titling them to obtain birds and eggs. In addition, a very small number of birds was sold to taxidermists.

During this period the taxpayer did not have a seller's permit and did not collect sales tax on any of its sales nor file sales and use tax returns with the department. In addition the taxpayer did not request nor receive sales and use tax exemption certificates from its customers. The taxpayer did not contact any representative of the department to inquire into the sales tax status of its sales, nor review the Wisconsin Statutes. In April, 1981 the department sent Jan Toubl a 2-page memorandum, captioned "To: Operators of Shooting Preserves and Game Farms", which summarized the application of the sales tax law to the gross receipts of these types of businesses.

The Tax Appeals Commission indicated that the first issue for determination was whether the taxpayer's sales of pheasants and other game birds were exempt under s. 77.54(20), Wis. Stats., from the Wisconsin sales tax as sales of food, food products, and beverages for human consumption. The Commission found that the taxpayer's sales of pheasants and other game birds to hunting clubs, dog kennels, taxidermists, and its sales of eggs and chicks were not exempt from the Wisconsin sales tax as sales of food, food products, and beverages for human consumption. The taxpayer had not met its burden of proof in providing exemption certificates covering these sales as required by ss. 77.52(13) and (14), Wis. Stats., or by showing in some other way, by clear and convincing evidence, what measure of tax is exempt.

The Tax Appeals Commission also held the taxpayer was not relieved of its tax liability on the basis of equitable estoppel, and the taxpayer has not shown that it has been denied equal protection of the laws under Amendment XIV, sec. 1 of the U.S. Constitution by the imposition of sales and use tax on its sales of game birds.

The fourth issue was whether references in the assessment notice to Wisconsin Statutes not applicable to the assessment invalidate the assessment. The Commission found that such references do not invalidate the assessment for the years 1974 and 1975.

The last issue was whether the department's imposition of delinquent interest rates was in accordance with the law and the Commission held that it was.

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. However, the answer 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 adjusiment. All references to section numbers are to the Wisconsin Statutes unless otherwise noted.)

INDIVIDUAL INCOME TAXES

CORPORATION FRANCHISE/INCOME TAXES

SALES/USE TAXES

HOMESTEAD CREDIT

INDIVIDUAL INCOME TAXES

1. Is Interest Income Received From Bonds Issued by the Wisconsin Housing Finance Authority Taxable?

Facts and Question: Is interest income which an individual receives from bonds issued by the Wisconsin Housing Finance Authority excludable from his or her Wisconsin taxable income under the provisions of s. 234.28, Wis. Stats.?

Answer: No. Interest received from a bond issued by the Wisconsin Housing Finance Authority is subject to Wisconsin income tax. Section 234.28 of the Wisconsin Statutes provides that the Wisconsin Housing Finance Authority (which is a corporate public body created by the Legislature) *itself* is exempt from taxation on income it receives. The tax exemption provided by s. 234.28, Wis. Stats., does not extend to interest which is received by individuals who invest in Wisconsin Housing Finance Authority bonds.

(The bonds which are the subject of this Tax Release should be distinguished from bonds which may be issued by a *municipal* public housing authority. Interest on public housing authority bonds of Wisconsin municipalities is exempt from Wisconsin income tax under s. 66.40(14), Wis. Stats. See Administrative rule Tax 3.095(4).)

2. Stock Dividend From a Dividend Reinvestment Plan of a Qualified Public Utility

Question: An individual received a stock dividend from a dividend reinvestment plan of a qualified public utility. This dividend has been excluded from federal taxable income but must be added back (per s. 71.05(1)(a)12, Wis. Stats.) in determining his or her Wisconsin taxable income. If this individual did not use any (or used only a portion) of the $100 dividend exclusion provided by the Internal Revenue Code when determining the amount of dividend income reported on line 8 of his or her Wisconsin Form 1, can the

unused portion of the $100 federal dividend exclusion be used to reduce the amount of public utility dividend income which must be added back for Wisconsin purposes?

Answer: Yes, any portion of the $100 federal dividend exclusion which is not used in determining the amount of dividend income reported on line 8 of Wisconsin Form 1 may be used to reduce the amount of public utility dividend required to be added back on line 29c of Form 1.

Example: During 1982 a single individual received stock dividends of $500 from a dividend reinvestment plan of a qualified public utility. No other dividends were received during 1982.

