within Iowa is taxable. The tax is computed on the fabricated cost or cost of production of the materials. See rule 701—219.6(423) for a characterization of the term "fabricated cost." The purchase of tangible personal property consumed by a manufacturer as building material in the manufacturer's or the manufacturer's subcontractor's performance of a construction contract outside Iowa is not subject to tax.

219.5(5) See old rule 701—32.8(423) for an exemption from use tax for building materials, supplies, or equipment purchased outside Iowa, brought into this state, and subsequently used in the performance of a construction contract outside this state.

701—219.6 (423) Tangible personal property used or consumed by the manufacturer thereof. When a person who is primarily engaged in the manufacture of building materials, supplies, or equipment for sale and not for the person's own use or consumption, considering the totality of the business, from time to time uses or consumes the building materials, supplies, or equipment for construction purposes, the person is deemed to be making retail sales to one's self and subject to tax on the basis of the fabricated cost of the items so used or consumed for construction purposes. If building materials, supplies, or equipment are used by a manufacturer in the performance of a construction contract, a "sale" occurs only if the materials, supplies, or equipment are used in the performance of a construction contract in Iowa. For purposes of this rule, the term "fabricated cost" means and includes the cost of all materials as well as the cost of labor, power, transportation to the plant, and other plant expenses but not installation on the job site. Associated General Contractors of Iowa v. State Tax Commission, 255 Iowa 673, 123 N.W.2d 922 (1963). Also see rule 701—219.4(423) relating to contractors and rule 701—219.5(423) relating to materials, supplies, and equipment used in construction contracts within and outside of Iowa.

701—219.7 (423) Prefabricated structures.

219.7(1) Basic concepts and general rules. A "prefabricated structure" is any structure assembled in a factory and capable of transport to the location where it will be used in the performance of a construction contract by placement on a foundation either by the buyer or a designated contractor. The term "prefabricated structure" includes a "modular home" as defined in rule 701—231.11(423), a mobile home whether or not sold subject to the issuance of a certificate of title, "manufactured housing" as defined in old rule 701—33.10(423), sectionalized housing, precut housing packages, and panelized construction. With a few major exceptions (see subrule 219.7(2) regarding the "60 percent rule" and old rule 701—33.10(423) regarding the taxation of manufactured housing while it is real property), the sales and use tax treatment of prefabricated structures generally follows the treatment of construction materials: Tax is due when those structures are sold to or used by owners, contractors, subcontractors, or builders. Sales of prefabricated structures which have not been erected on a foundation are considered sales of tangible personal property and thus are taxable at the time of retail sale. The usual basis for computing sales or use tax is the purchase price charged to a consumer or user by the seller of a prefabricated structure. Custom Built Homes Co. v. Kansas State Commission of Revenue and Taxation, 184 Kan. 31, 334 P.2d 808 (1959). Sales or use tax is due on the full pur-

chase price when a prefabricated structure is delivered under a contract for sale or sold for use in Iowa. Dodgen Industries Inc. v. Iowa State Tax Commission, 160 N.W.2d 289 (Iowa 1968).

219.7(2) Exceptions to the general rules. There are a number of exceptions to the general rules stated above in 219.7(1). Those exceptions are applicable to modular and mobile homes and manufactured housing. They are explained as follows.

a. Modular homes. Only 60 percent of the sales price from the sale of a modular home is subject to Iowa tax. See rule 701—231.11(423). This rule is applicable only to a "modular home" as that phrase is defined in rule 701—231.11(423) and not to other types of prefabricated structures which do not meet the definition of the term such as sectionalized housing or panelized construction. Also, the rule is not applicable to the sale of materials used in the assembly of a modular home, only to the sale of the finished product.

b. Mobile homes and manufactured housing. Iowa use tax and not Iowa sales tax is imposed on mobile homes or manufactured housing sold subject to the issuance of a certificate of title, and, similar to 219.7(2)"a" above, use tax is imposed only upon 60 percent of the purchase price of these mobile homes or manufactured housing. See old rule 701—32.3(423). All mobile homes sold in Iowa or sold outside Iowa for use in this state are sold

subject to Iowa use tax, whether sold for placement within or outside a mobile home park; see Iowa Code chapters 423 and 435.

219.7(3) Tax consequences of sales of modular homes by various parties, some operating in a dual capacity.

a. A retailer (dealer) who is not additionally a contractor or manufacturer of modular homes purchases those homes tax-free from a wholesaler or manufacturer for subsequent resale to contractors or owners. Tax must be collected when the dealer sells the modular home to an owner or contractor.

b. A contractor who is not a dealer must pay tax when purchasing a modular home for use in a construction contract or for some other purpose. A contractor's sale of a modular home to an owner or another contractor is treated as explained in Examples 2 and 4 of rule 219.4(423).

c. A dealer who is also a contractor will purchase homes tax-free for inclusion in its inventory. Tax is imposed when the dealer withdraws a home from inventory for sale or use in the performance of a construction contract as explained in rule 219.4(423).

d. A manufacturer that acts as its own dealer and sells its own modular homes at retail to contractors or owners will collect tax on the sales price from its sales of those modular homes to its customers. This situation is in contrast to that described in subrule 219.7(4) in which a manufacturer uses its

own modular homes in the performance of construction contracts and the tax due is computed on a sum other than the sales price from the sale of a home.

What is stated in this subrule concerning sales of modular homes is generally applicable to the use tax on mobile homes and manufactured housing. However, one distinct difference is that mobile homes and manufactured housing are seldom, if ever, purchased by a dealer for any subsequent use in the performance of construction contracts. A dealer will often purchase a mobile home or manufactured housing for subsequent resale to a customer as tangible personal property and then will place or install the mobile home or manufactured housing on a site prepared by the customer. This is not the performance of a construction contract (see rule 219.8(423)), and the dealer is a retailer who installs tangible personal property and is not a construction contractor.

219.7(4) Manufacturers who perform construction contracts. When companies whose principal business is the manufacture of prefabricated structures use those structures in the performance of construction contracts, this use is treated as a retail sale of the structures on the manufacturer's part. See rule 701—219.6(423) for a detailed description of the sales tax treatment of this sort of transaction. The 60 percent rule (see 219.7(2)

above) is not applicable when calculating the amount of tax owed by a manufacturer.

219.7(5) Examples. The following examples are intended to illustrate who must collect or remit sales or use tax when a manufacturer sells a modular home to a contractor or owner, or acts as a contractor in erecting the home. The incidence of tax depends on several factors, such as the nature of the manufacturer's business, the point of delivery, the contractual agreement for erection and whether or not a sale for resale has occurred.

Example 1. The manufacturer is located outside Iowa. The manufacturer contracts with an Iowa customer to build a home in its factory. The manufacturer also contracts to completely erect the home, install the furnace, and do electrical and other necessary work to make the home ready for occupancy. The main source of the manufacturer's income relates to on-site construction. The manufacturer has paid a sales tax equal to Iowa tax in its state of residency. The manufacturer would be considered to be performing a construction contract in Iowa and would owe use tax in Iowa; however, a sales tax credit would be allowed for tax paid to another state.

Example 2. The manufacturer is located outside Iowa. An Iowa unrelated builder/dealer contracts with the customer for the home and then contracts with the manufacturer for construction,

delivery, and installation on the customer's foundation. The manufacturer delivers the home into Iowa on its own truck. The customer, by contractual agreement, is obligated to pay for the home on delivery of the property so the sale takes place in Iowa. In this situation, the manufacturer is involved in the sale of tangible personal property rather than the sale of real estate and must collect Iowa sales tax on 60 percent of the sales price to the Iowa builder/dealer.

Example 3. The manufacturer is located outside Iowa. The manufacturer contracts to sell a home to a customer (owner) in Iowa. The manufacturer hires a common carrier to deliver the home to the Iowa customer. The manufacturer has no activity in Iowa that would create a "nexus" requiring the manufacturer to collect Iowa tax. In this situation the Iowa customer is required to remit use tax on 60 percent of the purchase price of the home.

Example 4. The manufacturer may be located in Iowa or outside Iowa. The manufacturer sells a home to a dealer in Iowa who will resell the home to the final customer. The manufacturer may deliver the home or delivery may be made by a common carrier. The manufacturer has no contractual obligation for erection. In this situation the manufacturer is making a sale for resale and is not required to collect tax. The manufacturer must have a valid resale certificate on file from the dealer.

The dealer, if in Iowa, would be required to collect tax when the home is sold.

Example 5. The manufacturer is located in Iowa. The manufacturer contracts to furnish, deliver, and perform the setup on a home in a state other than Iowa. The manufacturer withdraws the home from inventory and transports the home to the other state for setup. In this example, the Iowa manufacturer does not owe any Iowa tax because Iowa Code subsection 423.2(1)"b" exempts building materials and supplies that manufacturers withdraw from inventory for construction outside Iowa.

Example 6. The manufacturer is located in Iowa. The manufacturer sells a home to an Iowa customer and agrees, under separate contract, to transport the home to the job site and perform the setup. The manufacturer should collect tax on 60 percent of the sales price of the home. The customer also wanted a garage. The manufacturer agreed to sell the lumber, nails, and shingles to the customer who would build the garage. This sale would be considered a sale at retail and the manufacturer should collect tax on the entire sales price of these materials. The same would be true if the manufacturer sold appliances separate from the sale of the home; sales tax would be due on the entire sales price of the appliances.

Example 7. The manufacturer may be located inside or outside Iowa. The manufacturer sells a modular home to a dealer who is

a general contractor. The dealer subcontracts the work of placing the home on a foundation to various third parties, who transport the home to its site, excavate for and pour the concrete slab, and perform plumbing, electrical hookup, and all other services which are part of the construction contract for placing the modular home at its location. Since the sale of the modular home is to a dealer who is a contractor, the manufacturer will collect and the dealer will pay tax on 60 percent of the modular home's invoice price.

701—219.8(423) Types of construction contracts. The term "construction contract" is defined as an agreement under the terms of which an individual, corporation, partnership or other entity agrees to furnish the necessary building or structural materials, supplies, equipment or fixtures and to erect the same on the project site for a second party known as a sponsor. Nonexclusive examples of the types of construction contracts would include: lump-sum contracts; cost plus contracts; time and material contracts; unit price contracts; guaranteed maximum or upset price contracts; construction management contracts; design built contracts; and turnkey contracts.

The following is a nonexclusive list of activities and items which could fall within the meaning of a construction contract or are generally associated with new construction, reconstruction, alteration, or expansion of a building or structure. The

list is provided merely for the purpose of illustration. It should not be used to distinguish machinery and equipment from real property or structures since such a determination is factual. See rules 219.11(423) and 219.12(423) for details.

Ash removal equipment (installed as distinguished from portable units).

Automatic sprinkler systems (fire protection).

Awnings and venetian blinds which become attached to real property.

Boilers (installed as distinguished from portable units).

Brick work.

Builder's hardware.

Burglar alarm and fire alarm fixtures.

Caulking materials work.

Cement work.

Central air conditioner installation.

Coal handling equipment (installed as distinguished from portable units).

Concrete work.

Counters, lockers (installed as distinguished from portable units), and prefabricated cabinets.

Drapery installation.

Electric conduit work and items relating thereto.

Electric distribution lines.

Electric transmission lines.

Floor covering which is permanently installed. See old rule 701—16.48(422,423) for an exception to this regarding carpeting.

Flooring work.

Furnaces, heating boilers and heating units.

Glass and glazing work.

Gravel work (excluding landscaping).

Installation of modular homes on foundations.

Lathing work.

Lead work.

Lighting fixtures.

Lime work.

Lumber and carpenter works.

Macadam work.

Millwork installation.

Mortar work.

Oil work.

Paint booths and spray booths (installed as distinguished from portable units).

Painting work.

Paneling work.

Papering work.

Passenger and freight elevators.

Piping valves and pipe fitting work.

Plastering work.

Plumbing work.

Putty work.

Refrigeration units (central plants installation as distinguished from portable units).

Reinforcing mesh work.

Road construction (concrete, bituminous, gravel, etc.).

Roofing work.

Sheet metal work.

Sign installation (other than portable sign installation).

Steel work.

Stone work.

Stucco work.

Tile work, ceiling, floor and walls.

Underground gas mains.

Underground sewage disposal.

Underground water mains.

Vault doors and equipment.

Wallboard work.

Wall coping work.

Wallpaper work.

Water heater and softener installation.

Weather stripping work.

Wire net screen work.

Wood preserving work.

701—219.9 (423) Machinery and equipment sales contracts with installation. Machinery and equipment sales contracts with installation are transactions which are considered a sale of tangible personal property to a final consumer. Therefore, the individual who sells the equipment with installation must purchase the machinery and equipment tax-free as a purchase for resale. (This rule should not be confused with subrule 219.3(3) regarding building equipment.) The contract should itemize the sales tax separately. If a contractor wishes to avoid an itemization of sales and use tax on machinery and equipment which remains tangible personal property, the contractor can do so by figuring the tax as a general overhead expense and including a statement in the contract and related invoices that "sales tax is included in the contract price."

If the sales transaction is one completed out of state and shipped in interstate commerce to a consumer or a user in Iowa, and not otherwise exempt from tax, the final purchaser is required to pay Iowa use tax on the purchase price of the machinery and equipment.

