

When the taxpayer learned that the corporation had an unpaid tax obligation, he had a **duty** to see that it was paid. The taxpayer learned of the tax delinquencies no later than June 1994. From that point, as a person with **authority** to direct the payment of taxes, the taxpayer had a **duty** to make sure that they were paid. The taxpayer favored other creditors and suppliers over the corporation's obligations to the department. This establishes that the taxpayer **intentionally breached his duty** to direct payment of taxes to the department.

The taxpayer has not appealed this decision. □



Tax Releases

“Tax releases” are designed to provide answers to the specific tax questions covered, based on the facts indicated. In situations where the facts vary from those given herein, the answers may not apply. Unless otherwise indicated, tax releases apply for all periods open to adjustment. All references to section numbers are to the Wisconsin Statutes unless otherwise noted.

The following tax releases are included:

Corporation Franchise and Income Taxes

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CORPORATION FRANCHISE AND INCOME TAXES

1 Basis in Tax-Option (S) Corporation Stock When Losses in Excess of Basis Were Claimed in Closed Years

Statutes: Sections 71.33 and 71.365, Wis. Stats. (1995-96)

Background: Under secs. 1366 and 1367 of the Internal Revenue Code (IRC), a shareholder's federal basis in stock of an S corporation is increased by income items and decreased by expense and loss items which flow through from the S corporation to the shareholder. A shareholder's basis in stock and loans to the corporation may not go below zero. Any expense or loss item which is not deductible by the shareholder due to the basis limitation may be carried over indefinitely by the shareholder and allowed as a deduction when the shareholder has sufficient basis to deduct the expense or loss item.

Section 71.365, Wis. Stats. (1995-96), provides that the adjusted basis of a shareholder in the stock and indebtedness of a tax-option (S) corporation shall be determined in the manner prescribed by the Internal Revenue Code for a shareholder of an S corporation, except that the nature and amount of items affecting that basis shall be determined under ch. 71, Wis.

Stats. Section 71.33, Wis. Stats. (1995-96), states that it is the intent of subch. V of ch. 71 and other subchapters relating to the treatment of tax-option (S) corporations and their shareholders to prevent the double inclusion or omission of any item of income, deduction, or basis.

Facts and Question: The shareholder of a tax-option (S) corporation had a stock basis of \$75,000 and loan basis of \$25,000 on January 1, 1993. The corporation incurred a \$150,000 ordinary loss for the 1993 calendar year which was passed through and deducted by the shareholder on his 1993 Wisconsin individual income tax return. Thus, the shareholder deducted \$50,000 more than the total of his stock and loan bases. This error was discovered after the 1993 year was closed to adjustments by the statutes of limitations provided in sec. 71.77, Wis. Stats. (1995-96). The shareholder contributed an additional \$50,000 to the corporation during 1994.

What are the shareholder's stock and loan bases for 1994 after he made the additional capital contribution of \$50,000 but before taking into account any items of income, loss, or deduction passed through from the tax-option (S) corporation in 1994?

Answer: The shareholder's 1994 stock and loan bases are both zero before taking into account any tax-option (S) corporation items of income, loss, or deduction passed through for 1994. The department may invoke sec. 71.33, Wis. Stats. (1995-96), to require the shareholder to reduce

the \$50,000 basis from additional capital contributions made during 1994 by the \$50,000 loss claimed in excess of basis in 1993. Applying excess losses used in closed years to reduce stock or loan basis in open years prevents the omission of any item of basis. □

2 Wisconsin Tax Treatment of Limited Service Health Organizations (LSHOs)

Statutes: Sections 71.01(2), (3), and (4), Wis. Stats. (1985-86), secs. 71.26(1)(a), 71.43(2), and 71.45, Wis. Stats. (1989-90), and secs. 71.26(1)(a), 71.43(2), and 71.45, Wis. Stats. (1995-96)

Background: Beginning with the calendar year 1972 and thereafter, insurance companies organized under Wisconsin law, with certain exceptions, became subject to the Wisconsin franchise or income tax. The exceptions included income of:

- mutual insurers that was exempt from federal income taxation pursuant to sec. 501(c)(15) of the Internal Revenue Code,
- bona fide cooperatives operated without pecuniary profit to any shareholder or member, and
- other corporations or associations of individuals not organized or conducted for pecuniary profit.