On line 8 of Wisconsin Form 1 no dividend income was reported and no portion of the $100 federal dividend exclusion was used. On line 29c, $400 would be entered as an addition to federal income ($500 public utility stock dividend less $100 dividend exclusion).

CORPORATION FRANCHISE/INCOME TAXES

1. Deductibility of Motor Carriers' Operating Authorities

Facts and Questions: The Motor Carrier Act of 1980 liberalized the requirements for obtaining interstate motor carrier operating authorities, and as a result existing interstate operating authorities declined in value. By a directive dated February 13, 1981 (ICC Accounting Series Circular No. 188), motor carriers who received their operating authorities from the Interstate Commerce Commission (ICC) were ordered by the ICC to write off against income of the year ending in December 1980 the cost (adjusted basis) of their interstate operating authorities owned on July 1, 1980 or acquired substantially under binding contracts on that date. On November 20, 1981 motor carriers also were ordered (ICC Accounting Series Circular No. 188 Revised) to recognize on their books the deferred tax effect of such write-off, since the federal Economic Recovery Tax Act of 1981 provided an ordinary deduction to be taken ratably over 60 months for the adjusted basis of such rights.

Example: Motor Carrier Corporation "A" has an interstate operating authority with an adjusted cost basis of $500,000 capitalized on its books as of July 1, 1980. It files Wisconsin franchise/income tax returns on a calendar year basis.

Questions:

1. May Corporation "A" deduct as depreciation or amortization pursuant to s. 71.04(15), Wis. Stats., ratably over a period of 60 months, the adjusted basis of $500,000?
2. May Corporation "A" deduct the entire $500,000 in one year as a write-off ordered by "any state or federal regulatory authority, body, agency or commission having power to make such demand or order. . ." pursuant to s. 71.04(8), Wis. Stats.?
3. Is the deduction pursuant to s. 71.04(8), Wis. Stats., a mandatory deduction required by all motor carriers with operating authorities, or is it a deduction which may, or may not, be elected by the motor carrier?
4. In what year, or years, may the deduction be taken?
5. How is the election to claim a deduction pursuant to s. 71.04(8), Wis. Stats., to be made?
6. May a 1981 return be amended or adjusted to allow the full $500,000 deduction?
7. If the deduction is not taken pursuant to s. 71.04(8), Wis. Stats., is the basis of the authority reduced to zero?
8. May the election to claim the full deduction in 1981 be subsequently revoked?

Answers:

1. No. Corporation "A" may not deduct as depreciation or amortization over 60 months the adjusted basis of its operating authority, pursuant to s. 71.04(15). The authority is not depreciable property, therefore the provisions of the Internal Revenue Code relating to this item do not apply for Wisconsin corporation franchise/income tax purposes.
2. Yes. Corporation "A" may deduct the entire adjusted basis of $500,000, pursuant to s. 71.04(8).
3. The deduction under s. 71.04(8) is not mandatory, but may be elected.
4. The deduction may be taken on a corporation's Wisconsin franchise/income return for taxable year 1981. The write-off was ordered by the ICC on February 13, 1981, to be booked in the year ended December 31, 1980. Section 71.04(8) states the write-off is to be made in the "return covering the first income year *in which* the charge down or write-off is demanded or ordered." The charge down or write-off was ordered in 1981.
5. The election is made by taking a deduction for the adjusted basis of the authority on a 1981 Wisconsin corporation franchise/income tax return. Section 71.04 provides in part that "Every corporation, joint stock company or association shall be allowed to make from its gross income the following deductions: . . .(8) The amount any asset has been charged down or off by any corporation upon the demand or order of any state or federal regulatory authority, body, agency or commission having power to make such demand or order. . . provided all the requirements of this subsection have been complied with: the corporation must elect to make deduction under this subsection by claiming a charge down or write-off of such asset, in an amount consistent with the terms of the demand or order, in its return covering the first income year in which the charge down or write-off is demanded or ordered."
6. Yes, either a timely or late return can be amended or adjusted (within the statute of limitations provided in Chapter 71) to claim or allow the full deduction. If a deduction or amortization was claimed incorrectly on a return, amended returns should be filed as appropriate.
7. No. If a deduction is not taken, the cost basis of the authority remains a capital asset. Upon a subsequent sale, exchange, or other disposition of either the authority or the business to which it relates, the remaining adjusted cost basis of the authority is deductible in determining any recognized gain or loss, pursuant to s. 71.03(1)(g), Wis. Stats.
8. No. The election to claim the full deduction in 1981 once made, cannot be revoked, since s. 71.04(8) provides in part, "An election to claim or not claim a deduction under this subsection with respect to any such order shall be irrevocable".