In a "mixed contract" (a construction contract mingled with a machinery and equipment sales contract), the elements of the contract should be separated for sales tax purposes. See rule 219.10(422,423).

Certain services which are enumerated in Iowa Code section 423.2 are subject to tax when performed under a contract for the installation of machinery and equipment which is not done in connection with new construction, reconstruction, alteration, expansion or remodeling of a building or structure. See old rule 701—15.14(422,423) relating to installation charges. Examples of these services are: electrical installation; plumbing; welding; and pipe fitting. Other labor charges for job site installation which do not involve a taxable enumerated service are not subject to tax if the charges are separately contracted or, if no written contract exists, are separately itemized on the billing from the seller to the purchaser.

Example: Company B contracts with Company A to furnish and install a portable conveyor unit in Company A's new building. Company B can purchase the portable conveyor unit tax-free because the portable conveyor unit maintains its identity as tangible personal property after installation and does not become a component part of the real property. Company B would then charge tax to Company A on the sale of the portable conveyor unit. Installation charges would be part of the total sales price subject to tax unless they are separately contracted, or if no written contract exists, separately itemized on the billing from Company B to Company A.

701—219.10 (423) Construction contracts with equipment sales (mixed contracts). Construction contracts with equipment sales, commonly known as mixed contracts, place a dual burden on the contractor as a contractor is a consumer of construction materials and also a retailer of the machinery and equipment. As a consumer by statute of construction building materials, supplies, and building equipment, a contractor is required to pay sales tax to the supplier at the time of purchase or remit use tax to the department if purchasing building materials, supplies, and building equipment from an out-of-state supplier. See 701—Old Chapter 30 of the rules regarding use taxes. Machinery and equipment must be purchased for resale by the contractor if it does not become real property. This means that the contractor does not pay tax to a supplier at the time of purchase of machinery and equipment, but instead, the contractor is responsible for collecting sales tax on the sales price from a sponsor and remitting it to the department.

Example: Company A contracts with Company B to have Company B build a new building and install all of the production machinery and equipment for the new building. Company B must pay tax on its purchases of building materials and supplies which lose their identity as tangible personal property and become a component part of the real property. Company B also purchases some refrigeration units for the new building which maintain their

identity as tangible personal property. These units must be purchased tax-free by Company B because they will be resold. Company B would then charge Company A the tax on the units which retain their identity as tangible personal property. The installation charges for the units which remain as tangible personal property would be part of the total sales price subject to tax unless they are separately contracted or, if no written contract exists, are separately itemized on the billing from Company B to Company A.

When a mixed construction contract is let for a lump-sum amount, the machinery and equipment furnished and installed shall be considered, for the purposes of this rule only, as being sold by the contractor for an amount equal to the cost of the machinery and equipment.

Persons required to collect sales tax in Iowa under machinery and equipment contracts or a mixed contract are required to have a sales tax or a retailer's use tax permit.

701—219.11 (423) Distinguishing machinery and equipment from real property. A construction contract may include many activities, but it does not include a contract for the sale and installation of machinery or equipment. Machinery and equipment includes property that is tangible personal property when it is purchased and remains tangible personal property after installation. Generally, tangible personal property can be moved with-

out causing damage or injury to itself or to the structure, it does not bear the weight of the structure, and it does not in any other manner constitute an integral part of a structure. Manufactured machinery and equipment which does not become permanently annexed to the realty remains tangible personal property after installation.

219.11(1) The following is a list of property which, under normal conditions, remains tangible personal property after installation. The list is nonexclusive and is offered for illustrative purposes only:

a. Furniture, radio and television sets and antennas, washers and dryers, portable lamps, home freezers, portable appliances and window air conditioning units.

b. Portable items such as casework, tables, counters, cabinets, lockers, athletic and gymnasium equipment and other related easily movable property attached to the structure.

c. Machinery, equipment, tools, appliances, and materials used exclusively as such by manufacturers, industrial processors and others performing a processing function with the items.

d. Office, bank and savings and loan association furniture and equipment, including office machines.

e. Radio, television and cable television station equipment, but not broadcasting towers.

f. Certain equipment used by restaurants and in institutional kitchens; for instance, dishwashers, stainless steel wall cabinets, stainless steel natural gas stoves, stainless steel natural gas convection ovens, and combination ovens and steamers with stands. This paragraph is not applicable to similar items used in residential kitchens. See Petition of Taylor Industries Inc. (Dkt No. 94-30-6-0367, 3-14-95).

219.11(2) The following is a list of property which, under normal conditions, becomes a part of realty. The list is nonexclusive and is offered for illustrative purposes only:

a. Boilers and furnaces.

b. Built-in household items such as kitchen cabinets, dishwashers, sinks (including faucets), fans, garbage disposals and incinerators.

c. Buildings, and structural and other improvements to buildings, including awnings, canopies, foundations for machinery, floors (including computer room floors), walls, general wiring and lighting facilities, roofs, stairways, stair lifts, sprinkler systems, storm doors and windows, door controls, air curtains, loading platforms, central air conditioning units, building elevators, sanitation and plumbing systems, decks, and heating, cooling and ventilation systems.

d. Fixed (year-round) wharves and docks.

e. Improvements to land including patios, retaining walls, roads, walks, bridges, fencing, railway switch tracks, ponds, dams, ditches, wells, underground irrigation systems, drainage, storm and sanitary sewers, and water supply lines for drinking water, sanitary purposes and fire protection. See old rule 701—18.35(422,423) relating to drainage tile.

f. Mobile and modular homes installed on foundations.

g. Planted nursery stock.

h. Residential water heaters, water softeners, intercoms, garage door opening equipment, pneumatic tube systems and music and sound equipment (except portable equipment).

i. Safe deposit boxes, drive-up and walk-up windows, night depository equipment, remote TV auto teller systems, vault doors, and camera security equipment (except portable equipment).

j. Seating in auditoriums and theaters and theater stage lights (except portable seating and lighting).

k. Silos and grain storage bins.

l. Storage tanks constructed on the site.

m. Swimming pools (wholly or partially underground (except portable pools)).

n. Truck platform scale foundations.

o. Walk-in cold storage units becoming a component part of a building.

701—219.12 (423) Tangible personal property which becomes structures. Items which are manufactured as tangible personal property can, by their nature, become structures. However, the determination is factual and must be made on an item-by-item basis. The following is a listing of criteria which courts have used in making such a determination:

1. The degree of architectural and engineering skills necessary to design and construct the structure.

2. The overall scope of the business and the contractual obligations of the person designing and building the structure.

3. The amount and variety of materials needed to complete the structure, including the identity of materials prior to assembly and the complexity of assembly.

4. The size and weight of the structure.

5. The permanency or degree of annexation of the structure to other real property which would affect its mobility.

6. The cost of building, moving or dismantling the structure.

Example: A farm silo, which is a prefabricated glass-lined structure, is intended to be permanently installed. The prefabricated glass-lined structure is 70 feet high, 20 feet around, weighs 30 tons, and it is affixed to a concrete foundation weighing 60 tons which is set in the ground specifically for the purpose of supporting the silo. The assembly kit includes 105 steel sheets and 7000 bolts. The silo can be removed without

material injury to the realty or to the unit itself at a cost of $7,000. In view of its massive size, the firm and permanent manner in which it is erected on a most substantial foundation, its purpose and function, the expense and size of the task and the difficulty of removing it, it is considered a structure and not machinery or equipment. Wisconsin Department of Revenue v. A. O. Smith Harve-store, 240 N.W.2d 357 (Wisc. 1976).

The above criteria are intended only to be summation of factors which the department will consider in determining whether or not a project involves construction. The following cases are used as reference material: Wisconsin Department of Revenue v. A. O. Smith Harvestore Products, Inc., 240 N.W.2d 357 (Wisc. 1976); Prairie Tank or Construction Co. v. Department of Revenue, 364 N.W.2d 963 (Ill. 1977); Levine v. State Board of Equalization, 299 P. 2d 738 (Calif. 1956); State of Alabama v. Air Conditioning Engineers, Inc., 174 So 2d 315 (Ala. 1965); A. S. Schulman Electric Company v. State Board of Equalization, 122 Cal. Rptr 278 (Calif. 1975); Western Pipeline Constructors, Inc. v. J. M. Dickinson, 310 S.W.2d 455 (Tenn.); and City of Pella Municipal Light Plant, Order of the Director of Revenue, June 16, 1975.

701—219.13(423) [423.3(37)*] Tax on enumerated services. The tax on the services enumerated in Iowa Code section 423.2 is basically a tax on labor. When such services are performed on or

connected with new construction, reconstruction, alteration, expansion or remodeling of real property or structures, they are exempt from tax. Neither the repair nor the rental of machinery on the job site is exempt from tax under this rule. See rule 701-219.21(423) for an explanation of the exemption in favor of rented machinery used by a contractor on a jobsite.

The distinction between a repair (see subrule 219.13(1)) and new construction, reconstruction, alteration, expansion and remodeling activities (see subrule 219.13(2)) can, oftentimes, be difficult to grasp. Therefore, the intent of the parties and the scope of the project may become the factors which determine whether certain enumerated services are taxable. An area of particular difficulty is the distinction between repair and remodeling. "Remodeling" a building or other structure means much more than making repairs or minor changes to it. Remodeling is a reforming or reshaping of a structure or some substantial portion of it to the extent that the remodeled structure or portion of the structure is in large part the equivalent of a new structure or part thereof. See Board of Commissioners of Guadalupe County v. State, 43 N.M. 409, 94 P.2d 515 (1939) and City of Mayville v. Rosing, 19 N.D. 98, 123 N.W. 393 (1909).

219.13(1) Repair is synonymous with mend, restore, maintain, replace and service. A repair contemplates an existing structure or tangible personal property which has become imperfect

and constitutes the restoration to a good and sound condition. A repair is not a capital improvement; that is, it does not materially add to the value or substantially prolong the useful life of the property.

Iowa Code section 423.1(42) defines a person engaged in the business of performing taxable services as a retailer. Since retailers may purchase building materials, supplies and equipment for resale, persons making taxable repairs (repairpersons and servicepersons) are not considered to be contractors and are not subject to the provisions of Iowa Code subsection 423.2(1)"b". In addition, such persons are not considered to be owners, subcontractors or builders. So repairpersons and servicepersons will normally purchase building materials and supplies free of tax for subsequent resale to their customers; contractor-retailers will also do this. However, contractors, subcontractors or builders who may make repairs are subject to Iowa Code subsection 423.2(1)"b" and must pay tax at the time building materials, supplies and equipment are purchased from their vendors even though they hold a valid sales tax permit. See rules 219.2(423) and 219.3(423). In determining who is a contractor and who is a retailer of repair services, the department looks to the "total business" of the entity in question and not to any one portion of it. Thus, the fact that a business whose overall activity is contracting has a division engaged in tax-

able repair services does not transform that business into a retailer providing services rather than a contractor. When contractors do repair work, they may separately itemize labor and materials charges and collect sales tax on all charges. A contractor's markup on a materials charge is part of any taxable sale. A contractor can take a credit for any tax paid on the purchase of materials that are sold as part of a service transaction.

When other persons making repairs sell tangible personal property at retail in connection with any taxable service enumerated in Iowa Code subsection 423.2, then those persons shall collect and remit tax on the sales price. The person making repairs shall purchase tangible personal property for resale when the property is used in the repair job and is resold to a customer. See old rule 701—18.31(422,423) for an explanation of when persons performing services sell the property they use in performing those services to their customers. Nonexclusive examples of repair situations follow:

1. Repair of broken or defective glass.

2. Replacement of broken, defective or rotten windows.

3. Replacing individual or damaged roof shingles.

4. Replacing or repairing a segment of worn-out or broken kitchen cabinets.

5. Repair or replacement of broken or damaged garage doors or garage door openers.

6. Replacing or repairing a part of a broken or worn tub, shower, or faucets.

7. Replacing or repairing a broken water heater, furnace or central air conditioning compressor.

8. Restoration of original wiring in a house or building.

219.13(2) The following are examples of new construction, reconstruction, alteration, expansion and remodeling activities:

a. The building of a garage or adding a garage to an existing building would be considered new construction.

b. Adding a redwood deck to an existing structure would be considered new construction.

c. Replacing a complete roof on an existing structure would be considered reconstruction or alteration.

d. Adding a new room to an existing building would be considered new construction.

e. Adding a new room by building interior walls would be considered alteration.

f. Replacing kitchen cabinets with some modification would be considered an improvement.

g. Paneling existing walls would be considered an improvement.

h. Laying a new floor over an existing floor would be considered an improvement.

i. Rebuilding a structure damaged by flood, fire or other uncontrollable disaster or casualty would be considered reconstruction.

j. Building a new wing to an existing building would be considered an expansion.

k. Rearranging the interior physical structure of a building would be considered remodeling.

l. Installing manufactured housing or a modular or mobile home on a foundation. However, see old rule 701—33.10(423) for a description of the special treatment of taxable installation charges when the taxable sale of manufactured housing as real estate occurs.

m. Replacing an entire water heater, water softener, furnace or central air conditioning unit.

n. Sign installation and well-drilling services are generally performed in connection with new construction.

