February 1, 1988. The corporation was fined $155.

T. A. Young, Inc., a tavern at 229 North 3rd Street, LaCrosse, was found guilty of wholesaling liquor without a permit. The corporation was fined $327.50 on March 7, 1988.

General Beverage Sales Co., a beer wholesaler located at 2855 Oregon Street, Oshkosh, Wisconsin, was found guilty of 3 counts of commercial bribery on April 18, 1988, in Winnebago County. The charges included giving of free half-barrels of beer to local retailers. General Beverage was fined $897.

NEW ISI&E DIVISION RULES AND RULE AMENDMENTS IN PROCESS

Listed below, under Part A are proposed new administrative rules and amendments to existing rules that are currently in the rule adoption process. The rules are shown at their state in the process as of June 30, 1988. Part B lists new rules and amendments which are adopted. ("A" means amendment, "NR" means new rule, "R" means repealed and "R&R" means repealed and recreated.)

A. Rules at Legislative Council Rules Clearinghouse

2.16	Change in method of accounting for corporations-A
2.19	Installment method of accounting for corporations-A
2.20	Accounting for acceptance corporations, dealers in commercial paper, mortgage discount companies and small loan companies-A
2.21	Accounting for incorporated contractors-A
2.22	Accounting for incorporated dealers in securities-R&R
2.24	Accounting for incorporated retail merchants-A
2.25	Corporation accounting generally-A
2.26	"Last in, first out" method of inventorying for corporations-A
2.45	Apportionment in special cases-A
2.50	Apportionment of net business income of interstate public utilities-A
2.505	Apportionment of net business income of interstate professional sport clubs-A
2.53	Stock dividends and stock rights received by corporations-A
2.56	Insurance proceeds received by corporations-A
2.65	Interest received by corporations-A
2.72	Exchanges of property by corporations generally-A
2.721	Exchanges of property held for productive use or investment by corporations-A
2.83	Requirements for written elections as to recognition of gain in certain corporation liquidations-A
2.88	Interest rates-A
3.44	Organization and financing expenses—corporations-R&R
3.45	Bond premium, discount and expense—corporations-A
11.05	Governmental units-A
11.09	Medicines-A
11.10	Occasional sales-A
11.12	Farming, agriculture, horticulture and floriculture-A
11.16	Common or contract carriers-A
11.18	Dentists and their supplies-A
11.19	Printed material exemptions-A
11.26	Other taxes in taxable gross receipts and sales price-A
11.32	"Gross receipts" and "sales price"-A
11.40	Exemption of machines and processing equipment-A
11.41	Exemption of property consumed or destroyed in manufacturing-A
11.51	Grocers' guidelist-A
11.57	Public utilities-A
11.61	Veterinarians and their suppliers-A
11.66	Communications and CATV services-A
11.67	Service enterprises-A
11.68	Construction contractors-A
11.84	Aircraft-A
11.85	Boats, vessels and barges-A

B. Rules Adopted in 1988

3.095	Interest income from federal obligations-R&R (effective 5/1/88)
11.10	Occasional sales-A (effective 1/1/88)

REPORT ON LITIGATION

This portion of the WTB summarizes recent significant Tax Appeals Commission and Wisconsin court decisions. The last paragraph of each decision indicates whether the case has been appealed to a higher court.

The last paragraph of each WTAC decision in which the department's determination has been reversed will indicate one of the following: (1) "the department appealed," (2) "the department has not appealed but has filed a notice of nonacquiescence" or (3) "the department has not appealed" (in this case the department has acquiesced to the Commission's decision).

The following decisions are included:

Corporation Franchise or Income Taxes

CORPORATION FRANCHISE OR INCOME TAXES

Interest and dividends—taxable. *American Telephone & Telegraph Co. v. Wisconsin Department of Revenue* (Court of Appeals, District IV, February 18, 1988). American Telephone & Telegraph Co., appeals an order of the Circuit Court affirming the Wisconsin Tax Appeals Commission's decision and order, as modified by its order on rehearing. The Commission affirmed the department's denial of AT&T's petition for redetermination of additional taxes for tax years ending December 31, 1972, through December 31, 1976.

AT&T claims that the failure of the department to tax AT&T as part of a unitary business violates ss. 71.07(2) and 71.07(2)(e), Wis. Stats., and the due process, commerce, and equal protection clauses of the United States Constitution because the apportionment formula by which the department determined AT&T's Wisconsin taxable income for tax years 1975 and 1976, taxed income earned outside the borders of the state.