SALES/USE TAXES

1. Construction and Leasing Grain Storage Bins and Silos to Farmers

Facts and Questions: A financial institution has a grain storage bin or silo constructed on a farmer's land after the farmer selects the size of the unit desired. Upon completion of the unit to the farmer's satisfaction, the financial institution, as the owner, leases the bin or silo to the farmer for a period of 5, 7 or 10 years. During the period of the lease the farmer is responsible for all upkeep and repairs, as well as the cost of insuring the item. At the end of the lease term, the farmer is *required* to purchase the item for a predetermined amount, at which point ownership would pass to the farmer. The farmer intends to make the item a permanent improvement to the farm.

In the event of a default on the part of the farmer, the financial institution has the right to demand full payment on the contract. In other words, all lease payments including the buyout amount would be due and payable. If the farmer is unable to pay, as owners of the unit, the financial institution may take possesson of it and either sell or release it to another party.

The lease is structured so that it may qualify under the new federal safe harbor provisions which allow for fixed buyout amounts and the tax benefits of ownership to accrue to the owner (lessor).

The questions are: (1) Is the person who constructs the grain bin or silo required to pay a sales or use tax on the cost of the materials used to construct the unit, and (2) Are the gross receipts received by the financial institution from the farmer subject to the sales tax?

Answers: (1) The building materials used by the person constructing the grain storage bin or silo are subject to tax because the person performing this construction is constructing or installing a realty improvement, and (2) The gross receipts received from the farmer by the financial institution are not taxable, because this is considered a conditional sale of a realty improvement to the farmer. Although this transaction qualifies for the 'safe harbor' lease provisions of the federal Internal Revenue Code, the transaction is not a rental or lease for Wisconsin sales/use tax purposes. Rather, it is a conditional sale.

2. Governmental Unit's Receipts From Shrub and Tree Services and Charges for Trees

Facts and Questions: Chapter 317, Laws of 1981, effective May 1, 1982, imposed the 5% sales tax on the gross receipts of persons (including cities and other governmental units) providing landscaping and lawn maintenance services. The imposition language in s. 77.52(2)(a)20. Wis. Stats., includes "shrub and tree services". These services include the planting, bracing, fertilizing, spraying, pruning, trimming, surgery and removal of shrubs, stumps and trees.

Questions concern the amounts a governmental unit collects from builder/developers and property owners for trees to be planted in terraces, and whether any of these receipts are subject to the sales tax.

1. Removal of Trees A governmental unit notifies a property owner that a diseased tree must be removed. If the property owner does not remove the tree by a specific date, the governmental unit either removes it or has it done by a subcontractor. The governmental unit then bills the property owner for the removal of the tree, and this charge may appear on the person's property tax bill.
2. Builder/Developer Deposits Funds for Trees A governmental unit also may require each builder/developer to deposit an amount with it prior to the issuance of a building permit in a new subdivision, so that when the development is completed the governmental unit will have the funds necessary to plant trees along the terrace in front of the development.
3. Property Owner Deposits One-Half the Cost of a Tree Property owners located in established areas are required to deposit with the city one-half the cost of a tree the property owner requests the governmental unit plant in a terrace. The city then matches this amount and delivers a tree to the property owner, who is responsible for planting the tree.

Answers:

1. A governmental unit's gross receipts from removing trees in lawn and garden areas are subject to the sales tax under s. 77.52(2)(a)20, Wis. Stats., effective May 1, 1982, even though the charge may appear on the property owner's property tax bill. The amount a subcontractor charges the governmental unit to do the work is not taxable under the resale exemption provided under s. 77.52(13), Wis. Stats., and under the exemption provided under s. 77.54(9a), Wis. Stats.
2. The collection of a deposit from a builder/developer is not a taxable transaction, but when trees are planted by the governmental unit it is providing a tree service, which includes the charge for the tree, subject to the tax under s. 77.52(2)(a)20, Wis. Stats., effective May 1, 1982.
3. The collection of the deposit is not taxable. However, when the governmental unit delivers a tree to the property owner it is making a sale of tangible personal property. Such sales have been taxable since 1969.