In all the examples, the contractor is responsible for paying tax to any supplier on materials. However, there would be no tax on any enumerated services.

219.13(3) The term "on or connected with" is broad and should be used to convey generally accepted meaning. Therefore, in a specific situation, the facts relating thereto are controlling in determining whether the exemption is applicable. "On or connected with" does not connote that those things connected have

to be primary or subsidiary to the construction, reconstruction, alteration, expansion or remodeling of the real property. An incidental relationship can qualify the activity for exemption if the relationship forms an intimate connection with the construction activity. For example, the service of excavating and grading relating to the clearing of land to begin construction of a building would qualify for the exemption; however, excavating and grading land without motive toward construction would not qualify for exemption even though at some later date plans to construct a building were created and a structure was actually erected.

The presence of a time relationship can also be a factor in determining the applicability of exemption. For example, tax would not apply to separate labor charges relating to the installation of production machinery and equipment in a building while remodeling of the real property was in progress. (Tax could apply to the sales price of the production machinery and equipment; see old rule 701—18.58(422,423). However, if a year after all construction activity has ended, the owner decides to install a piece of production machinery in the building, any taxable enumerated services relating thereto would be subject to tax. Further, if following construction, the land is graded for the purpose of seeding a new lawn, the exemption would be applicable. However, if the lawn does not grow and the land is re-

graded the following year, the exemption would not be applicable. See also 701—old subrule 18.58(8) for the exemption regarding the installation of new industrial machinery and equipment.

Therefore, the motive behind the activity and the course of events that could reasonably be expected to occur would be a further consideration in determining if the exemption is applicable.

A physical relationship is also a factor that should be evaluated. If a building is constructed to house machinery, any enumerated services relating to the installation of that machinery would be exempt from tax. For example, piping joining two pieces of equipment housed in separate buildings would qualify for exemption if the equipment in either building was installed while such new construction, reconstruction, alteration, expansion or remodeling to the structure was also taking place to house the equipment.

On the other hand, an incidental relationship, a time relationship and close physical proximity may not be enough to support the conclusion that a taxable service is performed in connection with new construction or reconstruction. For example, a homeowner hires a general contractor to add a new room to an existing home (which is new construction; see 219.13(2)"d"). The existing home is in need of a number of the repairs described in

219.13(1); for example, it is in need of rewiring and replacement of a broken window. The general contractor rewires the home and repairs the window in addition to building the new room. The taxable services which the general contractor performs while rewiring the home and repairing the window are not performed in connection with the construction of the new room simply because those services happen to be performed at the same time and on the same home as the new construction. If the addition of the new room were the cause of the need for the taxable service (e.g., the window was broken during construction of the new room) and not just a convenient occasion for performance of the service, that performance would be exempt from tax.

The department would like to emphasize that facts and motives are important in the determination of the taxability of services relating to construction activities. However, it should also be noted that taxes on enumerated services are applicable to repair or installation work that is not a construction activity. Please refer to subrule 219.13(1) relating to persons who make repairs or perform enumerated services for more information.

219.13(4) Excavating includes the digging, hollowing out, scooping out, or making a hole in the earth. It also includes removal of materials or substance found beneath the surface. Grading includes a change in the earth's structure by scraping and filling to a common level or a fixed line known as a grade.

The enumerated services excavating and grading are not subject to tax if performed on or connected with new construction. Removal of overburden which is directly related to road building, building of dikes, building of farm ponds, and creating drainage ditches would not be taxable as such activities would be considered on or connected with the creation of a structure. See Maasdam v. Kirkpatrick, 214 Iowa 1388 (1932). However the mere removal of overburden, without more, would be taxable as the enumerated service of excavating or grading under Iowa Code subsection 423.2(6).

219.13(5) Services associated with new construction or reconstruction, for example, which are not taxable include, but are not limited to, brick laying, concrete finishing, tiling, siding installation, laying of linoleum and other flooring and carpet installation. No tax can be collected on the performance of these services even when they are furnished in connection with the performance of repairs.

701—219.14(423) Transportation cost. Transportation charges and delivery charges are not subject to the Iowa sales and use tax when they are separately contracted or, if no written contract exists, are separately itemized on the billing from the seller to the purchaser. See old rule 701—15.13(422,423).

701—219.15(423) Start-up charges. Start-up charges are not subject to the Iowa sales and use tax when they are separately con-

tracted or, if no written contract exists, are separately itemized on the billing from the seller to the purchaser.

701—219.16(423) Liability of subcontractors. A subcontractor who is providing materials and labor on the actual construction of the building or structure has the same status and tax responsibilities as a general contractor under the Iowa statutes. However, where an individual or firm is hired to provide machinery and equipment to a general contractor or another subcontractor, the individual or firm is considered a material supplier rather than a subcontractor. This is true, even though the machinery and equipment are supplied with installation. Items of machinery and equipment sold by material suppliers to contractors shall be sold for resale and the contractor must provide the material supplier with a valid resale certificate.

701—219.17(423) Liability of sponsors. The sponsor cannot be held responsible for a tax liability incurred on building materials, supplies and equipment by a general contractor or subcontractor in the completion of a construction contract. Likewise, a general contractor cannot be held responsible for the tax liability incurred on building materials, supplies and equipment by a subcontractor in the completion of a construction contract. The tax responsibility regarding machinery and equipment contracts depends on where the sale was consummated. If the sale was consummated in Iowa, the seller is responsible for the col-

lection and remittance of tax unless a valid exemption certificate is given by the purchaser. If the sale was consummated outside Iowa and the seller does not remit use tax to the department, then a use tax would be due from the Iowa user.

701—219.18(423) Withholding. A sponsor of a contract with a nonregistered out-of-state (nonresident) contractor may be asked to withhold the final payment of the contract as a guarantee that sales and use taxes will be paid. The withholding requirement may also apply to registered out-of-state contractors at the discretion of the department. The department will issue a notice to the sponsor to support the withholding of funds. In order to seek a release of the notice, the out-of-state contractor is required to file a report with the department consisting of the following departmental forms:

1. Form 35-012 which is a listing of subcontractors to whom the out-of-state contractor has awarded a construction contract. This statement should be submitted on each project as it becomes available.

2. Form 35-013 which is a list of material suppliers both in state and out of state from whom tangible personal property has been purchased for use in completing each project or contract.

3. Form 35-001 which is a summary of the provisions of the actual contract.

All letters of release furnished by the department are subject to audit and therefore, are not unconditional release from any Iowa sales or use tax liability. All letters of release will be issued within 60 days upon receipt of the proper information unless an error or discrepancy is noted.

701—219.19(423) Resale certificates. Whenever machinery and equipment which will remain tangible personal property after installation is purchased for a machinery and equipment contract, by a contractor from a supplier or a material supplier, it should be purchased for resale. See rule 219.9(423). Resale purchases are most commonly related to machinery and equipment sales contracts with installation and mixed construction contracts. Contractor-retailers and persons making repairs may also purchase materials for resale as long as they collect tax on their retail sales and pay the tax themselves on items withdrawn from inventory for use in the performance of a construction contract. See rule 219.4 (423) and subrule 219.13(1). Resale certificates can be obtained by contacting the Iowa department of revenue . See old rule 701—15.3(422,423) for detailed information on resale certificates.

701—219.20(423) Reporting for use tax. An Iowa contractor can report use tax either on a consumers use tax return or as consumed goods on a sales tax return. Tax is due in the quarter the materials are delivered into Iowa. Nonresident contractors

should report use tax on a consumers use tax return. Consumer use tax returns for nonresident contractors must be obtained directly from the department of revenue unless the contractor is registered with the department.

701-219.21(423) Exempt lease or rental of equipment. On and after July 1, 2004, the sales price on the lease or rental of the following types of equipment is exempt from tax: self-propelled building equipment, self-constructed cranes, pile drivers, structural concrete forms, regular and motorized scaffolding, generators, or attachments customarily drawn or attached to those items of equipment, including auxiliary attachments which improve the performance, safety, operation, or efficiency of the equipment and replacement parts and are directly and primarily used by contractors, subcontractors, and builders for new construction, reconstruction, alterations, expansion, or remodeling of real property or structures. A contractor's, subcontractor's, or builder's purchases of this equipment would continue to be taxable. A contractor's, subcontractor's, or builder's rental of equipment is not exempt from tax under rule 701-219.13(423) because the rental of equipment is now the sale of that equipment and no longer the performance of a taxable service. See rule 701-225.6(423) for an extensive explanation of this matter.

This chapter is intended to implement Iowa Code subsections 423.1(42), 423.2(1) "b" and "c", 423.2(6), 423.3(37), 423.3(63), and 423.5(2).

CHAPTER 231

EXEMPTIONS PRIMARILY OF BENEFIT TO CONSUMERS

701—231.1 (423) [423.3(54)*] Newspapers, free newspapers and shoppers' guides.

231.1(1) General observations. The sales price from the sales of newspapers, free newspapers, and shoppers' guides is exempt from tax. The sales price from the sales of magazines, newsletters, and other periodicals which are not newspapers is taxable. Cases decided by the United States Supreme Court and the Supreme Court of Iowa prohibit exempting from taxation the sale of any periodical if that exemption from taxation is based solely upon the contents of that periodical. See Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987) and Hearst v. Iowa Department of Revenue & Finance, 461 N.W.2d 295 (Iowa 1990).

231.1(2) General characteristics of a newspaper. "Newspaper" is a term with a common definition. A "newspaper" is a periodical, published at short, stated, and regular intervals, usually daily or weekly. It is printed on newsprint with news ink. The format of a newspaper is that of sheets folded loosely together

without stapling. A newspaper is admitted to the U.S. mails as second-class material. Other frequent characteristics of newspapers are the following:

a. Newspapers usually contain photographs.

b. Information printed on newspapers is usually contained in columns on the newspaper pages.

c. The larger the cross section of the population which reads a periodical in the area where the periodical circulates, the more likely it is that the department will consider that periodical to be a "newspaper."

231.1(3) Characteristics of newspaper publishing companies. Often, companies publishing larger newspapers will subscribe to various syndicates or "wire services." A larger newspaper will employ a general editor and a number of subordinate editors as well, for example, sports and lifestyle editors; business, local, agricultural, national, and world news editors; and editorial page editors. A larger newspaper will also employ a variety of reporters and staff writers. Smaller newspapers may or may not have these characteristics or may consolidate these functions.

231.1(4) Characteristics which distinguish a newsletter from a newspaper. A "newsletter" is generally distributed to members or employees of a single organization and not usually to a large cross section of the general public. It is often published at

irregular intervals by a volunteer, rather than the paid individual who usually publishes a newspaper. A newsletter is often printed on sheets which are held together at one point only by a staple, rather than folded together.

This rule is intended to implement Iowa Code subsection 423.3(54).

701—231.2 (423) Motor fuel, special fuel, aviation fuels and gasoline.

231.2(1) In general. [423.3(55)*] The sales price from the sale of motor fuel, including gasohol, and special fuel is exempt from sales tax under Iowa Code section 423.3(55) if (1) the fuel is consumed for highway use, in watercraft, or in aircraft, (2) the Iowa fuel tax has been imposed and paid, and (3) no refund or credit of fuel tax has been made or will be allowed. The sales price from the sale of special fuel for diesel engines used in commercial watercraft on rivers bordering Iowa is exempt from sales tax, even though no fuel tax has been imposed and paid, providing the seller delivers the fuel to the owner's watercraft while it is afloat.

231.2(2) Refunds or credits of motor fuel and special fuel. Claims for refund or credit of fuel taxes under the provisions of Iowa Code chapter 452A must be reduced by any sales or use tax owing the state unless a sales tax exemption is applicable. Generally, refund claims or credits are allowed where fuel is

purchased tax paid and used for purposes other than to propel a motor vehicle or used in watercraft.

231.2(3) Refunds of tax on fuel purchased in Iowa and consumed out of Iowa. Even though fuel is purchased in Iowa, fuel tax paid in Iowa, and the fuel tax is subject to refund under the provisions of division III of Iowa Code chapter 452A relating to interstate motor vehicle operations, the refund of the fuel tax does not subject the purchase of the fuel to sales tax. Subjecting the purchase to sales tax has the effect of imposing sales tax when fuel is consumed in interstate commerce while fuel consumed on Iowa highways in intrastate commerce is exempt from sales tax pursuant to Iowa Code subsection 423.3(55). The effect for sales tax purposes is to impose a greater tax burden on non-Iowa highway fuel consumption than Iowa highway fuel consumption thereby discriminating against interstate commerce. In addition, the effect of imposing sales tax on interstate excess purchases where intrastate highway use is not subject to the tax constitutes an export duty for purchasing fuel in Iowa and exporting it for use in another state. Such effects are in violation of the commerce clause of the United States Constitution. Boston Stock Exchange v. State Tax Commission, 1977, 429 U.S. 319, 97 S.Ct. 599,50 L.Ed.2d 514 and Coe v. Errol, 1886, 116 U.S. 517, 6 S.Ct. 475, 29L.Ed. 715.