However, for 1986 and prior taxable years, the income of societies, organizations, or corporations organized under ch. 613,

Wis. Stats., operating by virtue of sec. 148.03 (plans of sickness care), 447.13 (dental care), 449.15 (prepaid optometric service plans), or 613.80 (hospital services), Wis. Stats., was not exempt from taxation. These corporations were subject to tax upon their Wisconsin net income determined by applying the provisions of the Internal Revenue Code applicable to mutual insurance companies, other than life insurance companies or mutual marine insurance companies, having total receipts over \$500,000. The amount computed was subject to any applicable additions or subtractions provided in sec. 71.01(4)(a), Wis. Stats. (1985-86). [Section 71.01(2), Wis. Stats. (1985-86).]

Beginning with the 1987 taxable year, the federal Tax Reform Act of 1986 revised the federal income taxation of mutual insurance companies and eliminated the distinction, for federal tax purposes, between stock and mutual insurance companies.

Effective for the taxable year 1987 and thereafter, 1989 Wisconsin Act 31 retroactively eliminated the requirement that insurers organized under ch. 613, Wis. Stats., operating by virtue of sec. 148.03, 447.13, 449.15, or 613.80, Wis. Stats., must determine their Wisconsin net income by applying the provisions of the Internal Revenue Code applicable to mutual insurance companies having total receipts over \$500,000. [Sections 71.43(2) and 71.45(1) and (2)(a)(intro.), Wis. Stats. (1989-90).]

For taxable years beginning on or after January 1, 1996, 1995 Wisconsin Act 27 repealed the exemption available for income from a cooperative sickness care association organized under sec. 185.981, Wis. Stats., or a service insurance corporation organized under ch. 613, Wis. Stats., that is derived from a health maintenance organization (HMO), as defined in sec. 609.01(2), Wis. Stats., or a limited service health organization (LSHO), as defined in sec. 609.01(3), Wis. Stats. The net income subject to Wisconsin tax is the amount that would be determined if the entity were subject to federal income tax and as if that income were that of an insurance company. [Sections 71.26(1)(a) and (2)(a) and 71.45(1), (2)(a)(intro.), and (5), Wis. Stats. (1995-96).]

An LSHO, as defined in sec. 609.01(3), Wis. Stats. (1995-96), means a health care plan offered by an organization established under ch. 185, 611, 613, or 614, Wis. Stats., or issued a certificate of authority under ch. 618, Wis. Stats., that makes available to its enrolled participants, for consideration other than predetermined periodic fixed payments, either comprehensive health care services or a limited range of health care services performed by providers selected by the organization.

Question 1: Are all LSHOs, as defined under sec. 609.01(3), Wis. Stats, and organized under ch. 613, Wis. Stats., exempt from Wisconsin franchise and income tax for all taxable years begin-

ning after 1986 and before January 1, 1996?

Answer 1: Yes. All LSHOs, as defined under sec. 609.01(3), Wis. Stats, and organized under ch. 613, Wis. Stats., are exempt from Wisconsin franchise and income tax for all taxable years beginning after 1986 and before January 1, 1996.

Question 2: Does the exemption from Wisconsin franchise and income tax apply even if the LSHO is subject to federal income taxation?

Answer 2: Yes. The Wisconsin exemption applies even if the LSHO is subject to federal income tax. The Wisconsin statutes for that period of time did not pick up the federal provisions under which the federal income tax is imposed.

Question 3: If an LSHO was exempt from tax but had filed Wisconsin franchise or income tax returns for taxable years after 1986 and before January 1, 1996, are net business losses reported on the Wisconsin returns for prior years allowable as an offset against 1996 net income?

Answer 3: No. Since LSHOs were not subject to Wisconsin franchise or income taxation for taxable years beginning after 1986 and before January 1, 1996, they cannot carry forward losses incurred in years for which no tax was imposed. □

3 Years in Which a Wisconsin Net Business Loss Carryforward May Be Used

Statutes: Sections 71.26, 71.75, 71.76, and 71.77, Wis. Stats. (1995-96)

Background: Section 71.26(4), Wis. Stats., provides that a corporation may offset against its Wisconsin net business income any Wisconsin net business loss sustained in any of the next 15 preceding taxable years. The corporation had to be subject to Wisconsin franchise or income taxation in the taxable year in which the loss was sustained. The loss may be carried forward to the extent not offset by other items of Wisconsin income in the loss year and by Wisconsin net income of any year between the loss year and the taxable year for which an offset is claimed.