Prior to this litigation, the department apportioned AT&T's business income by using in the apportionment formula the sales, property, and payroll of AT&T's Long Lines Department. Beginning in tax year 1975, pursuant to newly-created s. 71.07(1m), Wis. Stats., the department included in the apportionable business income of AT&T, income to its General Department from dividends and interest paid to it by its subsidiaries. However, the department made no change to the property, sales, and payroll factors of the apportionment formula. The Commission concluded that this was an error and ordered that for tax years 1975 and 1976 intangible income received by AT&T from its subsidiaries was to be included in the denominator of the sales factor.

AT&T claims that in order to comply with the commands of ss. 71.07(2) and 71.07(2)(e), Wis. Stats., and the United States Constitution, the department was required to treat AT&T and its subsidiaries as one entity and determine its tax liability by a combined report, or alternatively, was required to include in the property factor of the formula, its book cost investment in and advances to its subsidiaries which generated the dividend and interest income paid to it.

The department's contention is that the statutes and case law do not permit it to include in the apportionment formula, by combined reporting or otherwise, the value of AT&T's investment in the real and tangible personal property of its subsidiaries. The department argues:

A. The property from which AT&T's General Department derives its income is intangible property — stock and evidences of indebtedness — and that s. 71.07(2)(a)1, Wis. Stats., expressly excludes intangible property from the property factor.

B. Section 71.07(2)(a)1, Wis. Stats., includes only the "taxpayer's" real and tangible personal property and the subsidiaries are not the "taxpayer."

C. According to *Interstate Finance Corp. v. Dept. of Taxation*, 28 Wis. 2d 262, 137 N.W. 2d 38 (1965), and other cases, there is no statutory authority to include the sales, property, and payroll factors of subsidiaries in the apportionment formula.

The Court of Appeals concluded that neither the statutes nor Wisconsin case law excludes from the apportionment formula the value of AT&T's investment in the real and tangible personal property of its subsidiaries. The apportionment formula used by the department does not bear a reasonable relation to the corporate activities of the Bell System in Wisconsin; it apportions to Wisconsin far too much income of the Bell System in relation to its property located here, its sales here, or its payroll. The apportionment formula used by the department does not reflect a reasonable sense of how AT&T's income is generated and taxes value earned outside the borders of Wisconsin, contrary to ss. 71.07(2) and 71.07(2)(e), Wis. Stats., and the due process and commerce clauses of the United States Constitution. The Court does not, however, mandate a formula. The department should have flexibility in determining a formula which involves the least administrative inconvenience and expense, as long as the formula satisfies statutory and constitutional requirements. For this reason, the Court rejected AT&T's claim that a fair apportionment formula must include in the property factor the value of its investments in its subsidiaries.

The department appealed this decision to the Supreme Court which denied the department's petition for review. The case has been remanded to the Commission for further proceedings.

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Apportionment—property factor. *Fort Howard Paper Company vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, April 29, 1988). There are three issues raised in this case. The first issue relates to aircraft and how they are divided between Wisconsin and non-Wisconsin property in the property factor. The second issue relates to the State of Washington and the throwback of Washington sales to Wisconsin. The Department of Revenue has conceded this issue. The third issue raised relates to retroactive interest.

Fort Howard Paper Company contends that for purposes of the numerator in the property apportionment factor, found in s. 71.07(2)(a), Wis. Stats., and section Tax 2.39 (3)(a), Wis. Adm. Code, the value of the taxpayer's airplanes used both inside and outside Wisconsin should be based on the ratio of air time in Wisconsin to total air time. The department's redetermination was based on the ratio of total time located in Wisconsin, regardless of whether the plane was being used, to total time in a year.

The airplanes were hangared at Austin Straubel Field in Green Bay, Wisconsin, and were used to carry the taxpayer's employes and others flying with them to and from various destinations in Wisconsin and outside Wisconsin. Some of the taxpayer's employes who flew in the planes were regularly located in Wisconsin and others were regularly located in Oklahoma.

"Air time" is actual time from take-off to landing. "Flight time" is the time the plane is moving under its own power, including taxi time. "Hands-on time" is flight time plus pre-flight time for exterior check, interior check, and boarding, and post-flight time for unloading, exterior check, cleaning, fueling, and hangaring. "Total time" means all time in the calendar year, 24 hours a day and 365 days a year.