231.2(4) Tax base. The basis for computing the Iowa sales tax will be the retail sales price of the fuel less any Iowa fuel tax included in such price. Federal excise tax should not be removed from the sales price in determining the proper sales tax due. W.M. Gurley v. Arny Rhoden supra. Also see old rule 701—15.12(422,423).

This rule is intended to implement Iowa Code 423.3(55).

701-231.3(423) [423.3(56)*] Sales of food and food ingredients. On and after July 1, 2004, the sales price from all sales of food and food ingredients is exempt from tax. For the purposes of this rule the phrase "food and food ingredients" is defined to mean substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value.

231.3(1) Most substances can easily be classified either as food, food ingredients, or as nonfood items. There are, however, certain substances that are not readily distinguishable as food or nonfood and may present problems in judgment. The following guidelines apply to some of the more unique categories of eligible foods and food ingredients and ineligible nonfood items about which questions may arise. The guidelines and their lists are not to be considered all-inclusive:

a. Foods eligible for purchase with food coupons. Sales of almost all substances which may be purchased with food coupons issued by the United States Department of Agriculture under the regulations in effect on July 1, 1974 remain exempt from tax on and after July 1, 2004. However, since the exemption no longer depends on ability to be purchased with food stamps (see old rule 701-20.1(1)) sales of certain substances which can be purchased with food stamps but are neither food nor food ingredients are now taxable.

These taxable sales would include garden seeds and plants sold for use in gardens to produce food for human consumption. Seeds and plants eligible for purchase with food coupons include vegetable seeds and food-producing plants such as tomato and green pepper plants and fruit trees, food-producing roots, bushes, and bulbs (e.g., asparagus roots and onion sets) and seeds and plants used to produce spices for use in cooking foods. Sales of all these substances are taxable. Sales of chewing gum are now taxable as sales of "candy."

b. Distilled water and ice. These substances, although having some nonfood usages, are largely used as food or as ingredients in food for human consumption. Unless these substances are specifically labeled for nonfood use or the recipient indicates they will be used for other than food for human consumption or

as ingredients in food for human consumption, their sales are exempt from tax.

c. Specialty foods. This category of eligible foods includes special dietary foods (e.g., diabetic and dietetic), enriched or fortified foods, infant formulas, and certain foods commonly referred to as health food items. These substances are food products which are substituted for more commonly used food items in the diet, and thus they are purchased for ingestion by humans and are consumed for their taste or nutritional value. Examples of items in this category of eligible foods are Metrecal, Enfamil, Sustegen, wheat germ, brewer's yeast, sunflower seeds which are packaged for human consumption, and rose hips powder which is used for preparing tea. It is not possible to formulate a comprehensive list of eligible specialty foods. The guideline to be used to determine the eligibility of specific items is the ordinary use of a product.

Note: If the product is primarily used as a food or as an ingredient in food, then it is an eligible item; if it is primarily used for medicinal purposes as either a therapeutic agent or a deficiency corrector and only occasionally used as a food, the product is not an eligible item.

d. Snack foods. These substances are food items and, therefore, are usually eligible for the exemption. Typical examples of snack foods are cheese puffs; corn chips; popcorn; peanuts;

potato chips and sticks; packaged cookies, cupcakes, and donuts; and pretzels. Alcoholic beverages, candy, and soft drinks are examples of snack foods the sales of which are not exempt from tax; see subrule 231.3(2).

e. Others. There are certain eligible food substances which are normally consumed only after being incorporated into foods sold for ingestion or chewing by humans. Sales of substances which are ingredients of items identical to those which are eligible for exemption when sold as finished products are sales eligible for exemption. Since these substances are food ingredients, their sales are exempt. An example is pectin. Pectin is the generic term for products marketed under various brand names and commonly used as a base in making jams and jellies. When pectin is incorporated into jams or jellies, it becomes part of a food for human consumption and, therefore, is an eligible food item. Other examples are lard and vegetable oils.

The following general classifications of food products are also exempt from tax unless taxable as prepared food; see rule 701-231.5(423):

Bread and flour products

Bottled water, unless it is a sweetened bottled water and thus taxable as a soft drink (a change from previous law: see old rule 701-20.1(3)"b"(1)).

Cereal and cereal products

Cocoa and cocoa products, unless taxable in the form of candy as in rule 701-231.4.

Coffee and coffee substitutes unless taxable as soft drinks; see subrule 231.3(2)"f".

Dietary substitutes, other than dietary supplements (see paragraphs 231.3(1)"c" above and 231.3(2)"a")

Eggs and egg products

Fish and fish products

Frozen foods

Fruits and fruit products including fruit juices, unless taxable as soft drinks; see subrule 231.3(2)"f".

Margarine, butter, and shortening.

Meat and meat products.

Milk and milk products including packaged ice cream products.

Milk substitutes, such as soy and rice milk substitutes. This is a change from previous law; see old rule 20.1(3)"b"(2).

Spices, condiments, extracts, and artificial food coloring.

Sugar and sugar products and substitutes, unless taxable in the form of candy as in rule 701-231.4.

Tea unless taxable as a soft drink. See subrule 231.3(2) "f".

Vegetables and vegetable products.

231.3(2) Substances excluded from the term "food and food ingredients." Sales of alcoholic beverages, candy, dietary supplements, food sold through vending machines, prepared food,

soft drinks, and tobacco are not sales of “food” and are not exempted from tax by this rule.

a. “Alcoholic beverages” means beverages that are suitable for human consumption and contain one-half of one percent or more of alcohol by volume.

b. “Candy”, see rule 701-231.4.

c. "Dietary supplement" means any product, other than tobacco, intended to supplement the diet that contains one or more of the following dietary ingredients:

(1) A vitamin.

(2) A mineral.

(3) An herb or other botanical.

(4) An amino acid.

(5) A dietary substance for use by humans to supplement the diet by increasing the total dietary intake.

(6) A concentrate, metabolite, constituent, extract, or combination of any of the ingredients in subparagraphs (1) through (5) that is intended for ingestion in tablet, capsule, powder, softgel, gelcap, or liquid form, or if not intended for ingestion in such a form, is not represented as conventional food and is not represented for use as a sole item of a meal or of the diet; and is required to be labeled as a dietary supplement, identifiable by the "supplement facts" box found on the

label and as required pursuant to 21 Code of Federal Regulations 101.36.

Dietary supplements, as their name indicates, serve as supplements to food or food products rather than as “food”, and, therefore, are not included within the definition of that word. Since these substances serve as deficiency correctors or therapeutic agents to supplement diets deficient in essential nutrition rather than as foods, they are not eligible for the food and food ingredients exemption. In addition to vitamin and mineral tablets or capsules, this category includes substances such as cod liver oil, which is used primarily as a source of vitamins A and D. It is not possible to provide a comprehensive list of other such items which are primarily used for medicinal purposes or as health aids and which may be stocked by authorized firms.

d. "Food sold through vending machines" means food dispensed from a machine or other mechanical device that accepts payment, other than food which would be qualified for exemption if purchased with coupons (commonly known as “food stamps”) issued under the federal Food Stamp Act of 1977, 7 United States Code 2011 et seq. Alcoholic beverages, candy, dietary supplements, prepared food, soft drinks, and tobacco sold through vending machines are sold subject to tax in all instances because they are specifically excluded from this rule’s definition of “foods”;

see this subrule 231.3(2) generally . This paragraph “d" should be interpreted in such a fashion that if the sale of a substance is exempt from tax because it is a sale of “food” when the substance is sold by means other than a vending machine then the sale of that same substance through a vending machine will also be exempt from tax. Conversely, if the sale of a substance by any means other than a vending machine is taxable, the sale of that same substance through a vending machine should also be taxable.

e. “Prepared food”, see rule 701-231.5.

f. "Soft drinks" means nonalcoholic beverages that contain natural or artificial sweeteners. Soft drinks may be noncarbonated. "Soft drinks" do not include beverages that contain milk or milk products; soy, rice, or similar milk substitutes; coffee and tea which are not sweetened; effervescent, noneffervescent, and mineral water sold in containers; beverages that contain greater than fifty percent of vegetable or fruit juice by volume. This latter is a change from the law as it existed prior to July 1, 2004, which required a volume of only fifteen percent for exemption.

Taxable soft drinks are noncarbonated water and soda water if naturally or artificially sweetened; soft drinks carbonated and noncarbonated including but not limited to colas, ginger ale, near beer, and root beer; bottled and sweetened tea and coffee;

lemonade, orangeade, and all other drinks or punches with natural fruit or vegetable juice less than 50 percent by volume.

Beverage mixes and ingredients intended to be made into soft drinks are taxable. Beverage mixes or ingredients may be liquid or frozen, concentrated or nonconcentrated, dehydrated, powdered, granulated, sweetened or unsweetened, seasoned or unseasoned. Sales of beverage mixes to which a sweetener is to be added before drinking are taxable. Concentrates intended to be made into beverages which contain natural fruit or vegetable juice of less than 50 percent by volume are taxable. Beverages, the sales of which are otherwise exempt, are taxable if sold as prepared food under rule 701-231.5.

Nondairy coffee "creamers" in liquid, frozen or powdered form are not beverages. Sugar or other artificial or natural sweeteners sold separately are not taxable as beverage ingredients. Specialty foods that are liquids or that are to be added to a liquid and that are intended to be a substitute in the diet for more commonly used food items are not beverages and are not taxable as beverages. These foods include infant formula.

f. "Tobacco" means cigarettes, cigars, chewing or pipe tobacco, or any other item that contains tobacco.

231.3(3). Other substances which are not food or food ingredients. Various products are not purchased for ingestion or chewing by humans and or, if they are, are not consumed for

their taste or nutritional value. Therefore, they are not purchased exempt from tax under this rule. They include, but are not limited to, the following:

a. Health aids. Over the counter medicines and other products used primarily as health aids or therapeutic agents are not foods since they are consumed for their medicinal value as opposed to their nutritional value or taste. Such products include aspirin, cough drops or syrups and other cold remedies, antacids, and all over the counter medicines or other products used as health aids. In addition to these commonly used health aids, any product used primarily for medicinal purposes is ineligible. An example of such products is slippery elm powder, a demulcent which is used to soothe sore throats.

b. Items not exempt. The following general classifications of products are subject to tax:

Cosmetics.

Household supplies.

Paper products.

Pet foods and supplies.

Soaps and detergents.

Tobacco products.

Toiletry articles.

Tonics.

Lunch counter or foods prepared for consumption on the premises of the retailer.

This rule is intended to implement Iowa Code subsection 423.3(56).

701-231.4(423) [423.3(56)*] Sales of candy.

231.4(1) Definition. Sales of candy were excluded from exemption prior to July 1, 2004; however, the definition of "candy" applicable to the exclusion was slightly different from the definition set out in this rule. See old rule 701-21.1(422,423). For the purposes of this rule "candy" means a preparation of sugar, honey, or other natural or artificial sweeteners in combination with chocolate, fruits, nuts, or other ingredients or flavorings in the form of bars, drops, or pieces. Candy shall not include any preparation containing flour and shall require no refrigeration. Any preparation to which flour has been added only for the purpose of excluding its sales from tax and not for any legitimate purpose, culinary or otherwise, shall not be sold exempt from tax under this rule.

231.4(2) Candy-coated items and candy products. Candy-coated items and candy products include those products normally considered to be "candy." Their sales were taxable prior to July 1, 2004 and remain taxable after that date.

a. Candy. Candy is a prepared food made of a sugar paste or syrup or other natural or artificial sweeteners often enriched

and varied with coloring and flavoring and formed into various shapes.

b. Candy-coated items. Candy-coated items are products like fruit or nuts which are dipped or otherwise substantially covered with candy and which would normally be considered candy and which are "candy" under the definition set out above in subrule 231.4(1) above.

c. Candy products. Candy products include mixtures containing both candy and noncandy items. The inclusion of candy merely as an incidental ingredient in a product does not make the item a candy product.

d. Taxable candy, candy-coated items, and candy products. Candy, candy-coated items, and candy products include: preparation of fruits, nuts or other ingredients in combination with sugar, honey or other natural or artificial sweeteners in the form of bars, drops or pieces; hard or soft candies including jelly beans, taffy, licorice, and mints; dried fruit leathers or other similar products prepared with natural or artificial sweeteners; cotton candy; candy breath mints; chewing gum; and mixes of candy pieces, dried fruits, nuts, and similar items.

Sales of items which are normally sold for use as ingredients in recipes but which can be eaten as candy are taxable on and after July 1, 2004. Examples of these items include but are not limited to the following: white, milk, and German chocolate bak-

ing squares; unsweetened or sweetened baking chocolate in bars or pieces; white and dark chocolate almond bark; toffee bits; M&M's sold for baking; candy primarily intended for decorating baked goods; and the following baking chips: mint, mint-chocolate, peanut butter, peanut butter and chocolate, butterscotch, chocolate, and butterscotch and chocolate.

e. Nontaxable items and products. Candy, candy-coated items, or candy products do not include: jams, jellies, preserves, or syrups; frostings; dried fruits; marshmallows; breakfast cereals; prepared fruit in a sugar or similar base; ice cream or other frozen desserts covered with chocolate or similar coverings; caramel or other candy-coated apples or other fruit; candy-coated popcorn; cakes, cookies, and similar products covered with chocolate or other similar coating; and granola bars. However, these and similar items are taxable if sold as prepared food under rule 701-231.5.