Facts X Example 1: Corporation A computed a Wisconsin net business loss of \$300,000 on its Wisconsin franchise or income tax return for the 1995 calendar year.

For 1996, Corporation A has Wisconsin net income of \$250,000 before subtracting its 1995 Wisconsin net business loss carryforward. Corporation A computes a \$4,750 manufacturer's sales tax credit for 1996. In addition, it has a \$125,000 manufacturer's sales tax credit carryforward available for 1996. Corporation A's manufacturer's sales tax credit carryforward includes a \$15,000 credit from its 1981 taxable year, which will expire if not used in 1996. Under

sec. Tax 2.11(3)(b), Wis. Adm. Code (February 1990 Register), Corporation A must first use its 1996 manufacturer's sales tax credit to offset its 1996 Wisconsin tax before it may claim an unused credit from a prior year.

Question 1: May Corporation A choose not to deduct any part of its 1995 Wisconsin net business loss carryforward on its 1996 Wisconsin return so that it may claim its manufacturer's sales tax credit?

Answer 1: Yes, Corporation A may choose not to deduct any part of its 1995 Wisconsin net business loss carryforward on its 1996 Wisconsin return. Corporation A may claim the net business loss carryforward in any year between the loss year and the next 15 succeeding years.

Facts X Example 2: On December 31, 1988, Corporation P liquidated its wholly owned subsidiary, Corporation S, pursuant to sec. 332 of the Internal Revenue Code (IRC). At the time of liquidation, Corporation S had a federal net operating loss carryover under IRC sec. 172 of \$150,000, and a Wisconsin net business loss carryforward under sec. 71.26(4), Wis. Stats., of \$2,000,000.

For federal income tax purposes, Corporation P filed its 1988 tax return utilizing Corporation S's net operating loss carryover in full. Upon examination of the return by the Internal Revenue Service (IRS), Corporation P was required to limit Corporation S's net operating loss deduction to zero for 1988 due to IRC sec. 381

limitations. However, Corporation P was allowed to deduct in full Corporation S's net operating loss carryover in its 1989 federal return pursuant to IRC sec. 381.

Corporation P did not claim any deduction for Corporation S's Wisconsin net business loss carryforward on its 1988 Wisconsin franchise tax return, nor did it claim any deduction related to Corporation S's Wisconsin net business loss carryforward on any subsequent Wisconsin franchise return.

Other IRS audit adjustments were also made to Corporation P's federal 1989 tax return which impact Corporation P's Wisconsin 1989 franchise tax liability. Corporation P is obligated by sec. 71.76, Wis. Stats., to file an amended Wisconsin return to report the 1989 IRS adjustments.

Question 2a: On its amended 1989 Wisconsin return, may Corporation P claim a refund for the Wisconsin net business loss carryforward from Corporation S?

Answer 2a: Yes, Corporation P may claim a refund for the Wisconsin net business loss carryforward from Corporation S on its amended 1989 Wisconsin return. Section 71.77(7)(b), Wis. Stats., allows the department to issue a refund if a taxpayer reports federal audit adjustments within 90 days after the IRS's final determination or within 4 years after the department discovers the federal adjustments.

Question 2b: May Corporation P utilize the entire \$2,000,000

Wisconsin net business loss carryforward on its 1989 return or is its deduction limited to the \$150,000 federal net operating loss?

Answer 2b: Corporation P may utilize the entire \$2,000,000 Wisconsin net business loss carryforward on its 1989 return, provided the full amount would be allowed under IRC secs. 381 and 382. A corporation computes its net income for Wisconsin purposes under sec. 71.26(2), Wis. Stats., with the modifications provided in sec. 71.26(3), Wis. Stats. One of the modifications, sec. 71.36(3)(n), provides that IRC secs. 381, 382, and 383, relating to carryovers in certain corporate acquisitions, are modified so that they apply to losses under sec. 71.26(4), Wis. Stats., and Wisconsin credits instead of to federal credits and federal net operating losses. □

SALES AND USE TAXES

Note: The following tax releases interpret the Wisconsin sales and use tax law as it applies to the 5% state sales and use tax. The 0.5% county and 0.1% stadium sales and use taxes may also apply. For information on sales or purchases that are subject to the county or stadium sales and use tax, refer to Wisconsin Publication 201, *Wisconsin Sales and Use Tax Information*.

