2. Shares are voted in such a manner that the vote of the majority of employes controls the vote of the majority shares.

3. The pass-through voting requirements under 26 USC 409A(e) are met.

4. The majority of the board of directors are elected by the employes.

Question 2: What are the voting requirements under 26 USC 409A(e)?

Answer 2: The voting requirements under 26 USC 409A(e) are as follows:

1. If the employer has registration-type securities, the employe must be entitled to direct the manner in which the securities allocated to him or her are voted by the employe stock ownership plan. Registration-type securities are publically traded stocks of the employer which provide voting and dividend rights equivalent to the rights possessed by shareholders of the highest class of stock of the issuing corporation which is readily available on a public market.

2. If the securities of the employer are not registration-type securities (i.e., stock of a closely held corporation), the employe must be entitled to direct how the employe stock ownership plan will vote stock allocated to him or her on matters which must be decided by more than a majority vote of outstanding common shares.

Question 3: A Delaware corporation doing business primarily in Wisconsin employs 100 people. Of the 100 employes, 7 own 84.7% of all voting stock in the corporation. The remainder of shares are owned by persons outside the corporation. Does this meet the requirement, under s. 560.16(1)(c)2, 1985 Wis. Stats., that the vote of the majority of employes controls the vote of the majority of shares?

Answer 3: No. The term "majority of employes" is interpreted by the Department of Development to require that over 50% of *all* employes of the corporation own stock in the corporation and, as a group, control the vote of the majority of shares. In this example, 51 employes would have to own some of the corporation's stock and in total they must control over 50% of all voting stock in the corporation for it to qualify as an employe-owned business.

Question 4: A taxpayer is a major shareholder in a small corporation owning 40% of the corporation's stock. Twenty percent of stock is held equally by the other 5 employes of the corporation. The remaining 40% of the stock is held by persons outside the corporation. May the taxpayer use the entire amount of interest paid on a loan to purchase stock in the corporation in computing the itemized deduction credit?

Answer 4: If the taxpayer is an employe of the corporation and receives 50% of all his or her 1986 wage and salary income from the corporation, the first condition given in Answer 1 is met and provided the corporation meets all other conditions in Answer 1, the taxpayer may use the entire amount of interest paid in computing the itemized deduction credit.

Question 5: A taxpayer took out a loan in 1985 to purchase stock in an employe-owned business. At the time the stock was purchased, the taxpayer was an employe of the business. On January 1, 1986, the taxpayer retired from the business. Can the taxpayer use the entire amount of interest paid in 1986 on the loan to purchase stock in the employe-owned business in computing the Wisconsin itemized deduction credit?

Answer 5: No. Because the taxpayer is no longer an employe of the business, the interest is not being "paid by an employe" and therefore, does not qualify as interest paid on a loan to purchase stock in an employe-owned business. However, the interest is "other interest" and may be used subject to the $1,200 limitation.

Question 6: An employe has an option to purchase stock in the company which employs him or her. The stock, if acquired, is subject to a substantial risk of forfeiture, as defined in Internal Revenue Code Section 83(c), for two years. If the corporation is an employe-owned business as defined in s. 560.16(1), 1985 Wis. Stats., is the entire amount of interest paid on a loan to purchase the restricted stock allowable in computing the itemized deduction credit or is the interest subject to the $1,200 "other interest" limitation until the restrictions lapse?

Answer 6: The entire amount of interest paid on a loan to purchase the restricted stock is allowable in computing the itemized deduction credit. Section 71.09(6r)(a), 1985 Wis. Stats., doesn't contain any provision to treat restricted stock differently from stock not subject to restrictions.

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CORPORATION FRANCHISE OR INCOME TAXES

1. Mortgage Banker's Apportionment Formula

Statutes: Sections 71.07(2), 71.07(2)(d)1 and (e), 1985 Wis. Stats.

Wis. Adm. Code: Section Tax 2.49, July 1978 Register

Facts and Question: Section 71.07(2)(e), 1985 Wis. Stats., provides that financial organizations engaged in business within and without Wisconsin must apportion their net business income pursuant to rules of the Department of Revenue. "Financial organization" is defined in s. 71.07(2)(d)1, 1985 Wis. Stats., and

means "any bank, trust company, savings bank, industrial bank, land bank, safe deposit company, private banker, savings and loan association, credit union, cooperative bank, small loan company, sales finance company, investment company, brokerage house, underwriter or any type of insurance company." Section Tax 2.49, Wis. Adm. Code, requires financial organizations to use a 2-factor apportionment formula rather than the standard 3-factor apportionment formula provided for in s. 71.07(2), 1985 Wis. Stats.