The department's notice of action determined the numerator of the property factor on the basis of "total time." The taxpayer contends the numerator should be based on "air time," or in the alternative, on "flight time" or "hands-on time."

The taxpayer further contends that the department improperly retroactively applied a 12% interest rate to the taxpayer's assessment for periods prior to July 31, 1981. Throughout the period under review, the statutory rate of interest on income and franchise tax deficiencies was 9% per year. Pursuant to s. 1090n, Chapter 20, Laws of 1981, the interest rates were increased from 9% to 12%. It is the taxpayer's position that pursuant to s. 2203 (45)(g) and s. 2204, Chapter 20, Laws of 1981, the effective date of the higher interest rate was July 31, 1981, and therefore the department should have assessed interest on the alleged deficiencies at a rate of 9% until July 30, 1981, and thereafter at the rate of 12%.

The Commission concluded that the department incorrectly calculated the property factor for the taxpayer's airplanes on the basis of the ratio of total time the planes were located in Wisconsin to total time everywhere, rather than on the basis of "flight time" inside and outside Wisconsin. The Commission has jurisdiction to determine the retroactive interest rate issue. The department was correct in retroactively applying a 12% interest rate. The increased interest rate is not unconstitutional.

The taxpayer and the department have not appealed this decision but the department has filed a notice of nonacquiescence in regard to this matter.

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Franchise tax—imposition. *Savings League of Wisconsin, Ltd., Equitable Savings & Loan Association, Liberty Savings & Loan Association, and Marathon County Savings & Loan Association v. Wisconsin Department of Revenue* (Court of Appeals, District IV, October 15, 1987). This appeal is from a summary judgment declaring constitutional s. 71.01(2), Wis. Stats., which imposes on domestic corporations an annual franchise tax for the privilege of doing business in the state.

The taxpayers claim that s. 71.01(2), Wis. Stats., violates the supremacy clause, Art. VI of the federal constitution, the borrowing clause, Art. I, Sec. 8, Cl. 2 of the federal constitution, and 31 U.S.C. §3124 (1982), to the extent that a tax is imposed on income earned on federal obligations. They also argue that if s. 71.01(2), Wis. Stats., imposes what would otherwise be a valid corporate franchise tax, that the tax is nevertheless invalid because its principal purpose is to reach otherwise unreachable income earned on federal obligations.

The Court of Appeals concluded that s. 71.01(2), Wis. Stats., does not violate the supremacy or borrowing clauses of the United States Constitution or 31 U.S.C. §3124 and, therefore, affirmed the Commission and Circuit Court decisions.

The taxpayers have appealed this decision to the Supreme Court.

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Deferred income. *76th and Good Hope, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 2, 1988). The only unresolved issue raised in the taxpayer's petition for redetermination pertains to the manner in which the taxpayer treated income received by its restaurant for banquet room party deposits and gift certificates.

76th and Good Hope, Inc., is a corporation organized and existing under the laws of the State of Wisconsin, and as such is subject to the income tax provisions of Chapter 71 of the Wisconsin Statutes. Since October 1, 1979, the taxpayer has owned and operated Manning's Restaurant and Cocktail Lounge located in Milwaukee, Wisconsin.

Manning's Restaurant and Cocktail Lounge (Manning's) consists primarily of a restaurant, a bar, and four banquet rooms (two of which were added in 1983). In addition to serving food and beverages to "walk-in" customers during normal dining hours, the business also provides facilities, services, food, and beverages for private parties, banquets, and other social functions. The services included in the rental of a banquet room will depend upon the nature of the function. Among those services available to customers is the preparation and service of meals and drinks, clean up after meals, and cutting of wedding cakes.

Pursuant to the catering policies of Manning's, a specified deposit was required in advance when engaging one of the banquet rooms. In the case of weddings, an additional deposit was required six months before the date of the wedding. These deposits were subsequently applied toward the customer's final bill. Any cancellations received six months prior to the date of the function entitled the customer to a return of his/her deposit upon rebooking of the room. Customers cancelling less than six months prior to the date of the function forfeited their deposits.

As part of the restaurant business, Manning's sold gift certificates which were redeemable at the restaurant for food or beverages. Those gift certificates were paid for at the time of purchase and had no specified expiration date.