4 Boat Launching Fees

Statutes: Sections 77.52(2)(a)2 and 77.54(10), Wis. Stats. (1995-96)

Wis. Adm. Code: Section Tax 11.65(4)(a), Wis. Adm. Code (June 1991 Register)

Background: Section 77.52(2)(a)2, Wis. Stats. (1995-96), imposes a sales or use tax on admissions to amusement, athletic, entertainment, or recreational events or places. "Admissions" includes the furnishing for dues, fees, or other consideration, the privilege of access to clubs or the privilege of having access to or the use of amusement, entertainment, athletic, or recreational devices or facilities.

Section 77.54(10), Wis. Stats. (1995-96), allows an exemption for certain admission fees and stickers for state parks and state forest campgrounds under sec. 27.01(7) to (11), Wis. Stats. (1995-96). An admission sticker that qualifies for this exemption (e.g., a Wisconsin state park admission sticker that allows a vehicle access to the state parks) is exempt from sales tax.

Boat Launching Fees Paid

Facts 1:

- Company A owns and maintains a boat launching area.
- The boat launching area consists of a ramp between

two piers. A vehicle with a boat and trailer can back into the launching area, allowing the boat entry to the lake.

- A \$5 fee is charged by Company A for use of its launching area.

Question 1: Is the fee paid to Company A for launching a boat subject to Wisconsin sales and use tax?

Answer 1: Yes. Launching a boat is subject to sales and use tax under sec. 77.52(2)(a)2, Wis. Stats. (1995-96). However, if the boat is used for a business purpose (e.g., commercial fishing), the \$5 fee is not subject to sales and use tax.

Boat Launching Fees Paid to a Governmental Unit

Facts 2:

- Same as in Facts 1, except that the owner of the launching area is a Wisconsin governmental unit (e.g., state of Wisconsin, or a city, county, village, or township).

Question 2: Is the fee paid to the governmental unit for launching a boat subject to Wisconsin sales and use tax?

Answer 2: Yes, unless the fee paid to the governmental unit qualifies for exemption under sec. 77.54(10), Wis. Stats. (1995-96).

Boat Launching Donations Paid

Facts 3:

- Same facts as in Facts 1, except that instead of a fee being charged, there is a donation box at the launching site.
- A sign is posted next to the box, soliciting donations and thanking the boater, but a donation is not required to use the launching area.
- No price is listed.

Question 3: Is the donation for launching a boat subject to Wisconsin sales and use tax?

Answer 3: No. Donations are not subject to sales and use tax (sec. Tax 11.65(4)(a), Wis. Adm. Code (June 1991 Register)). The donation must be totally voluntary, and no restriction may be placed on persons not making the donation. □

5 Common and Contract Carrier Exemption

Statutes: Sections 77.54(5)(b), 194.01(1), (2), and (4), and 340.01(4), (31), (34), (53), (57), (71), and (73), Wis. Stats. (1995-96)

Wis. Adm. Code: Section Tax 11.16, Wis. Adm. Code (June 1991 Register)

I. Background: This tax release explains the requirements that must be met for sales of trucks, trailers,

etc., to common or contract carriers to qualify for the sales and use tax exemption in sec. 77.54(5)(b), Wis. Stats. (1995-96).

Section 77.54(5)(b), Wis. Stats. (1995-96), provides a sales and use tax exemption for the gross receipts from the sale of and the storage, use, or other consumption of:

“Motor trucks, truck tractors, road tractors, buses, trailers and semitrailers, and accessories, attachments, parts, supplies and materials therefor, sold to common or contract carriers who use such motor trucks, truck tractors, road tractors, buses, trailers and semitrailers exclusively as common or contract carriers, including the urban mass transportation of passengers as defined in s. 71.38.”

II. Requirements for Exemption:

A. General

Three requirements must be met to qualify for the sales and use tax exemption in sec. 77.54(5)(b), Wis. Stats. (1995-96).

1. Item must be **sold to a common or contract carrier**.
2. Item sold must be a **motor truck, truck tractor,**

road tractor, bus, trailer, or semitrailer, or accessory, attachment, part, supply, or material for a motor truck, truck tractor, road tractor, bus, trailer, or semitrailer.

3. Item sold must be **used** by the common or contract carrier **exclusively as a common or contract carrier**.

Additional information about each of the three requirements follows.

