

or an amended return filed, the statute of limitation for adjusting the Wisconsin return for the year involved is extended from the normal 4 year period to 10 years. Administrative Rule Tax 2.105 provides additional information regarding this reporting requirement and indicates when adjustments made by the IRS are considered to become final.

To simplify the filing of an amended return, Wisconsin Form 1X for individuals and Form 4X for corporations may be used. These forms are available at any Department office. The amended Wisconsin return or copy of the federal audit report should be sent to:

Wisconsin Department of Revenue  
Audit Bureau  
Post Office Box 8906  
Madison, Wisconsin 53708

## TAX RELEASES

*("Tax Releases" are designed to provide answers to the specific tax questions covered, based on the facts indicated. However, the answers may not apply to all questions of a similar nature. In situations where the facts vary from those given herein, it is recommended that advice be sought from the Department. 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.)*

### INCOME TAXES

#### Capital Loss Deduction

Under s. 71.05 (1) (j), Wis. Stats., a subtraction modification is available for amounts of long-term capital loss which are not allowable as a deduction in computing federal adjusted gross income.

For federal income tax purposes, only 50% of a net long-term capital loss can be used to reduce ordinary (other than capital gain) income. The subtraction modification available for Wisconsin purposes provides that capital losses are deductible in full (subject to an annual limitation of \$1,000) on the Wisconsin income tax return. The Department has received inquiries regarding the proper application of this modification in the following situation:

A taxpayer has a Wisconsin long-term capital loss carryforward of \$5,000 available for the taxable year

1978. No loss carryforward is available for federal purposes for 1978. During July 1978 this taxpayer sold stock realizing a long-term capital gain of \$3,000 and received wages in the amount of \$15,000.

On the 1978 Wisconsin income tax return, this individual should report the following:

Federal adjusted gross income (includes \$1,500 of long-term capital gain and \$15,000 of wages) - line 25, Form 1	\$16,500
Addition modification (½ of capital gain not included in federal income) - line 26, Form 1	1,500
Subtraction modification - line 29, Form 1	<u>(4,000)</u>
Wisconsin Total Income	<u>\$14,000</u>

A Wisconsin capital loss carryforward claimed as a subtraction modification under s. 71.05 (1) (j) may be used to offset the entire amount of capital gain income includable in Wisconsin income plus \$1,000 of other income. In the above example, the subtraction modification of \$4,000 offsets the \$3,000 of gain included in income, plus an additional \$1,000 of income.

### SALES TAX

#### When and Where a Sale Takes Place

Section 77.51 (4r) of the sales and use tax law locates a sale involving the transfer of the ownership of property both as to time and place as follows:

"A sale or purchase involving transfer of ownership of property shall be deemed to have been completed at the time and place when and where possession is transferred by the seller or his agent to the purchaser or his agent, except that for purposes of this subsection a common carrier or the U.S. postal service shall be deemed the agent of the seller, regardless of any f.o.b. point and regardless of the method by which freight or postage is paid."

The effect of this statute on the determination of whether a sale is a Wisconsin or out-of-state sale is illustrated by the following examples:

1. When a Wisconsin seller transfers possession of tangible personal property to the purchaser at the seller's Wisconsin plant or other Wisconsin place of business, and the buyer removes the property in its own truck or other conveyance, possession transfers to the buyer in Wisconsin and there has been a Wisconsin sale. It is immaterial that the purchaser may, subsequent to the sale, transport the property out of the state. This sale is subject to the Wisconsin tax, except when some other exemption applies to the transaction.
2. When a Wisconsin seller carries the property in its own conveyance from its place of business in Wisconsin to Chicago, and delivers the property to an Illinois customer, possession has transferred in Illinois and the sale is not a Wisconsin sale. In this situation the result would be the same if the seller moved the goods in a conveyance operated by an employe, or by an independent contractor engaged by the seller for such hauling.
3. When property is transferred between the seller and the buyer by a common carrier or by the United States Postal Service, such property is deemed to come into the possession of the buyer when turned over to the buyer or the buyer's agent by the carrier or postal service at destination regardless of the f.o.b. point and regardless of the method by which the freight or postage is paid. Accordingly, sales made by a Wisconsin seller to a nonresident buyer which are shipped by common carrier f.o.b. the seller's Wisconsin plant and delivered by such common carrier to the purchaser in Illinois, are not Wisconsin sales.

### REPORT ON LITIGATION

*(This portion of the WTB summarizes recent significant Tax Appeals Commission and Wisconsin court decisions. In cases which decisions adverse to the Department's position are rendered, it will be noted whether or not the Department acquiesces or will appeal.)*

**Department of Revenue vs. Romain A. Howick** (Circuit Court of Washington County, Case No. 78-CI-0544, November 6, 1978.) The taxpayer purchased securities prior to becoming a Wisconsin resident and then

sold them after becoming a resident of this state.

Securities from 12 corporations were sold in 1970 and stocks from 3 additional corporations were sold in 1973. The Department computed gain or loss from each security using either the stock's market value on the date taxpayer's Wisconsin residence was established or the stock's federal basis. The Department did not compute a gain on any sale for Wisconsin purposes when federal loss actually occurred.

The issue involved in this case is how income or losses arising from capital gains or losses should be measured for Wisconsin individual income tax purposes when the taxpayer acquired the securities prior to moving to Wisconsin and sold the securities after becoming a Wisconsin resident.

The taxpayer contended that his original cost was his basis. The Department contended that the taxpayer's basis is the fair market value of the stock on the date the taxpayer became a Wisconsin resident. (The Department's position on this issue is contained in Administrative Rule Tax 2.97, "Sale of constant basis assets acquired prior to becoming a Wisconsin resident".)

The Tax Appeals Commission held in favor of the taxpayer. The Commission found that the Department's position had the ultimate effect of creating artificial gain from actual loss when the sales for the 2 years under review were viewed on a net, rather than an individual, sale basis.

The Circuit Court of Washington County held in favor of the taxpayer. The Court stated that the Department's interpretation may violate the equal protection clause of the Fourteenth Amendment to the U.S. Constitution.

The Department has appealed this decision.

**William B. Riley vs. Department of Revenue** (Wisconsin Tax Appeals Commission, December 12, 1978.) In 1972, taxpayer was a partner in a Wisconsin partnership. On October 1, 1972, when taxpayer was not a resident of Wisconsin, the capital assets of the partnership were sold to a Wisconsin corporation for \$140,000. In addition, the corporation agreed to collect and pay to the partners the partnership's outstanding accounts receivable.

Under the terms of the purchase, taxpayer was to receive 33 $\frac{1}{3}$ % of the

\$140,000 and 40% of the receivable collections over 4 years. On October 18, 1972, the Department advised taxpayer that his sale of the partnership interest was an intangible following residence and not subject to Wisconsin income taxation.

In 1978, the Department issued an assessment for income taxes covering 1973, 1974 and 1975, taxing the receivables collected and paid to the taxpayer during the period. The Department contended that the collection and payment of the receivables to the taxpayer was a transaction separate from the sale of the partnership interest and therefore, taxable as a distributive share of a Wisconsin partnership's net income.

Taxpayer contended that the October 1, 1972 sale included both capital assets and receivables made when he was not a Wisconsin resident. The commission held in favor of the taxpayer, stating that the sale of both accounts receivable and capital assets was consummated on October 1, 1972. Thus, taxpayer's gain while he was a nonresident is not taxable.

The Department has appealed this decision.