3. Landscaping or Lawn Maintenance on a Utility's Right-of-Way

Facts and Question: Various types of work are performed on a utility's right-of-way. Are these services subject to the sales tax under s. 77.52(2)(a)20, Wis. Stats., as taxable landscaping services, effective May 1, 1982?

1. Right-of-Way Work, Including Tree Trimming Rights-of-way are easements over land owned by others and are used by utilities for their transmission and distribution lines. Before the right-of-way can be used by the utility, it must be cleared of trees, brush, rock, etc., to provide access and safety in the construction of power lines. Then annually, rights-of-way are sprayed or otherwise treated to prevent brush and weed growth that would hamper access to the lines or create safety problems. Trees on rights-of-way also are trimmed periodically to prevent interference with overhead distribution lines or as a result of storm damage where limbs have fallen on power lines.
2. Restoration Work Restoration work may involve 2 types of activities:

   (a) the installation of new underground lines when a utility extends its gas service or underground electrical service. A trench is dug and then covered. Since the land is being developed, little more than refilling and compacting occurs; and

(b) the repair or replacement of existing underground lines. After digging the trench, refilling and compacting, the utility is obligated by law to restore the property to its usual condition. This may entail spreading grass seed or laying sod after refilling and compacting. In some cases bushes and shrubs are replaced.

Answer: The taxability of a utility's right-of-way and restoration work depends upon the type of service involved and whether it is performed on lawn or garden areas. Landscaping services which are taxable when performed on lawn or garden areas include: (1) planting, sodding, mowing, raking, weeding, thatching, spraying and fertjlizing lawns; (2) plowing, rototilling, planting, spraying, fertilizing and weeding gardens; (3) planting, bracing, fertilizing, spraying, pruning, trimming, surgery and removal of shrubs, stumps and trees; (4) filling, leveling and grading topsoil; and (5) installing rocks, stone, boulders, wood bark, wood chips, wood timber or wood ties for decorative or ornamental purposes. "Lawn and garden areas" include developed areas found in residential, business, commercial and industrial areas, cemeteries, golf courses, athletic fields and stadiums as well as parking lot areas near or adjacent to buildings or other residential areas, and lawns and gardens associated with farm residences. Therefore, the answers to the questions are:

1. Right-of-way work described in the example performed for a utility in rural undeveloped areas is not taxable. Therefore, the clearing of trees, brush and rocks, the spraying to prevent brush and weed growth and tree trimming in rural undeveloped areas is not subject to sales tax. However, if any of these services to lawns, gardens, trees or shrubs are performed for a utility in lawn or garden areas, the charge for the service is taxable under s. 77.52(2)(a)20, Wis. Stats.
2. The digging of trenches, refilling and compacting of soil in the installation, removal or repair of underground utility lines described in the example is not taxable. However, the charge for grading of topsoil, spreading grass seed, laying sod and replacing bushes and shrubs in lawn or garden areas is taxable under s. 77.52(2)(a)20, Wis. Stats.

HOMESTEAD CREDIT

1. $5,000 Write-off for Section 179 Property Not Considered Depreciation for Homestead Credit and Farmland Credit

Facts and Question: Section 202 of the Federal Economic Recovery Tax Act of 1981 amended Section 179 of the Internal Revenue Code to permit taxpayers (other than trusts, estates, and certain noncorporate lessors) the election to expense certain property, called Section 179 property, rather than depreciate it. Qualifying taxpayers may elect for federal purposes to expense amounts ranging from a maximum of $5,000 in 1982 and 1983 to $10,000 in 1986 and thereafter.

Question: How does this code Section 179 expense provision affect the computation of household income for Homestead Credit and Farmland Preservation Credit purposes, that is, is this considered as depreciation for purposes of adding depreciation back to income as provided by ss. 71.09(7)(a)1 and 71.09(11)(a)6a, Wis. Stats.?

Answer: Since code Section 179 is an expense and not depreciation, the expense would not be included in household income as part of the depreciation add back provisions.