B. Requirement 1: Item must be sold to a common or contract carrier.

For purposes of the exemption in sec. 77.54(5)(b), Wis. Stats. (1995-96), “**common carrier**” has the same meaning as “common motor carrier” in sec. 194.01(1), Wis. Stats. (1995-96). “**Contract carrier**” has the same meaning as “contract motor carrier” in sec. 194.01(2), Wis. Stats. (1995-96). See definitions below.

“**Common motor carrier**” is defined in sec. 194.01(1), Wis. Stats. (1995-96), as “any person who holds himself or herself out to the public as willing to undertake for hire to transport passengers by motor vehicle between fixed end points or over a regular route upon the public highways or property over regular or irregular routes upon the public high-

ways. The transportation of passengers in taxicab service or in commuter car pool or van pool vehicles with a passenger-carrying capacity of less than 16 persons or in a school bus under s. 120.13 (27) shall not be construed as being that of a common motor carrier.” (underlining supplied)

“**Contract motor carrier**” is defined in sec. 194.01(2), Wis. Stats. (1995-96), as “any person engaged in the transportation by motor vehicle over a regular or irregular route upon the public highways of property for hire”. (underlining supplied)

“**For hire**” as used in sec. 194.01(1) and (2), is defined in sec. 194.01(4), Wis. Stats. (1995-96). It means “for compensation, and includes compensation obtained by a motor carrier indirectly, by subtraction from the purchase price or addition to the selling price of property transported, where the purchase or sale thereof is not a bona fide purchase or sale. Any person who pretends to purchase property to be transported by such person or who purchases property immediately prior to and sells it immediately after the transportation thereof shall be deemed to be transporting the property for hire and not a bona fide purchaser or seller thereof. The rental of a motor vehicle to a person for transportation of the person’s

property which rental directly or indirectly includes the services of a driver shall be deemed to be transportation for hire and not private carriage. This subsection does not apply to motor vehicle operations which are conducted merely as an incident to or in furtherance of any business or industrial activity.”

C. Requirement 2: Item sold must be a motor truck, truck tractor, road tractor, bus, trailer, or semitrailer, or accessory, attachment, part, supply, or material for a motor truck, truck tractor, road tractor, bus, trailer, or semitrailer.

1. Definitions of Motor Truck, etc.

For purposes of the exemption in sec. 77.54(5)(b), Wis. Stats. (1995-96), the following definitions apply:

“**Bus**” means a motor vehicle designed primarily for the transportation of persons rather than property and having a passenger-carrying capacity of 16 or more persons, including the operator. Passenger-carrying capacity shall be determined by dividing by 20 the total seating space measured in inches. (Same as definition of “motor bus” in

sec. 340.01(31), Wis. Stats. (1995-96).)

“**Motor truck**” means every motor vehicle designed, used or maintained primarily for the transportation of property. (sec. 340.01(34), Wis. Stats. (1995-96))

“**Road tractor**” means a motor vehicle designed and used for drawing other vehicles and not so constructed as to carry any load thereon either independently or any part of the weight of the vehicle or load so drawn. (sec. 340.01(53), Wis. Stats. (1995-96))

“**Semitrailer**” means a vehicle of the trailer type so designed and used in conjunction with a motor vehicle that some part of its own weight and that of its own load rests upon or is carried by another vehicle, but does not include a mobile home. A vehicle used with a ready-mix motor truck to spread the load is considered a semitrailer. (sec. 340.01(57), Wis. Stats. (1995-96))

“**Trailer**” means a vehicle without motive power designed for carrying property or passengers wholly on its own structure and for being drawn by a motor

vehicle, but does not include a mobile home. (sec. 340.01(71), Wis. Stats. (1995-96))

“**Truck tractor**” means a motor vehicle designed and used primarily for drawing other vehicles and not so constructed as to carry a load other than a part of the weight of the vehicle and load so drawn. (sec. 340.01(73), Wis. Stats. (1995-96))

(**Note:** Motor truck, road tractor, and truck tractor do not include an automobile as defined in sec. 340.01(4), Wis. Stats. (1995-96), unless the automobile is registered as a truck.)

2. Accessories, attachments, parts, supplies, and materials for motor trucks, etc.

Accessories, attachments, parts, supplies, and materials for motor trucks, etc., includes items that are assigned to and carried on an exempt vehicle.