Mortgage banker XYZ's primary business activities involve the originating of first mortgage loans on residential real estate and the pooling of these loans in GNMA mortgage backed securities. Even though the mortgage banker has, in effect, sold these loans, it continues servicing the loans, which includes collecting the monthly principal, interest, and real estate tax escrow payments and remitting these amounts to the appropriate parties.

Is mortgage banker XYZ a "financial organization" within the meaning of s. 71.07(2)(d)1, 1985 Wis. Stats., and, therefore, required to apportion its income under section Tax 2.49, Wis. Adm. Code?

Answer: No, mortgage banker XYZ is not included within the definition of financial organizations under s. 71.07(2)(d)1, 1985 Wis. Stats. Therefore, mortgage banker XYZ is required to use the standard 3-factor apportionment formula provided for in s. 71.07(2), 1985 Wis. Stats.

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2. Sales Factor: Treatment of Intangible Income

Statutes: Section 71.07(2)(c), (cm) and (cr), 1985 Wis. Stats.

Background: In a Tax Release published in April 1986 in *Wisconsin Tax Bulletin* 46, the department provided some examples of intangible incomes which are includable in the sales factor of multi-state businesses based on the *U.S. Steel* and *IBM* Tax Appeals Commission decisions of May 9, 1985. The types of intangible income described in that Tax Release are includable only in taxable years prior to 1986 where the taxpayer has not exercised the option in 1985 Wisconsin Act 120. Wisconsin Act 120 provides, in part, that beginning with taxable year 1986, apportionable income from intangibles is not included in the sales factor computation except for certain royalties and franchise fees; however, at the taxpayer's option this treatment may be applied retroactively to all years prior to 1986 open to assessment or refund.

Part II. B. (1)(i) of the Tax Release states that "Gross receipts from dispositions (sales, exchanges or redemptions) of intangible assets (other than investments in nonunitary affiliates) includable in apportionable income" are includable in the sales factor.

Question 1: Do such dispositions include redemptions of certificates of deposit, bankers acceptances, repurchase agreements and time deposits?

Answer 1: Yes, proceeds from redemptions of certificates of deposit, bankers acceptances, repurchase agreements and time deposits are includable in the sales factor.

Question 2: Do such dispositions include withdrawals from money market funds, savings accounts and NOW checking accounts?

Answer 2: No, these withdrawals are not includable in the sales factor because they are not proceeds from the disposition of intangible investments.

Question 3: Are collections of receivables includable in the sales factor?

Answer 3: No, collections of accounts which had been included in the sales factor when they were recorded are not includable in the sales factor.

Question 4: Are sales of its own stocks and bonds by a corporation includable in the sales factor?

Answer 4: No, receipts from a corporation issuing its own securities are not proceeds from the disposition of intangible investments.

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SALES/USE TAXES

1. Real vs. Personal Property- Service Station Canopies

Statutes: Sections 70.03, 77.51(2) and (20), 1985 Wis. Stats.

Wis. Adm. Code: Section Tax 11.68(4), (5), and (6)(a)6, October 1986 Register

Wis. Tax Bulletin: Issue Number 4, page 4

Facts and Question: Section 70.03, 1985 Wis. Stats., defines real property as "The terms 'real property', 'real estate' and 'land' when used in chs. 70 to 79, shall include not only the land itself but all buildings and improvements thereon, and all fixtures and rights and privileges appertaining thereto. . ."

Service station canopies are constructed in a similar manner to the construction of a building. The supporting columns of the

actual roof of the canopy are secured within and imbedded into a concrete foundation which begins five feet below ground level. The completed canopy cannot be removed from the columns without destroying the columns. Nor can the columns be removed without destroying the foundation and the surrounding real estate into which they are affixed. For both Wisconsin state building codes and Wisconsin state property tax classification the constructed canopies are considered real property. Are these canopies considered to be real property or personal property for sales/use tax purposes?

Answer: Service station canopies constructed in the manner described above are deemed to be real property improvements for sales/use tax purposes. The gross receipts from the construction of such canopies are not subject to the sales tax. The person engaged in real property construction activities is the consumer of, and must pay tax on the purchase of, the building materials used in altering, repairing, or improving real property.

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2. Sales/Use Tax Due on the "Trade-in" of Motor Vehicles

Statutes: Sections 77.51(4)(b)3 and (15)(b)4 and 77.53(1), 1985 Wis. Stats.

Facts and Question: An automobile dealer purchased for $10,600 a wrecker subject to the sales and use tax for use in its business. The dealer took an automobile from inventory and used it to obtain a trade-in allowance of $3,000, making the net cash payment for the wrecker $7,600. The automobile used as a trade-in on the purchase of the wrecker was previously acquired for a trade-in allowance of $2,000 by the automobile dealer on the sale of a new automobile.