This rule is intended to implement Iowa Code subsection 423.3(56).

701-231.5(423) [423.3(56*] Sales of prepared food. On and after July 1, 2004 sales of "prepared food" are subject to tax as such sales were taxable prior to that date. However, before and after that date, the definitions of "Prepared food" differ slightly. See old rule 701-20.5 for a description of the taxa-

tion of “prepared food” prior to July 1, 2004. On and after July 1, 2004, “Prepared food” means any of the following:

(1) Food sold in a heated state or heated by the seller, including food sold by a caterer.

(2) Two or more food ingredients mixed or combined by the seller for sale as a single item.

(3) Food sold with eating utensils provided by the seller, including plates, knives, forks, spoons, glasses, cups, napkins, or straws. A plate does not include a container or packaging used to transport food.

The types of retailers who are generally considered to be offering prepared food for sale include restaurants, coffee shops, cafeterias, convenience stores, snack shops, and concession stands including those at recreation and entertainment facilities. Other retailers that often offer prepared food include vending machines, mobile vendors, and concessionaires operating facilities for such activities as education, office work, or manufacturing.

If food is sold for consumption on the premises of a retailer, the food is rebuttabley presumed to be prepared food. “Premises of the retailer” means the total space and facilities under control of the retailer or available to the retailer, including buildings, grounds, and parking lots that are made available or that are available for use by the retailer, for the purpose of

sale of prepared food and drink or for the purpose of consumption of prepared food and drink sold by the retailer. Availability of self-service heating or other preparation facilities or eating facilities such as tables and chairs and knives, forks, and spoons, indicates that food, food products, and drinks are sold for consumption on the premises of the retailer and are subject to tax as sales of prepared food.

The following examples are intended to show some of the situations in which sales are taxable as sales of prepared food and drink.

Example A. A movie theater owner operates a movie theater and a concession stand in the lobby of the theater. There is not a separate area set aside for eating facilities. Sales of prepared food and drink through the concession stand are taxable.

Example B. As a convenience to employees, a manufacturer owns and operates several food and drink vending machines located on the premises of the plant. No separate seating or other facilities for eating are provided. Sales of prepared food and drink through the vending machines are taxable.

Example C. Mobile vendor units located throughout an office are operated by the owner of the business and are stocked with snack food priced to cover the cost of the items to the employer. No separate eating facilities are provided. Sales of prepared food through the mobile vendors are taxable.

Example D. An insurance company hires a caterer to run a cafeteria which provides food, at a low cost, to its employees. The insurance company also pays the caterer an amount, per month, which varies with the number of meals the caterer serves, to provide this food service. The caterer does not lease the cafeteria premises; thus those premises remain under the control of the insurance company. In this case, the caterer sells the food in a space "made available to the retailer [caterer]", and the amount which the insurance company pays, on a monthly basis, to the caterer is presumed to be the taxable sales price from the sale of prepared food, as well as the amount paid by the employees to the caterer.

(3) "Prepared food", for the purposes of this rule, does not include food that is any of the following:

(a) Only cut, repackaged, or pasteurized by the seller.

(b) Eggs, fish, meat, poultry, and foods containing these raw animal foods requiring cooking by the consumer as recommended by the United States food and drug administration in chapter 3, part 401.11 of its food code, so as to prevent food borne illnesses.

(c) Bakery items sold by the seller which baked them. The words "bakery items" includes but is not limited to breads, rolls, buns, biscuits, bagels, croissants, pastries, donuts, Danish, cakes, tortes, pies, tarts, muffins, bars, cookies, and

tortillas. On and after July 1, 2004, baked goods sold for consumption on the premises by the seller which baked them are sold exempt from tax. This is a change from previous law; see old subrule 20.5(2), Example D.

(d) Food sold without eating utensils provided by the seller in an unheated state as a single item which is priced by weight or volume.

The following are additional examples of foods that are and are not "prepared foods" the sales price of which is taxable.

Example A: A supermarket retailer cuts bibb and romaine lettuce, mixes them together, and places them in a bag for sale. This is food which is only cut and repackaged. Its sale is not the sale of prepared food; thus its sale is exempt from tax.

Example B: The same factual situation as Example A above, except that the lettuce is mixed with a salad dressing, placed in a container, and sold as a salad which is ready to eat. Sale of the salad is the taxable sale of "prepared food."

Example C: A supermarket retailer slices a roll of cotto salami and a roll of regular salami. The retailer places ten slices of each in the same container and sells the combination as an Italian luncheon meat variety pack. This is, again, the sale of food which is only cut and repackaged. The sale of the salami is exempt from tax.

Example D: The same factual circumstances as in Example C except that the retailer takes the sliced salami, places it between two slices of bread, adds some condiments, surrounds the meat, bread, and condiments with plastic, and sells the result as a ready to eat sandwich. This is prepared food, "two or more food ingredients. . .combined by the seller for sale as a single item", and more is done to the ingredients than cutting and repackaging. Sales of the sandwiches are taxable.

This rule is intended to implement Iowa Code subsection 423.3(56).

701—231.6 (423) [423.3(59)*] Prescription drugs, medical devices, and oxygen. Sales of prescription drugs and medical devices as defined in subrule 231.6(1) and dispensed for human use or consumption in accordance with 231.6(3) and 231.6(4) shall be exempt from sales tax. Rentals of medical devices as defined in subrule 231.6(1) are also exempt from tax. The sales price from the sales of any oxygen purchased for human use or consumption (whether prescribed or not) is exempt from tax.

231.6(1) Definitions:

A "medical device" means equipment or supplies, including orthopedic or orthotic devices, intended to be prescribed by a practitioner for human use to an ultimate user.

A “prescription drug” is a drug intended to be dispensed for human consumption to an ultimate user pursuant to a prescription or medication order from a practitioner.

An “ultimate user” is any individual who has lawfully obtained and possesses a prescription drug or medical device for the individual’s own use or for the use of a member of the individual’s household, or an individual to whom a prescription drug or medical device has been lawfully supplied, administered, dispensed or prescribed. The phrase does not include any entity created by law, such as a corporation or partnership.

231.6(2) Tax exemption. The sale or rental of a medical device or a prescription drug is exempt from tax only if the device or drug is intended to be prescribed or dispensed to an ultimate user. A drug or device is intended to be prescribed or dispensed to an ultimate user only if the drug or device is obtained by or supplied or administered to an ultimate user for placement on or in the ultimate user’s body.

Example A: A sports medicine clinic purchases a new type of device which scans the inside of the human body to disclose injured soft tissue. The device can be used only on the order of a practitioner. The device is prescribed, but since, by its very nature, the device cannot be dispensed to an ultimate user, its purchase is not exempt from tax.

Example B: Pursuant to a practitioner's prescription, a pacemaker is inserted in a patient's body. The pacemaker is dispensed to an ultimate user and its sale is exempt from tax.

Example C: A physician prescribes a tranquilizer for a patient who is chronically nervous. The patient uses the prescription to purchase the tranquilizer at a pharmacy. The purchase is exempt from tax.

For purposes of this subrule, any medical device or drug prescribed in writing by a licensed physician, surgeon, osteopath, osteopathic physician or surgeon, or other person authorized by law to an ultimate user for human use or consumption shall be deemed a device or drug exempt from tax if a prescription is required or permitted under Iowa state or federal law.

Example A: A common painkiller is sold over the counter in doses of 200 milligrams per tablet. In doses of 600 milligrams per tablet, federal law requires a prescription before the drug can be dispensed. Sales of 600 milligram tablets by prescription are exempt from tax.

Example B: A federal law permits but does not require the painkiller mentioned in Example A to be prescribed by a practitioner in dosages of 200 milligrams per tablet. A practitioner might prescribe the painkiller in the over-the-counter dosage, for example, to impress upon a patient the importance of taking

the drug. Sales of 200 milligram tablets by prescription are exempt from tax.

See rules 231.7(423) and 231.8(423) for examples of medical devices sold without a prescription but exempt from tax.

231.6(3) Persons authorized to dispense prescription drugs or prescription devices. In order for a prescription drug or device to qualify for an exemption, it must be dispensed by one of the following persons:

a. Any store or other place of business where prescription drugs are compounded, dispensed or sold by a person holding a license to practice pharmacy in Iowa, and where prescription orders for prescription drugs or devices are received or processed in accordance with pharmacy laws.

b. Persons licensed by the state board of medical examiners to practice medicine or surgery in Iowa.

c. Persons licensed by the state board of medical examiners to practice osteopathic medicine or surgery in Iowa.

d. Persons licensed by the state board of podiatry to engage in the practice of podiatry in Iowa.

e. Persons licensed by the state board of dentistry to practice dentistry in Iowa.

f. Persons licensed by the optometry examiners as therapeutically certified optometrists.

g. Persons licensed by the board of chiropractic examiners to practice chiropractic in Iowa when dispensing in accordance with Iowa Code chapter 151.

h. Any other person authorized under Iowa law to dispense prescription drugs or devices in this state.

i. Any person licensed in another state in a health field in which, under Iowa law, licensees in this state may legally prescribe drugs or devices.

231.6(4) Disposition of prescription drugs and devices. Prescription drugs or devices may be dispensed either directly from one of the persons licensed in 231.6(3) who may also prescribe drugs or devices or by a pharmacist upon receipt of a prescription from one of the persons licensed to prescribe. A prescription received by a licensed pharmacist from one of the persons licensed in 231.6(3) who may also prescribe drugs or devices shall be sufficient evidence that a drug or device is exempt from sales tax. When a person who prescribes a drug or device is also the dispenser, the drug or device will not require a prescription by such person but the drug or device must be recorded as if a prescription would have been issued or required. If this condition is met, the sales price from the sale of the drug or device shall be exempt from sales tax.

231.6(5) Others required to collect sales tax. Any person other than those who are allowed to dispense drugs or devices

under 231.6(3) shall be required to collect sales tax on any prescription drugs or devices.

231.6(6) Prescription drugs and devices purchased by hospitals for resale. This subrule applies to for-profit hospitals only. Hospitals have purchased prescription drugs or devices for resale to patients and not for use or consumption in providing hospital services only if the following circumstances exist: (1) the drug or device is actually transferred to the patient; (2) the drug or device is transferred in a form or quantity capable of a fixed or definite price value; (3) the hospital and the patient intend the transfer to be a sale; and (4) the sale is evidenced in the patient's bill by a separate charge for the identifiable drug or device. See old rule 701—18.31(422,423) for a discussion generally of sales for resale by persons performing a service. Also see old rule 701—18.59(422,423) for the exemption applicable to all purchases of goods and services by a nonprofit hospital licensed under Iowa Code chapter 135B.

EXAMPLE A: A hospital purchases a bone saw blade and uses the blade to cut the bone of patient X during hip replacement surgery. This dulls the blade to the point that the blade cannot be used again and is discarded. The hospital bills patient X for "one bone saw blade—$30.00". In spite of the separate charge for an identifiable piece of property, the hospital did not purchase the bone saw blade for resale. The blade was used

up by the hospital, not transferred to the ownership of X. Since there was no transfer, there was no sale, thus no purchase for resale.

EXAMPLE B: A hospital buys lotion for use in massages given to patients by nurses aides. In spite of the fact that one can argue that a transfer of ownership of the lotion from hospital to patient occurred, the lotion was not purchased for resale. No real intent to sell the lotion to patients ever existed; the lotion was not transferred to patients in a quantity capable of a definite price value; and there is no separate charge for the lotion.

A hospital's purchase of a prescription drug or device for purposes other than resale will still be exempt from tax if a device or drug is intended to be prescribed to an ultimate user and the hospital's use of the drug or device is otherwise exempt under 231.6(1).

This rule is intended to implement Iowa Code subsection 423.3(59).

701—231.7(423) [423.3(59)*] Exempt sales of nonprescription medical devices, other than prosthetic devices. A prescription is not required for sales of the medical devices mentioned in subrule 231.7(1) to be exempt from tax if those devices are purchased for human use or consumption.

231.7(1) Definitions.

"Anesthesia trays" includes, without limit, paracervical anesthesia trays, saddle block anesthesia trays, spinal anesthesia trays, and continuous epidural anesthesia trays.

"Biopsy" means the removal and examination of tissue from a living body, performed to establish a precise diagnosis.

"Biopsy needles" includes, without limit, needles used to perform liver, kidney, other soft tissue, bone, and bone marrow biopsies. Menghini technique aspirating needles, rosenthal-type needles, and "J" Jamshidi needles are all examples of biopsy needles.

"Cannula" means a tube inserted into a body duct or cavity to drain fluid, insert medication including oxygen, or to open an air passage. Examples are lariat nasal cannulas and ableson cricothyrotomy cannulas.

"Catheter" means a tubular, flexible, surgical instrument used to withdraw fluids from or introduce fluids into a body cavity, or for making examinations. Examples are: robinson/nelation catheters, all types of foley catheters (e.g., pediatric and irrigating), three-way catheters, suction catheters, IV catheters, angiocath catheters and male and female catheters.