Examples include dollies, pianoboards, ladders, walkboards, tire chains, fire extinguishers, flares, bug deflectors, engine block heaters, defroster fans, auxiliary heaters and cooling units and their fuel, radios, flag kits in-

cluding flags and reflectors, and items designed to be used with a vehicle which protect or secure the vehicle's load including tape, fitted tarpaulins, tarpaulin straps, furniture pads and covers, load holding chains, logistic straps, and shoring beams.

The exemption in sec. 77.54(5)(b), Wis. Stats. (1995-96), for accessories, etc., does not include corrugated boxes, containers, and related materials that are transferred to customers in conjunction with the selling, performing, or furnishing of a moving service.

Equipment acquired by a carrier for the repair, service, or maintenance of its exempt vehicles is also not exempt, including repair tools, welding torches, battery chargers, and grinding discs.

D. Requirement 3: Item sold must be used by the common or contract carrier exclusively as a common or contract carrier.

“Exclusively,” as used in sec. 77.54(5)(b), Wis. Stats. (1995-96), means that “the motor trucks, truck tractors, road tractors, buses, trailers and semitrailers are used solely as common or contract carriers to the exclusion of all other uses, except that

the sales and use tax exemption for this tangible personal property will not be invalidated by an infrequent and sporadic use other than as a common or contract carrier.” (Section Tax 11.16(1)(am), Wis. Adm. Code (June 1991 Register))

III. Examples

The following examples illustrate how the exemption provided in sec. 77.54(5)(b), Wis. Stats. (1995-96), applies to purchases of motor trucks, etc.

A. Company engaged in business as a common or contract carrier only

Example 1:

Facts:

- Company A holds itself out to the public as willing to transport property for compensation upon the public highways by advertising in the yellow pages and by other advertising (i.e., Company A is a common carrier).
- Company A is not engaged in any business other than as a common carrier.

Tax Treatment:

Company A qualifies for exemption under sec. 77.54(5)(b), Wis. Stats. (1995-96), on its purchases of motor trucks, etc., which

it uses exclusively as a common carrier.

Example 2:

Facts:

- Company B enters into an agreement with Company C to transport Company C's products for compensation upon the public highways to various locations, as determined by Company C. Company B only hauls for persons it contracts with and does not hold itself out to the public as willing to transport persons or property for hire (i.e., Company B is a contract carrier).

- Company B is not engaged in any business other than as a contract carrier.

Tax Treatment:

Company B qualifies for exemption under sec. 77.54(5)(b), Wis. Stats. (1995-96), on its purchases of motor trucks, etc., which it uses exclusively as a contract carrier.

B. Company engaged in business as a common or contract carrier and has non-carrier business activities

Example 3:*Facts:*

- Company F is engaged in business as a manufacturer and seller of widgets and as a common carrier.
- Company F's primary business is the manufacture and sale of widgets.
- Company F has 10 motor trucks; 9 of which it uses exclusively in private carriage to transport its own widgets, and one which it uses exclusively in for-hire transportation of property.
- Company F's common carrier operations account for approximately 5% of its business activities.
- For its common carrier operations, Company F meets the definition of "common carrier" (i.e., Company F holds itself out to the public as willing to transport property for hire over the public highways by advertising in the yellow pages and by other advertising).

Tax Treatment:

Company F must pay sales or use tax on the 9 motor trucks it uses to transport its own widgets. It qualifies for exemption under sec. 77.54(5)(b), Wis. Stats. (1995-96), on its purchase of

the one motor truck which it uses exclusively as a common carrier.

Example 4:*Facts:*

- Company G is engaged in business as a manufacturer and seller of widgets and as a contract carrier.
- Company G's primary business is the manufacture and sale of widgets.
- Company G has 10 motor trucks; 9 of which it uses exclusively in private carriage to transport its own widgets, and one which it uses exclusively as a contract carrier.
- Company G's contract carrier operations account for approximately 5% of its business activities.
- For its contract carrier operations, Company G enters into an agreement with Company H to transport Company H's products to various locations, as determined by Company H.

Tax Treatment:

Company G must pay sales or use tax on the 9 motor trucks it uses to transport its own widgets. It qualifies for exemption under sec. 77.54(5)(b), Wis. Stats. (1995-96), on its purchase of

the one motor truck which it uses exclusively as a contract carrier.

Example 5:*Facts:*

Company D meets the definition of "common carrier" (i.e., Company D holds itself out to the public as willing to transport property for hire over the public highways by advertising in the yellow pages and by other advertising).