What sales and use taxes are due on the automobile dealer's purchase of the wrecker and the trade-in of a used vehicle acquired by trade-in?

Answer: Under s. 77.51(4)(b)3, 1985 Wis. Stats., the dealer should be charged sales tax by the seller of the wrecker, measured by the selling price of the wrecker minus the trade-in allowance, i.e., $7,600 ($10,600 - $3,000). The dealer also must report and pay tax to the Department of Revenue on the traded-in vehicle measured by the dealer's $2,000 cost of the vehicle because the dealer is using the vehicle for something other than resale. Since the dealer allowed $2,000 on the trade-in of this vehicle, the dealer's cost is considered to be $2,000.

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3. Third Party Purchases Car Through Auto Manufacturer's Employe

Statutes: Section 77.52(14), 1985 Wis. Stats.

Wis. Adm. Code: Section Tax 11.14(6)(a), June 1983 Register.

Facts and Question: An employe of an auto manufacturer purchased a car for his father-in-law in February 1985. He traded in his father-in-law's car. The father-in-law obtained a loan and bank draft using the new car as collateral. The bank draft which was endorsed by the father-in-law was used by the son-in-law to pay the dealer the net purchase price, plus sales tax, title fee and loan fee.

Although the son-in-law never used the car, or intended to use it, it was registered to him as required by the auto manufacturer. Then 11 months later in January 1986, the title was transferred to the father-in-law. On the application for title transfer they claimed exemption from sales tax by "gift."

Two transactions occurred in the acquisition and titling of this vehicle. Is a sales tax due on each transfer? Since the son-in-law never used the vehicle, could he claim the "resale" exemption even though the vehicle was titled in his name for approximately 11 months?

Answer: Sales tax is due on the original purchase of the vehicle from the dealer. The "resale" exemption cannot apply because the son-in-law is not a retailer who can issue a valid resale certificate. There is no sales tax due on the second transaction because no taxable gross receipts are involved in the second transfer.

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COUNTY SALES/USE TAXES

1. Contracts Entered Into Before Effective Date of County Tax

Statutes: Section 77.77(3), 1985 Wis. Stats.

Wis. Adm. Code: Section Tax 11.68(12), October 1986 Register

Facts and Question: If a contractor irrevocably enters into a written construction contract for a fixed price, without regard to the contractor's costs incurred in performing that contract, or irrevocably submitted a formal written bid accompanied by a bond or other performance guaranty prior to the effective date of the imposition of the 1/2% county use tax on construction materials, the building materials used in that particular construction contract are exempt from the 1/2% county tax.

If there is a change order to the contract or written bid before or after the county tax is in effect, are the building materials reflected in the change order also exempt from the tax?

Answer: The exemption in s. 77.77(3), 1985 Wis. Stats., for building materials used in a contract which the contractor must perform for a fixed price, only applies to construction projects irrevocably entered into before the tax was in effect in a particular county which adopted the county tax. The exemption also applies to formal written bids submitted before the tax is in effect. If there are change orders entered into after the county tax is in effect which increase the total contract price or the bid price, these change orders are not entitled to this exemption. However, change orders entered into before the county tax is in effect do not affect the exemption. Example: If a job was bid for $4,000,000 before the tax was in effect and a change order increases the total bid price to $4,300,000 after the county tax is in effect, building materials used in the $300,000 addition do not qualify for exemption under s. 77.77(3), 1985 Wis. Stats. However, if a change order merely substitutes one type of fixture for another type of fixture and the total contract price does not change, the exemption in s. 77.77(3), 1985 Wis. Stats., continues to apply.

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2. County Tax: Location at Which Metered Gas and Electricity are Sold

Statutes: Section 77.72(1), 1985 Wis. Stats.

Facts and Question: A service station is located on a county line. County "A" has the county tax and county "B" does not have a county tax. The electric meter is located in county "A" and the gas meter is located in county "B". The purchaser uses the electricity and gas in the building which is located in both counties. Is the location of the meter the point where the sale is made because possession of the product sold is transferred to the customer at that location?

Answer: Yes, possession of gas and electricity is transferred at the meter. If a gas or electric meter is located in a county which has adopted the county tax, the 1/2% county sales and use tax applies to the gross receipts from sales of gas or electricity made through that meter, even though a portion of the product purchased is used in a county which has not adopted the county tax. Conversely, if the meter is located in a county which has not adopted the county tax, such gross receipts from sales of gas and electricity are not subject to the county tax.

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