"Catheter trays." Universal foley catheter trays, economy foley trays, urethral catherization trays and catheter trays with domed covers are nonexclusive examples of these trays.

"Diabetic testing materials" means all materials used in testing for sugar or acetone in the urine, including, but not limited to, Clinitest, Tes-tape, and Clinistix; also, all materials used in monitoring the glucose level in the blood, including, but not limited to, bloodletting supplies and test strips.

"Drug infusion device" means a device designed for the slow introduction of a drug solution into the human body. The term includes devices which infuse by means of pumps or gravity flow (drip infusion).

"Fistula" means an abnormal passage usually between the internal organs or between an internal organ and the surface of the body.

"Hypodermic syringe" means an instrument for applying or administering liquid into any vessel or cavity beneath the skin. This includes the needle portion of the syringe if it accompanies the syringe at the time of purchase, and it also includes replacement needles.

"Insulin" means a preparation of the active principle of the pancreas, used therapeutically in diabetes and sometimes in other conditions.

"Intraocular lens" means a lens located inside the eye.

"Kit" means a combination of medical equipment and supplies used to perform one particular medical procedure which is packaged and sold as a single item.

"Medical device," for the purposes of this rule, means medical equipment or supplies intended to be dispensed for human use with or without a prescription to an ultimate user.

"Myelogram" means a radiographic picture of the spinal cord. A "radiographic" picture is one taken using radiation other than visible light.

"Nebulizer" means a mechanical device which converts a liquid to a spray or fog.

"Oxygen equipment" means all equipment used to deliver medicinal oxygen including, but not limited to, face masks, humidifiers, cannula, tubing, mouthpieces, tracheotomy masks or collars, regulators, oxygen concentrators and oxygen accessory racks or stands.

"Set." See "Kit" above.

"Tray." See "Kit" above.

231.7(2) Sales of the following medical devices are exempt from tax.

a. Insulin, hypodermic syringes, and diabetic testing materials.

b. Sales and rentals of oxygen equipment.

c. Sales of hypodermic needles, anesthesia trays, biopsy trays and needles, cannula systems, catheter trays, invasive catheters, dialyzers, drug infusion devices, fistula sets, hemodialysis devices, insulin infusion devices, intraocular lenses, irri-

gation solutions, intravenous administering sets, solutions and stopcocks, myelogram trays, nebulizers, small vein infusion kits, spinal puncture trays, transfusion sets and venous blood sets are no longer taxable.

231.7(3) Component parts. Sales of any component parts of the trays, systems, devices, sets, or kits listed above are taxable unless the sale of a component part, standing alone, is otherwise exempt under these rules. For instance, the sale of a biopsy needle or an invasive catheter would be exempt from tax whether or not it was purchased for use as a component part in a biopsy tray or catheter tray, so long as the needle or catheter will be dispensed for human use to an ultimate user. Conversely, sales of catheter introducers, disposable latex gloves, rayon balls, forceps, and specimen bottles are exempt when those items are sold as part of a catheter tray, but are not exempt when those items are sold individually.

This rule is intended to implement Iowa Code subsection 423.3(59).

701—231.8(423) [423.3(59)*] Prosthetic, orthotic and orthopedic devices.

231.8(1) Prosthetic devices. Sales or rental of prosthetic devices shall be exempt from sales tax.

231.8(2) Orthotic and orthopedic devices. Sales or rental of orthotic and orthopedic devices prescribed for human use which

meet the provisions of subrules 231.8(3) and 231.8(4) shall be exempt from sales tax. **"Prescribed" refers to a written prescription, or an oral prescription later reduced to writing, issued by any of the persons described in paragraphs "a" through "i" of subrule 231.6(3).**

231.8(3) Definitions.

a. "Prosthetic device" means a piece of special equipment designed to be a replacement or artificial substitute for an absent or missing part of the human body and intended to be dispensed with or without a prescription to an ultimate user. See subrule 231.6(1) for a definition of the term "ultimate user." The term "prosthetic device" includes ostomy, urological, and tracheostomy devices and supplies.

The following is a nonexclusive list of prosthetic devices:

Artificial arteries
Artificial breasts
Artificial ears
Artificial eyes
Artificial heart valves
Artificial implants
Artificial larynx
Artificial limbs
Artificial noses
Artificial teeth
Cardiac pacemakers
Contact lenses
Cosmetic gloves
Dental bridges and implants
Drainage bags
Hearing aids
Ileostomy devices
Intraocular lenses
Karaya paste
Karaya seals
Organ implants
Ostomy belts
Ostomy clamps
Ostomy cleaners and deodorizers
Ostomy pouch
Ostomy stoma caps and paste
Penile implants
Prescription eyeglasses
Stoma bags
Tracheal suction catheters
Tracheostomy care and cleaning starter kits
Tracheostomy cleaning brushes
Tracheostomy tubes
Urinary catheters
Urinary drainage bags
Urinary irrigation tubing
Urinary pouches

b. "Orthotic device" means a piece of special equipment designed to straighten a deformed or distorted part of the human body, such as corrective shoes or braces. An orthotic device is an orthopedic device.

c. "Orthopedic device" means a piece of special equipment designed to correct deformities or to preserve and restore the function of the human skeletal system, its articulations and associated structures. A hot tub or spa is not an orthopedic device.

The following is a nonexclusive list of orthopedic devices:

Abdominal belts	Clavicle splints	Nerve stimulators
Alternating pressure mattresses	Corrective braces	Orthopedic implants
Alternating pressure pads	Corrective shoes	Orthopedic shoes
Anti–embolism stockings	Crutch cushions	Patient lifts
Arch supports	Crutch handgrips	Plaster (surgical)
Arm slings	Crutch tips	Rib belts
Artificial sheepskin	Crutches	Rupture belts
Bone cement	Decubitus prevention devices	Sacroiliac supports
Bone nails	Dorsolumbar belts	Sacrolumbar belts
Bone pins	Dorsolumbar supports	Sacrolumbar supports
Bone plates	Elastic bandages	Shoulder immobilizers
Bone screws	Elastic supports	Space shoes
Bone wax	Exercise devices	Splints
Braces	Head halters	Traction equipment
Canes	Hernia belts	Transcutaneous electrical nerve stimulators (tens units0
Casts	Iliac belts	Trapezes
Cast heels	Invalid rings	Trusses
Cervical braces	Knee immobilizers	Walkers
Cervical collars	Lumbosacral supports	Wheelchairs
Cervical pillows	Muscle stimulators	

d. "Related devices." Sales or rental of devices which are used exclusively in conjunction with prosthetic, orthotic, or orthopedic devices shall be exempt from tax. Daw Industries, Inc. v. United States, 714 F.2d 1140 (Fed. Cir. 1983).

e. "Medical equipment and supplies." The scope of the term medical equipment and supplies is broader than the terms prescription drugs or medical devices. While all exempt prescription drugs are medical supplies and all exempt medical devices

are medical equipment, not all medical equipment and supplies are exempt medical devices or prescription drugs. The following is a nonexclusive list of items which are medical equipment or supplies, but are not prescription drugs or medical devices exempt from tax under subrules 231.6(1), 231.8(1), 231.8(2), and rule 231.7(423). Sales of the below-listed items would generally be taxable.

Adhesive bandages
Aneurysm clips
Arterial bloodsets
Aspirators
Athletic supporters
Atomizers
Autolit
Back cushions
Bathing aids
Bathing caps
Bedpans
Bedside rails
Bedside tables
Bedside trays
Bedwetting prevention devices
Belt vibrators
Blood cell washing equipment
Blood pack holders
Blood pack trays
Blood pack units
Blood pressure meters
Blood processing supplies
Blood tubing
Blood warmers
Breast pumps
Breathing machines
Cardiac electrodes
Cardiopulmonary equipment
Chair lifts
Clamps
Clip–on ash trays
Dry aid kits for ears
EKG paper
Earmolds
Electrodes (other than tens units)
Emesis basins
Enema units
First–aid kits
Foam slant pillows
Gauze bandages
Gauze packings
Gavage containers
Geriatric chairs
Grooming aids
Hand sealers
Hearing aid carriers
Hearing aid repair kits
Heart stimulators
Heat lamps
Heat pads
Hemolators
Hospital beds
Hot water bottles
Ice bags
Ident–a–bands
Incontinent garments
Incubators
Infrared lamps
Inhalators
Iron lungs
Irrigation apparatus
Nebulizers
(hypodermic)
Overbed tables
Page turning devices
Pap smear kits
Paraffin baths
Physicians instruments
Pigskin
Plasma extractors
Plasmapheresis units
Plastic heat sealers
Prescribed device repair kits and batteries
Respirators
Resuscitators
Sauna baths
Security pouches
Servipak dialysis supplies
Shelf trays
Shower chairs
Side rails
Sitz bath kit
Specimen containers
Sponges (surgical)
Stairway elevators
Staples
Steri–peel
Stools
Suction equipment
Sunlamps
Surgical bandages
Surgical equipment
Suspensories

Commode chairs	IV connectors	Sutures
Connectors		Thermometers
Contact lens cases		Toilet aids
Contact lens solution		Tourniquets
Convoluted pads	Laminar flow equipment	Transfer boards
Corrective pessaries	Latex gloves	
Cotton balls	Leukopheresis pumps	Tube sealers
Diagnostic kits	Lymphedema pumps	Underpads
Dialysis chairs	Manometer trays	Urinals
Dialysis supplies	Massagers	Vacutainers
	Maternity belts	Vacuum units
Dietetic scales	Medigrade tubing	Vaporizers
Disposable diapers	Modulung oxygenators	
Disposable gloves	Moist heat pads	Vibrators
Disposable underpads		Whirlpools
Donor chairs	Myringotomy tubes	X–ray film
Dressings		

231.8(4) Power devices. Sales or rental of power devices especially designed to operate prosthetic, orthotic or orthopedic devices shall be exempt from tax. This exemption does not include batteries which can be used to operate a number of devices, but batteries designed solely for use in hearing aids would be exempt.

This rule is intended to implement Iowa Code subsection 423.3(59).

701—231.9(423) [423.3(61)*] Raffles. The sales price from the sale of tickets for a raffle conducted at a fair pursuant to Iowa Code section 99B.5 is not subject to tax.

This rule is intended to implement Iowa Code subsection 423.3(61).

701—231.10(423) [423.3(62)*] Exempt sales of prizes. The sales price from sales of tangible personal property which will be

given as prizes to players in games of skill, games of chance, raffles, and bingo games as defined in and lawful under Iowa Code chapter 99B is exempt from tax. See Chapters 481—100 through 104 of Inspections and Appeals, Iowa Administrative Code, for a description of the games of skill, games of chance, raffles, and bingo games which are lawful. See rule 481—100.6(99B) for a description of the prizes which it is lawful to award. A gift certificate is not tangible personal property. If a person wins a gift certificate as a prize and then redeems the gift certificate for merchandise, tax is payable at the time the gift certificate is redeemed. See old rule 701—15.16(422,423).

This rule is intended to implement Iowa Code subsection 423.3(62).

701—231.11(423) [423.3(63)*] Modular homes. Forty percent of the sales price from the sale of a modular home is exempt from tax. A "modular home" is any structure, built in a factory, made to be used as a place for human habitation which cannot be attached or towed behind a motor vehicle and which does not have permanently attached to its body or frame any wheels or axles.

This rule is intended to implement Iowa Code subsection 423.3(63).

701-231.12(423) [423.3(64)*] Access to on-line computer service. The sales price from charges paid to a provider for access to an

on-line computer service is exempt from tax. An "on-line computer service" is one which provides for or enables multiple users to have computer access to the Internet. Also, the furnishing of any contracted on-line service is exempt from Iowa tax if the information is made available through a computer server. The exemption applies to all contracted on-line services, as long as they provide access to information through a computer server.

This rule is intended to implement Iowa Code subsection 423.3(64).

701—231.13(423) [423.3(65)*] Sale or rental of information services. The sales price from the service of the sale or rental of information services is exempt from tax. This exemption does not repeal by implication the tax on the performance of the services of investment counseling, of all financial institutions, private employment agencies, test laboratories, detective services, or any other services enumerated by statute. They remain taxable; see 701—old Chapter 26 generally.

"Information services" means every business activity, process, or function by which a seller or its agent accumulates, prepares, organizes, or conveys data, facts, knowledge, procedures, and like services to a particular buyer (or its agent) of the information through any tangible or intangible medium. Information accumulated, prepared, or organized for a particular buyer,

its agent, a group of buyers, or their agent, is an information service even though it may incorporate preexisting components of data or other information.

Information services include, but are not limited to, database files, mailing lists, subscription files, market research, credit reports, surveys, real estate listings, bond rating reports, abstracts of title, bad check lists, broadcasting rating services, wire services, scouting reports, white and yellow page listings, and other similar items of compiled information prepared for a particular customer. The furnishing of artwork (including musical compositions and films), drawings, illustrations, or other graphic material is not the performance of an "information service"; nor does the term include information prepared for general dissemination to the public in the form of books, magazines, newsletters, video or audio tapes, compact disks, or any other medium commonly used to communicate with large numbers of customers. The sale of a book, magazine, or similar item is not the sale of an information service, even if the item contains material of practical use (e.g., in conducting a private, for-profit business) to its purchaser.