- Company D does not hold itself out to the public as being engaged in business as a retailer of gravel.
- Company D enters into an agreement with Company E to transport gravel upon the public highways to Company E's construction site.
- Company D purchases gravel from a gravel pit operator who immediately loads the gravel into Company D's motor trucks.
- Company D transports the gravel to Company E's construction site and immediately transfers possession of the gravel to Company E by dumping it in a pile.
- Company D bills Company E for the gravel plus

a charge for transportation.

- Company D makes its profit by hauling. Company D's hauling operations are not conducted as an incident to or in furtherance of any business or industrial activity.
- Company D is not engaged in any business other than that described above, and does not use its motor trucks other than as described above.

Tax Treatment:

Company D qualifies for exemption under sec. 77.54(5)(b), Wis. Stats. (1995-96), on its purchases of motor trucks.

Company D meets the definition of "common motor carrier" in sec. 194.01(1), Wis. Stats. (1995-96), because it holds itself out to the public as willing to transport property (gravel) upon the public highways "for hire." The transportation performed by Company D is "for hire," as defined in sec. 194.01(4), Wis. Stats. (1995-96), because: (1) Company D purchases property immediately prior to transporting it and sells it immediately after transporting it; and (2) Company D's motor vehicle operations are not conducted merely as an incident to or in furtherance

of any business or industrial activity.

Company D qualifies for exemption under sec. 77.54(5)(b), Wis. Stats. (1995-96), on its purchases of motor trucks because it uses the motor trucks exclusively as a common carrier.

Example 6:

Facts:

- Company A is engaged in business as a landscaper.
- Company A also holds itself out to the public as a seller of fill dirt and topsoil as part of its landscaping business.
- Company A enters into an agreement with customers to sell fill dirt and topsoil and deliver the fill dirt and topsoil to the customers.
- Company A purchases fill dirt and topsoil from various suppliers and immediately loads the fill dirt and topsoil into Company A's trucks.
- Company A transports the fill dirt and topsoil to the customers' locations and transfers possession of the fill dirt and topsoil to the customers, by dumping it in piles.
- Company A bills the customers for the fill dirt

and topsoil, plus a charge for transportation.

- Company A makes its profit from buying and selling fill dirt and topsoil, from transporting fill dirt and topsoil, and from landscaping activities.

Tax Treatment:

Company A must pay sales or use tax on the trucks it uses to transport fill dirt and topsoil to its customers. Company A's transportation of fill dirt and topsoil is not "for hire," as defined in sec. 194.01(4), Wis. Stats. (1995-96), because the transportation is conducted in furtherance of its business of landscaping and buying and selling fill dirt and topsoil.

C. Company engaged in a non-carrier business only

Example 7:

Facts:

- Company I is engaged in business as a manufacturer and seller of widgets.
- Company I has 10 motor trucks, all of which it uses to transport the widgets it manufactures to its customers (i.e., private carriage).

Tax Treatment:

Company I must pay sales or use tax on the 10 motor trucks which it uses in private carriage.

D. Non-exclusive use**Example 8:***Facts:*

- Company J is engaged in business as a manufacturer and seller of widgets and as a common carrier.
- For its common carrier operations, Company J meets the definition of “common carrier” (i.e., Company J holds itself out to the public as willing to transport property for hire over the public highways by advertising in the yellow pages and by other advertising).
- Company J has one motor truck which it uses 40% in private carriage to transport its own widgets and 60% as a common carrier.

Tax Treatment:

Company J does not qualify for exemption under sec. 77.54(5)(b), Wis. Stats. (1995-96), on its purchase of the motor truck because it is not used exclusively as a common or contract carrier.

E. Garbage and snow hauling**Example 9:***Facts:*

- Company M hires Hauler N to transport its garbage to Landfill L.
- The garbage has no value.
- Landfill L charges Company M an amount per ton for dumping.
- Hauler N uses its motor truck exclusively to haul garbage for Company M, as described above.

Tax Treatment:

Hauler N does not qualify for exemption under sec. 77.54(5)(b), Wis. Stats. (1995-96), on its purchase of the motor truck because it is not used in hauling property of others. The garbage, because it has no value, is not considered “property” for purposes of the definition of “common motor carrier” in sec. 194.01(1), Wis. Stats. (1995-96), or the definition of “contract motor carrier” in sec. 194.01(2), Wis. Stats. (1995-96).

Example 10:*Facts:*

- Municipality O has excess snow which has been plowed from streets. Mu-

nicipality O does not have room to store the snow.