During the entire time it has been owned by the taxpayer, including taxable years in question, Manning's has followed the accrual method of accounting. Under this method, as applied by Manning's, all banquet room party deposits it received from customers were recorded as income in the year the function was held, rather than the year of receipt. Likewise, payments received for gift certificates were recorded in the year the certificate was redeemed as opposed to the year purchased. In those instances when a deposit was forfeited, the income was recognized in the year of the forfeiture.

The advance payments received by Manning's for gift certificates and banquet room deposits were recorded separately from other revenues on the business' balance sheet. The money actually received for those items, however, was deposited in the business' general money market account together with other business receipts. Once received there were no apparent restrictions placed upon the use of those monies.

Upon field audit, the department disallowed the taxpayer's treatment of the advanced payments for gift certificates and party deposits received by Manning's during the years 1979 through 1983. The department ruled that the income from those items must be recognized in the year in which it was received, as opposed to the year in which the party was held, or certificate redeemed.

The taxpayer argues the department's disallowance of the taxpayer's method of accounting, whereby it deferred recognition of the income it received for party deposits and gift certificates, was improper in that the method "clearly reflected" the taxpayer's income, the method proposed by the department is contrary to established restaurant accounting principles, the department's treatment of the income would result in an unwarranted distortion in the costs of facilities, food, beverages, and services provided by the taxpayer, as well as the income derived therefrom, and section 451 of the Internal Revenue Code provides that advance payments for goods may be reported on an accrual basis.

The Commission concluded that generally for both cash and accrual basis taxpayers, payments received in advance are usually income in the year actually received, provided no restrictions have been placed upon their use. The Wisconsin Department of Revenue properly disallowed the manner in which the taxpayer applied its accrual method of accounting which deferred recognition of income it received from party deposits and gift certificates to the year the parties were actually held or certificates redeemed, rather than in the year of receipt. During the years in question for Wisconsin corporate franchise purposes, Wisconsin had not adopted section 451 of the Internal Revenue Code, nor to date has it adopted Internal Revenue Procedure 71-21, and, therefore, is not bound by the deferral of income provisions contained thereunder.

The taxpayer has not appealed this decision.

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SALES/USE TAXES

Leases—teleprinters. *Wisconsin Department of Revenue vs. Dow Jones & Company, Inc.* (Circuit Court of Dane County, April 13, 1988). The Wisconsin Department of Revenue has petitioned for judicial review of a decision and order of the Wisconsin Tax Appeals Commission. That order vacated a sales and use tax assessment against Dow Jones & Company, Inc., upon the gross receipts from equipment charges for its leasing of teleprinters to the subscribers of its news service. The central issue is whether the Commission properly concluded that the teleprinter leasing is not taxable as a separate transfer of tangible personal property.

Dow Jones has provided financial and business news to its subscribers since 1882. From 1897 until the late 1960's, the news service information was delivered exclusively via "hard copy" teleprinters. With the advent of sophisticated video display devices, some subscribers opted to receive the service on such equipment, which they had obtained from third parties, primarily for other purposes. Dow Jones subsequently broke out and itemized a separate, flat charge in billing those who continued to receive the service in the traditional way. This had the effect of reducing the cost of the news service to the customers who opted to use their own video display equipment from what it had been under the single monthly charge formerly billed to all customers. It is this broken out and itemized "equipment charge" on which the department assessed sales tax.

The equipment charge was made up of Dow Jones' costs for depreciation of the teleprinter, ink, paper, parts and maintenance, and a "local loop" telephone cost. It also included a "display fee." Except for the display fee, Dow Jones realized no profit on the equipment charge, and all costs were merely passed through to the subscribers. The display fee is purely a service charge, and for teleprinter customers it was not separately billed but was a part of the equipment charge. For subscribers who did not use the teleprinter, the display fee was separately listed on the bill. For teleprinter customers, the display fee represented from 24-26% of the equipment charge. During the tax years in question, the overall equipment charge ranged from 41-52% of the total bill for teleprinter customers in 1978 to 41-50% in 1981.

The teleprinters remained the property of Dow Jones at all times, and it retained the right to remove them at any time. They had no use other than to receive the news service. They were self-actuating, and the only control which the customer could exercise over them was to "pull the plug" to turn them off. An Equipment Order Form was used for new customers who intended to use the traditional teleprinter mode of receiving the news service.