The following specific examples illustrate the general principles set out above.

EXAMPLE A. John Doe buys a packaged set of preprinted documents and instructions which anyone may purchase and which is

entitled "Legal Eagle." Mr. Doe prepares his own will by reading the instructions, making choices and filling in the blanks on the preprinted documents. Mr. Doe has purchased tangible personal property and not an information service. His purchase is taxable.

EXAMPLE B. A taxpayer buys a book entitled "Doing Your Own Iowa Individual Income Tax," which is written by an accountant and is available to any buyer. The taxpayer uses the book to prepare her own IA 1040. Since her purchase contains information prepared for general dissemination to the public in the form of a book, that purchase is a taxable sale of tangible personal property and not an exempt sale of an information service.

EXAMPLE C. The seller provides, for a fee, a weekly bulletin listing information on real estate of use to brokers selling homes in a certain Iowa county. The seller secures the information from a multiple listing service without applying any independent thought during the compiling of that information. The bulletin is useful only to those brokers and not to the general public. Since the bulletin is a "real estate listing" and has been prepared for a particular group of customers and not for the general public, its sale is the sale of an information service rather than the sale of tangible personal property and is thus exempt from tax.

EXAMPLE D. A-1 Corporation sells gourmet meats through the mail. A-1 rents its list of customers to whom it mails its catalog to other retailers who specialize in sales of goods or services to the wealthy. Since the list is a "mailing list" and made available only to a particular group of buyers, its rental is the performance of an exempt information service and not the taxable rental of tangible personal property.

EXAMPLE E. Company E is a tariff bureau which specializes in compiling and preparing tariff schedules. E acquires these schedules from various companies throughout the country. E then provides these schedules to common carriers who subscribe to its service. Its printed tariff schedules are published in bound and loose-leaf form; they may be updated daily. E's providing the schedules is the performance of an exempt information service because the schedules are compiled for a particular group of customers and they are items of compiled information similar to the files, lists, reports, and other information services named above.

EXAMPLE F. Company F compiles and prints telephone directories. F purchases white and yellow page listings from various telephone companies and uses those listings to make up its directories. F's purchases of the white and yellow page listings are purchases of an exempt information service. Any sales on

F's part of the directories to the general public would be sales of tangible personal property subject to tax.

EXAMPLE G. Company G purchases the assets of four businesses. The primary asset of each of the businesses is a database containing names, addresses, and other customer information of use to G but not to anyone other than a company similar to G. G transfers the lists to its own computers by way of paper or magnetic tape. G has purchased an exempt information service with its purchases of the four databases.

This rule is intended to implement Iowa Code subsection 423.3(65).

701—231.14(423) [423.3(66)*] Exclusion from tax for property delivered by certain media. A taxable "sale" of tangible personal property does not occur if the substance of the transaction is delivered to the purchaser digitally, electronically, or by utilizing cable, radio waves, microwaves, satellites, or fiber optics. This exclusion from tax is also applicable to the leasing of tangible personal property, since a lease is classified as a "sale" of tangible personal property for the purposes of Iowa sales and use tax law. The exclusion is not applicable to property delivered by any medium other than those listed above. Sales of items such as artwork, drawings, photographs, music, electronic greeting cards, "canned" software (see old subrule 18.34(1)), entertainment properties (e.g., films, concerts,

books, and television and radio programs), and all other digitized products delivered as described above are not taxable, except the exclusion does not repeal by implication the tax on the service of providing pay television. See old rule 701—26.56(422,423). If an order for a product is placed by way of any of the media described above but the product ordered is delivered by conventional, physical means, e.g., the U.S. Postal Service or common carrier, sale of the product is not excluded from tax under this rule.

This rule is intended to implement Iowa Code subsection 423.3(66).

701—231.15(423) [423.3(67)*] Exempt sales of clothing and footwear during two-day period in August. Tax is not due on the sale or use of a qualifying article of clothing or footwear if the sales price of the article is less than $100 and the sale takes place during a period beginning at 12:01 a.m. on the first Friday in August and ending at 12 midnight of the following Saturday. For example, in the year 2004, this period began at 12:01 a.m. on Friday, August 6, and ended at 12 midnight on Saturday, August 7. Eligible purchases of clothing and footwear are exempt from local option sales taxes as well as Iowa state sales tax.

231.15(1) Definitions. The following words and terms, when used in this rule, shall have the following meanings, unless the context clearly indicates otherwise.

"Accessories" include but are not limited to jewelry, handbags, purses, briefcases, luggage, wallets, watches, cufflinks, tie tacks and similar items carried on or about the human body, without regard to whether worn on the body in a manner characteristic of clothing.

"Clothing or footwear" means an article of wearing apparel designed to be worn on or about the human body. For the purposes of this rule, the term does not include accessories or special clothing or footwear or articles of wearing apparel designed to be worn by animals.

"Special clothing or footwear" is clothing or footwear primarily designed for athletic activity or protective use and which is not normally worn except when used for the athletic activity or protective use for which it is designed.

231.15(2) Exempt sales. The exemption applies to each article of clothing or footwear selling for less than $100, regardless of how many items are sold on the same invoice to a customer. For example, if a customer purchases two shirts for $80 each, both items qualify for the exemption even though the customer's total purchase price ($160) exceeds $99.99. The exemption does not apply to the first $99.99 of an article of clothing or foot-

wear selling for more than $99.99. For example, if a customer purchases a pair of pants costing $110, sales tax is due on the entire $110.

231.15(3) Taxable sales. This exemption does not apply to sales of the following goods or services:

a. Any special clothing or footwear that is primarily designed for athletic activity or protective use and that is not normally worn except when used for the athletic activity or protective use for which it is designed. For example, golf cleats and football pads are primarily designed for athletic activity or protective use and are not normally worn except when used for those purposes; therefore, they do not qualify for the exemption. However, tennis shoes, jogging suits, and swimsuits are commonly worn for purposes other than athletic activity and qualify for the exemption.

b. Accessories, including jewelry, handbags, purses, briefcases, luggage, umbrellas, wallets, watches, and similar items carried on or about the human body, without regard to whether they are worn on the body in a manner characteristic of clothing.

c. The rental of any clothing or footwear. For example, this exemption does not apply to rentals of formal wear, costumes, diapers, and bridal gowns, but would apply to sales of the above items.

d. Taxable services performed on the clothing or footwear, such as garment and shoe repair, dry cleaning or laundering, and alteration services. Sales tax is due on alterations to clothing, even though the alteration service may be performed, invoiced and paid for at the same time as the clothing is being purchased. If a customer purchases a pair of pants for $90 and pays $15 to have the pants cuffed, the $90 charge for the pants is exempt, but tax is due on the $15 alteration charge.

e. Purchases of items used to make, alter, or repair clothing or footwear, including fabric, thread, yarn, buttons, snaps, hooks, belt buckles, and zippers.

231.15(4) Special situations.

a. Articles normally sold as a unit. Articles that are normally sold as a unit must continue to be sold in that manner if the exemption is to apply; they cannot be priced separately and sold as individual items in order to obtain the exemption. For example, if a pair of shoes sells for $150, the pair cannot be split in order to sell each shoe for $75 to qualify for the exemption. If a suit is normally priced at $225 and sold as a unit on a single price tag, the suit cannot be split into separate articles so that any of the components may be sold for less than $100 in order to qualify for the exemption. However, components that are normally priced as separate articles (e.g., slacks and sport coats, and suit coats and suit pants sold sepa-

rately prior to the two-day period) may continue to be sold as separate articles and qualify for the exemption if the price of an article is less than $100.

b. Sales of exempt clothing combined with gifts of taxable merchandise. When exempt clothing is sold in a set that also contains taxable merchandise as a free gift and no additional charge is made for the gift, the exempt clothing may qualify for this exemption. For example, a boxed set may contain a tie and a free tie tack. If the price of the set is the same as the price of the tie sold separately, the item being sold is the tie, which is exempt from tax if sold for less than $100 during the exemption period.

c. Layaway sales. A layaway sale is a transaction in which merchandise is set aside for future delivery to a customer who makes a deposit, agrees to pay the balance of the purchase price over a period of time and, at the end of the payment period, receives the merchandise. Under Iowa sales tax law, a sale of tangible personal property occurs when a purchaser takes delivery of tangible personal property in return for a consideration. Therefore, if a customer takes delivery of qualifying clothing or footwear during the exemption period (usually by taking possession of it; see old rule 701—16.22(422,423) for general information on layaway sales) that sale of eligible clothing will qualify for the exemption.

231.15(5) Calculating taxable and exempt sales price — discounts, coupons, buying at a reduced price, and rebates.

a. Discounts. A discount allowed by a retailer and taken on a taxable sale can be used to reduce the sales price of an item. If the discount reduces the sales price of an item to $99.99 or less, the item may qualify for the exemption. For example, a customer buys a $150 dress and a $100 blouse from a retailer offering a 10 percent discount. After applying the 10 percent discount, the final sales price of the dress is $135, and the blouse is $90. The dress is taxable (it is over $99.99), and the blouse is exempt (it is less than $99.99). See old rule 701—15.6(422,423) for a definition of the word "discount" and a description of which retailers' reductions in price are discounts which reduce the taxable sales price of items and which are not.

b. Coupons. When a coupon is issued by a retailer and is actually used to reduce the sales price of any taxable item, the value of the coupon is excludable from the tax as a discount, regardless of whether the retailer is reimbursed for the amount represented by the coupon. Therefore, a retailer's coupon can be used to reduce the sales price of an item to $99.99 or less in order to qualify for the exemption. For example, if a customer purchases a pair of shoes priced at $110 with a coupon worth $20 off, the final sales price of the shoes is $90, and

the shoes qualify for the exemption. A manufacturer's coupon cannot be used to reduce the sales price of an item. See 701—old subrule 15.6(3).

c. Buy one, get one free or for a reduced price or "two for the price of one" sales. The total price of items advertised as "buy one, get one free," or "buy one, get one for a reduced price," or "two for the price of one" cannot be averaged in order for both items to qualify for the exemption. The following examples illustrate how such sales should be handled.

EXAMPLE 1. A retailer advertises pants as "buy one, get one free." The first pair of pants is priced at $120; the second pair of pants is free. Tax is due on $120. Having advertised that the second pair is free, the store cannot ring up each pair of pants for $60 in order for the items to qualify for the exemption. However, if the retailer advertises and sells the pants for 50 percent off, selling each pair of $120 pants for $60, each pair of pants qualifies for the exemption.

EXAMPLE 2. A retailer advertises shoes as "buy one pair at the regular price, get a second pair for half price." The first pair of shoes is sold for $100; the second pair is sold for $50 (half price). Tax is due on the $100 shoes, but not on the $50 shoes. Having advertised that the second pair is half price, the store cannot ring up each pair of shoes for $75 in order for the items to qualify for the exemption. However, if the re-

tailer advertises the shoes for 25 percent off, thereby selling each pair of $100 shoes for $75, each pair of shoes qualifies for the exemption.

EXAMPLE 3. A retailer advertises shirts as "buy two for the price of one" for $140. Tax is due on $140. Each shirt cannot be rung up as costing $70. However, as described in examples 1 and 2 above, the $140 cost of each shirt can be discounted to bring the price of each shirt within the exemption's limitation.

d. Rebates. Rebates occur after the sale and do not affect the sales price of an item purchased. For example, a customer purchases a sweater for $110 and receives a $12 rebate from the manufacturer. The retailer must collect tax on the $110 sales price of the sweater. See 701—old subrule 15.6(2) for additional information regarding rebates.

e. Shipping and handling charges. Shipping charges separately stated and separately contracted for (as explained in old rule 701—15.13(422,423)) are not part of the amount used to determine whether the sales price of an item qualifies it for exemption. Handling charges, however, are part of the amount used to make this determination if it is necessary to pay those charges in order to purchase an item.

231.15(6) Treatment of various transactions associated with sales.

a. Rain checks. Eligible items purchased during the exemption period using a rain check will qualify for the exemption regardless of when the rain check was issued. However, issuance of a rain check during the exemption period will not qualify an eligible item for the exemption if the item is actually purchased after the exemption period.

b. Exchanges.

(1) If a customer purchases an item of eligible clothing or footwear during the exemption period and later exchanges the item for the same item (different size, different color, etc.), no additional tax will be due even if the exchange is made after the exemption period.

EXAMPLE. A customer purchases a $35 shirt during the exemption period. After the exemption period ends, the customer exchanges the shirt for the same shirt in a different size. Tax is not due on the $35 price of the shirt.

(2) If a customer purchases an item of eligible clothing or footwear during the exemption period and after the exemption period has ended returns the item and receives credit on the purchase of a different item, the appropriate sales tax will apply to the sale of the newly purchased item.

EXAMPLE. A customer purchases a $35 shirt during the exemption period. After the exemption period, the customer exchanges the shirt for a $35 jacket. Because the jacket was not purchased

during the exemption period, tax is due on the $35 price of the jacket.

(3) If a customer purchases an item of eligible clothing or footwear during the exemption period and later during the exemption period returns the item and purchases a similar but nonexempt item, the purchase of the second item is not exempt from tax.