- Municipality O hires Hauler P to haul excess snow to an empty lot where it will melt.

Tax Treatment:

Hauler P does not qualify for exemption under sec. 77.54(5)(b), Wis. Stats. (1995-96), on its purchase of the motor truck because it is not used in hauling property of others. The snow, because it has no value, is not considered “property” for purposes of the definition of “common motor carrier” in sec. 194.01(1), Wis. Stats. (1995-96), or the definition of “contract motor carrier” in sec. 194.01(2), Wis. Stats. (1995-96). □

6 House Watching Services

Statutes: Section 77.52(2)(a)10, Wis. Stats. (1995-96)

Background: Section 77.52(2)(a)10, Wis. Stats. (1995-96), provides that the gross receipts from the repair, service, alteration, fitting, cleaning, painting, coating, towing, inspection, and maintenance of all items of tangible personal property are subject to Wisconsin sales and use tax unless, at the time of such repair, service, alteration, fitting, cleaning, painting, coating, towing, inspection, or maintenance, a sale of such type of tangible personal

property would have been exempt from sales and use tax. The repair, service, etc., to real property is not a service subject to Wisconsin sales and use tax.

Section 77.52(2)(a)10, Wis. Stats. (1995-96), also provides that certain items retain their character as tangible personal property for purposes of repair, service, alteration, fitting, cleaning, painting, coating, towing, inspection, and maintenance, regardless of the extent to which they are fastened to, connected with, or built into real property. Some of these items are furnaces, bathroom fixtures, and burglar and fire alarm systems (list not all inclusive).

Facts:

Company A is in the business of watching houses while the owners are gone for extended periods of time (e.g., owners taking a two-week vacation or owners leaving their home to go to Florida for the winter).

- Watching the house includes the following services:
 - a) Checking the furnace to see that it is providing heat;
 - b) Testing fire alarm systems;
 - c) Watering plants;
 - d) Flushing toilets and running water in sinks; and
 - e) Inspecting and testing the refrigerator, stove, and air conditioner.

Question: Is the charge for house watching subject to Wisconsin sales tax?

Answer: Yes. Since the services performed by Company A are services, inspection, and/or maintenance to items that are tangible personal property or retain their character as tangible personal property, the services are subject to Wisconsin sales tax under sec. 77.52(2)(a)10, Wis. Stats. (1995-96). □

7 Iced Coffee

Statutes: Sections 77.54(20) and 97.29(1)(i), Wis. Stats. (1995-96)

Wis. Adm. Code: Section Tax 11.51(2)(b), Wis. Adm. Code (December 1996 Register)

Background: Section 77.54(20)(intro.), Wis. Stats. (1995-96), provides: “Except as provided in par. (c), there are exempt from the taxes imposed by this subchapter the gross receipts from the sales of, and the storage, use or other consumption of, food, food products and beverages for human consumption.”

Section 77.54(20)(a)11, Wis. Stats. (1995-96), provides that “food,” “food products,” and “beverages” include coffee, coffee substitutes, tea, and cocoa.

Section 77.54(20)(b)4, Wis. Stats. (1995-96), provides, in part, that “food,” “food products,” and “beverages” do not include soda water beverages as

defined in sec. 97.29(1)(i), Wis. Stats.

Section 77.54(20)(c)1, Wis. Stats. (1995-96), provides, in part, that sales of meals, food, food products, and beverages sold for direct consumption on the premises are taxable.

Section 97.29(1)(i), Wis. Stats. (1995-96), provides that “soda water beverage” means all beverages commonly known as soft drinks or soda water, whether carbonated, uncarbonated, sweetened, or flavored.

Facts: Company A is a grocery store which sells flavored coffee drinks (“iced coffee”) for consumption off the grocery store premises. The iced coffee is in bottles and cans and contains coffee, milk, sugar, and other ingredients, including flavorings. The iced coffee comes in various flavors, including mocha, frapuccino, hazelnut, french vanilla, and dark roasted. Some of the iced coffee is sold at room temperature and some is refrigerated.

Question: Do Company A’s sales of iced coffee qualify for exemption under sec. 77.54(20), Wis. Stats. (1995-96), as sales of “beverages” for human consumption?

Answer: Yes. Section 77.54(20)(a)11, Wis. Stats. (1995-96), provides that “beverages” includes coffee. Iced coffee is considered coffee. □