EXAMPLE. During the exemption period, a customer purchases a $90 dress that qualifies for the exemption. Later, during the exemption period, the customer exchanges the $90 dress for a $150 dress. Tax is due on the $150 dress. The $90 credit from the returned item cannot be used to reduce the sales price of the $150 item to $60 for exemption purposes.

(4) If a customer purchases an item of eligible clothing or footwear before the exemption period and during the exemption period returns the item and receives credit on the purchase of a different item of eligible clothing or footwear, no sales tax is due on the sale of the new item if it is purchased during the exemption period and otherwise meets the qualifications for exemption.

EXAMPLE. Before the exemption period, a customer purchases a $60 dress. Later, during the exemption period, the customer exchanges the $60 dress for a $95 dress. Tax is not due on the

$95 dress because it was purchased during the exemption period and otherwise meets the qualifications for the exemption.

231.15(7) Nonexclusive list of exempt items. The following is a nonexclusive list of clothing or footwear, sales of which are exempt from tax during the two-day period in August:

Adult diapers	Employee uniforms other than those primarily designed for athletic activity or protective use	Raincoats and hats
Aerobic clothing	Formal clothing sold not rented	Religious clothing
Antique clothing	Fur coats and stoles	Riding pants
Aprons—household	Galoshes	Robes
Athletic socks	Garters and garter belts	Rubber thongs—"flip-flops"
Baby bibs	Girdles	Running shoes without cleats
+ Baby clothes—generally	Gloves—cloth, dress and leather	Safety shoes (adaptable for street wear)
Baby diapers	Golf clothing—caps, dresses, shirts and skirts	Sandals
Baseball caps	Graduation caps and gowns—sold not rented	Shawls
Bathing suits	Gym suits and uniforms	Shirts

Belts with buckles attached	Hats	Shoe inserts and laces
Blouses	Hiking boots	Stockings
Boots—general purpose	Hooded (sweat) shirts	Suits
Bow ties	Hosiery, including support hosiery	Support hose
Bowling shirts	Jackets	Suspenders
Bras	Jeans	Sweatshirts
Bridal apparel—sold not rented	Jerseys for other than athletic wear	Sweatsuits
Camp clothing	Jogging apparel	Swim trunks
Caps—sports and others	Knitted caps or hats	Tennis dresses
Chefs' uniforms	Lab coats	Tennis skirts
Children's novelty costumes	Leather clothing	Ties
Choir robes	Leg warmers	Tights
Clerical garments	Leotards and tights	Trousers
Coats	Lingerie	Tuxedoes (except cufflinks)—

		sold not rented
Corsets	Men's formal wear—sold not rented	Underclothes
Costumes—Halloween, Santa Claus, etc., sold not rented	Neckwear, e.g., scarves	Underpants
Coveralls	Nightgowns and nightshirts	Undershirts
Cowboy boots	Overshoes	Uniforms—generally
Diapers—cloth and disposable	Pajamas	Veils
Dresses	Pants	Vests—general, for wear with suits
Dress gloves	Panty hose	Walking shoes
Dress shoes	Prom dresses	Windbreakers
Ear muffs	Ponchos	Work clothes

231.15(8) Nonexclusive list of taxable items. The following is a nonexclusive list of items, sales of which are taxable during the two-day period in August:

Accessories—generally	Employee uniforms primarily designed for athletic activities or protective use	Repair of clothing

Alterations of clothing	Fabric sales	Roller blades
Athletic supporters	Fishing boots (waders)	Safety clothing
Backpacks	Football pads	Safety glasses
Ballet shoes	Football pants	Safety shoes—not adaptable for street wear
Barrettes	Football shoes	Shoes with cleats or spikes
Baseball cleats	Goggles	Shoulder pads for dresses and jackets
Baseball gloves	Golf gloves	Shower caps
Belt buckles sold without belts	Ice skates	Skates—ice and roller
Belts for weight lifting	In-line skates	Swim fins, masks and goggles
Belts needing buckles but sold without them	Insoles	Ski boots, masks, suits and vests
Bicycle shoes with cleats	Jewelry	Special protective clothing or footwear not adaptable for street wear
Billfolds	Key cases and chains	Sports helmets
Blankets	Knee pads	Sunglasses—except prescription

Boutonnieres	Laundry services	Sweatbands—arm, wrist and head
Bowling shoes—rented and sold	Life jackets and vests	Tap dance shoes
Bracelets	Luggage	Thread
Buttons	Monogramming services	Vests—bulletproof
Chest protectors	Pads—elbow, knee, and shoulder, football and hockey	Weight lifting belts
Clothing repair	Patterns	Wrist bands
Coin purses	Protective gloves and masks	Yard goods
Corsages	Purses	Yarn
Dry cleaning services	Rental of clothing	Zippers
Elbow pads	Rental of shoes or skates	

This rule is intended to implement Iowa Code subsection 423.3(67).

701—231.16 (423) [423.3(68)*] State sales tax phase-out on energies. Beginning January 1, 2002, the state sales tax is phased out at the rate of 1 percent per year on the sales price from the sale, furnishing, or service of metered natural gas,

electricity and fuels, including propane and heating oils, to residential customers for use as energy for residential dwellings, apartment units, and condominiums for human occupancy.

Local option taxes are not included in the phase-out of the state sales tax.

This phase-out of tax does not impact franchise fees. Franchise fees will continue to be imposed where applicable.

231.16(1) Definitions. The following definitions are applicable to this rule:

"Energy" means a substance that generates power to operate fixtures or appliances within a residential dwelling or that creates heat or cooling within a residential dwelling.

"Fuel" means a liquid source of energy for a residential dwelling, individual apartment unit, or condominium. "Fuel" includes propane, heating fuel, and kerosene. However, "fuel" does not include blended kerosene used as motor fuel or special fuel.

"Metered gas" means natural gas that is billed based on metered usage to provide energy to a residential dwelling, individual apartment unit, or individual condominium.

"Residential dwelling" means a structure used exclusively for human occupancy. This does not include commercial or agricultural structures, nor does it include nonresidential buildings attached to or detached from a residential dwelling, such as an

outbuilding. However, a garage attached to or detached from a dwelling that is used strictly for residential purposes will fall within the phase-out provisions. A building containing apartment units is not considered to be qualifying property for purposes of this rule. However, if each apartment has a separate meter, it may qualify for the phase-out if classified as qualifying property by the utility. Also excluded from the phase-out provisions are certain nonqualifying properties that include, but are not limited to, nursing homes, adult living facilities, assisted living facilities, halfway houses, charitable residential facilities, YMCA residential facilities, YWCA residential facilities, apartment units not individually metered, and group homes.

231.16(2) Schedule for phase-out of tax. State sales tax will be phased out at the rate of 1 percent per year based on the following schedule:

a. If the date of the utility billing or meter reading cycle of the residential customer for the sale, furnishing, or service of metered gas and electricity is on or after January 1, 2002, through December 31, 2002, or if the sale, furnishing, or service of fuel for purposes of residential energy and the delivery of the fuel occur on or after January 1, 2002, through December 31, 2002, the rate of state tax is 4 percent of the sales price.

b. If the date of the utility billing or meter reading cycle of the residential customer for the sale, furnishing, or service of metered gas and electricity is on or after January 1, 2003, through December 31, 2003, or if the sale, furnishing, or service of fuel for purposes of residential energy and the delivery of the fuel occur on or after January 1, 2003, through December 31, 2003, the rate of state tax is 3 percent of the sales price.

c. If the date of the utility billing or meter reading cycle of the residential customer for the sale, furnishing, or service of metered gas and electricity is on or after January 1, 2004, through December 31, 2004, or if the sale, furnishing, or service of fuel for purposes of residential energy and the delivery of the fuel occur on or after January 1, 2004, through December 31, 2004, the rate of state tax is 2 percent of the sales price.

d. If the date of the utility billing or meter reading cycle of the residential customer for the sale, furnishing, or service of metered gas and electricity is on or after January 1, 2005, through December 31, 2005, or if the sale, furnishing, or service of fuel for purposes of residential energy and the delivery of the fuel occur on or after January 1, 2005, through December 31, 2005, the rate of state tax is 1 percent of the sales price.

e. If the date of the utility billing or meter reading cycle of the residential customer for the sale, furnishing, or service of metered gas and electricity is on or after January 1, 2006,

or if the sale, furnishing, or service of fuel for purposes of residential energy and the delivery of the fuel occur on or after January 1, 2006, the rate of state tax is 0 percent of the sales price.

231.16(3) Determination of tax rate. Determination of the rate of state tax to be imposed on a transaction depends on the type of energy that is being purchased.

a. Electricity or metered natural gas. If the energy being purchased is either electricity or natural gas, then the rate of tax is governed by either the billing date or meter reading date. For example, ABC natural gas company sends out bills with a billing date of December 31, 2002, to qualifying residential customers. However, the bills to these qualifying customers are not placed in the United States mail until January 2, 2003. Based on the foregoing facts, the state sales tax to be imposed on the bills is 4 percent. Four percent is the tax rate imposed at the time of the billing date on the gas bills sent to the customers.

If a billing for the same usage period needs to be billed more than once due to loss of the original bill or some other error, the billing date of the original bill controls qualification for the phase-out provisions of metered gas or electricity. For example, a utility company issues a billing for metered gas on December 28, 2001, to a customer and the customer loses the bill-

ing. The customer calls the utility company on January 10, 2002, to report the lost billing and to request a new billing. The utility company issues a new billing with a billing date of January 12, 2002, to the customer. The original billing date issued to the customer is determinative for the tax rate to be imposed. As a result, a 5 percent state tax rate should be imposed on the billing because the original billing date was prior to January 1, 2002.

b. Fuel and heating oil. The proper rate of tax to be imposed for the sale, furnishing or service of fuel including propane is governed by the date of delivery of the fuel to the customer. Consequently, if a farmer purchases propane for home heating by executing an agreement and paying for the propane in October 2002 but the propane is not delivered to the farmer until January 2003, the rate of state sales tax that should be imposed on the transaction is 3 percent.

231.16(4) Qualifying and nonqualifying usage. Customers that have both qualifying and nonqualifying usage on the same meter or fuel tank are subject to a proration formula to obtain the qualifying portion eligible for the phase-out provisions. In these situations the percentage of qualifying usage must be determined by the purchaser for the purposes of applying the phase-out tax. Nonqualifying usage would be subject to the full state tax rate. Consequently, a proration of the metered gas,

electricity or fuel usage for the qualifying and the nonqualifying usage must be calculated by the purchaser. See 701—old subrules 15.3(4) and 15.4(5) for guidance on proration of electricity, natural gas and fuels. In addition, the purchaser must furnish an exemption certificate to the supplier with respect to that percentage of metered gas or electricity that is eligible for the phase-out provisions. See 701—old subrule 15.3(2). The customer may provide a calculation which includes only the usage not subject to phase-out.

The customer must notify the utility provider of the percentage of qualifying and nonqualifying usage and the customer has the burden of proof regarding the percentage. The customer is liable for any mistakes or misrepresentations made regarding the computation or for failure to notify the utility provider in writing of the percentage of qualifying or nonqualifying usage.

Security lights used by customers that are billed as a flat rate tariff will be subject to the phase-out if the customer is classified as a residential customer. However, if a customer uses security lights which are billed as a flat rate tariff and that customer is classified as a commercial customer, the sales price including the usage of the security lights are not subject to the phase-out of state sales tax and are subject to the full state sales tax rate, unless another exemption from state sales tax is applicable.

231.16(5) Reporting over the phase-out period. Sales/use tax returns will be filed on the same basis as they are currently filed. During each phase-out period, the entire sales price from sales should be reported on the return. The appropriate state sales tax rate for the tax period will be applied by claiming the phased-out portion of the tax rate as a deduction on the return.

The sales prices for local option taxes are also to be reported in their entirety and computed by applying the appropriate local option tax rate.

The following are examples regarding how state sales and local option taxes should be reported:

Example 1. Reporting of tax by an energy provider:

Sales price for a tax period in 2002 $100,000

Phase-out (20,000 for the first year, 40,000 for the second year, etc.) 20,000

Taxable sales 80,000

State tax at 5% to compute state sales tax due 4,000

Sales price to be reported for local option 100,000

Local option tax rate (assuming a 1% local option tax rate) X 1%

Local option tax due 1,000

Total tax due (local option and state sales tax) $ 5,000

Example 2. Reporting of tax on an individual billing:

Monthly charge during a billing or delivery period in 2002 $400

State tax rate X 4%

State tax due 16

Sales price for local option tax 400

Local option tax rate X 1%

Local option tax due 4

Total tax (local option and state sales tax) $20

This rule is intended to implement Iowa Code section subsection 423.3(68).

Schedule

1. First internal review-out 7-19-04 to Dave, Don C. Wayne C. & AGs.

2. First meeting re internal review-09-23-04. Dave, me, Don, Lucy in attendance.

3. Complete corrections to first draft. Distribute second draft. 09-29-04.

4. Meeting to make hopefully-final corrections to second draft. 10-04-04.

5. Copy of corrected draft to Dave C. 10-05-04.