

ISI&E DIVISION OFFERS TAXPAYER ASSISTANCE

During the filing season of January through April 17, 1989, department personnel will be available to answer questions.

In the department's larger offices, assistance is provided on a daily basis (Monday through Friday). Assistance in other offices generally is available on Mondays only, although there is an exception for Ashland and Janesville as noted below.

Offices Providing Daily Assistance

Location	Address	Telephone No.	Hours
*Appleton	265 W. Northland	(414)832-2727	7:45-4:30
*Eau Claire	718 W. Clairemont	(715)836-2811	7:45-4:30
*Green Bay	200 N. Jefferson St.	(414)436-4230	7:45-4:30
*Kenosha	5500 8th Ave.	(414)656-7100	7:45-4:30
*LaCrosse	620 Main	(608)785-9720	7:45-4:30
*Madison	4638 University Ave.	(608)266-2772	7:45-4:30
Madison	212 E. Washington Ave.	NONE	8:00-4:15
*Milwaukee	819 N. Sixth St.	(414)227-4000	7:45-4:30
*Racine	616 Lake Ave.	(414)636-3711	7:45-4:30
*Waukesha	141 N.W. Barstow St.	(414)521-5310	7:45-4:30

Offices Providing Assistance on Mondays Only (unless otherwise noted)

Ashland	Courthouse	NONE	10:00-2:00 (b)
Baraboo	1007 Washington	(608) 356-8973	7:45-4:30
Beaver Dam	211 S. Spring St.	(414) 887-8108	7:45-4:30
Grafton	220 Oak St.	(414) 377-6700	7:45-4:30
Elkhorn	300 S. Lincoln St.	(414) 723-4098	7:45-4:30
Fond du Lac	160 S. Macy St.	(414) 929-3985	7:45-4:30
Hayward	221 Kansas Ave.	(715) 634-8478	7:45-11:45
Hudson	1810 Crestview Dr.	(715) 386-8224	7:45-4:30
Janesville	101 E. Milwaukee	(608) 755-2750	7:45-4:30 (a)
Lancaster	130 W. Elm St.	(608) 723-2641	7:45-4:30
Manitowoc	1314 Memorial Dr.	(414) 683-4152	7:45-4:30
Marinette	Courthouse	(715) 735-5498	9:00-12:00
Marshfield	630 S. Central Ave.	(715) 387-6346	7:45-4:30
Monroe	1220 16th Ave.	(608) 325-3013	7:45-4:30
Oshkosh	404 N. Main St.	(414) 424-2100	7:45-4:30
Rhineland	203 Schiek Plaza	(715) 362-6749	7:45-4:30
Rice Lake	9 W. John St.	(715) 234-7889	7:45-4:30
Shawano	420 E. Green Bay St.	(715) 526-5647	7:45-4:30
Sheboygan	504 S. 14th St.	(414) 459-3101	7:45-4:30
Superior	Courthouse	(715) 392-7985	8:00-4:30
Tomah	City Hall	(608) 372-3256	8:00-12:00
Watertown	600 E. Main St.	(414) 261-7700	7:45-4:30
Waupaca	201 1/2 S. Main St.	(715) 258-9564	7:45-11:45
Wausau	210 McClellan St.	(715) 842-8665	7:45-4:30
West Bend	120 N. Main St.	(414) 338-4730	7:45-4:30
Wisconsin Rapids	1681 Second Ave., S.	(715) 421-0500	7:45-4:30

(a) Monday through Wednesday

(b) Tuesday only

*Open during noon hour

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:

Individual Income Taxes

Laird C. Cleaver (p. 7)

Gain or loss — property transferred by gift

Urban P. Van Susteren (p. 8)

Assessments — failure to file

Corporation Franchise or Income Taxes

Mobil Oil Corporation (p. 8)

Franchise tax — constitutionality

Savings League of Wisconsin Ltd., et al. (p. 9)

Franchise tax — imposition

William Wrigley, Jr., Co. (p. 9)

Nexus

Sales/Use Taxes

Dairyland Harvestore, Inc. et al. (p. 9)

Refunds and remedies of taxpayer — claims for refund

INDIVIDUAL INCOME TAXES

Gain or loss — property transferred by gift. Laird C. Cleaver vs. Wisconsin Department of Revenue (Circuit Court of Dane County, August 16, 1988). The key

issue in this case is whether section 1026 of federal Public Law 98-369 should apply to the computation of Wisconsin income for Wisconsin income tax purposes during taxable year 1977.

In December of 1976, after establishing the Laird C. Cleaver Issue Trust, the taxpayer transferred irrevocably to the trustees of the trust 25,000 shares of Coca Cola Company common stock having a total value of \$1,895,312.50. At the time of the transfer, the trustees assumed the obligation to make payments for any and all gift taxes associated with the transfer, it being Cleaver's intention to transfer the stock as a "net gift."

In 1981, the Internal Revenue Service (IRS) issued an assessment against Cleaver for additional income taxes due of \$178,866. The assessment was based on the concept that the gift was part sale and that taxable gain should be recognized to the extent of the difference between the gift taxes paid and Cleaver's basis in the transferred property. Cleaver appealed to the U.S. Tax Court.

In 1982, in *Diedrich v. Commissioner*, 457 U.S. 191 (1982), the United States Supreme Court affirmed an earlier 8th Circuit Court of Appeals decision holding that when the donee pays the gift tax on a transfer of property, the donor realizes a taxable gain to the extent that the gift taxes paid exceed the donor's basis in the property.

In December of 1982, Cleaver settled with the IRS by paying additional income taxes of \$152,901, based on the payment of the gift taxes in taxable year 1977. At the same time, pursuant to sec. 71.11 (21m), Wis. Stats., Cleaver filed an amended Wisconsin income tax return incorporating the 1977 federal income tax changes, including an additional \$431,566 of gain because of the gift taxes paid on his behalf.

On July 18, 1984, the President signed into law Public Law 98-369, referred to as the Tax Reform Act of 1984 (TRA). Act section 1026, a non-Internal Revenue Code provision of the TRA, provided that

for property transferred prior to March 4, 1981, the donor's gross income did not need to include any amount attributable to the donee's payment of gift taxes on that property. Subsequently, Cleaver filed a claim for a refund of the federal income taxes he had paid as a result of the gift tax payment by his donee.

On August 1, 1984, Cleaver filed a second amended Wisconsin income tax return claiming a refund of \$49,199 based on the same reduction in gross income as claimed on the amended federal income tax return. The Department of Revenue (DOR) denied his Wisconsin refund claim. Cleaver then protested the denial and the DOR issued its denial of the petition for redetermination.

Cleaver filed a Petition for Review with the Wisconsin Tax Appeals Commission (TAC). By decision dated December 28, 1987, the TAC affirmed the department's denial of Cleaver's claimed refund.

The Court concluded that statutory language should not be read to include a special Congressional exception to the Code such as section 1026 of the TRA. Section 1026 of the TRA is not an interpretation or modification of the definition of gross income under the Code. Rather, it is a special exception to the retroactive effect of the *Diedrich* court's final interpretation of the definition of income under the Code for taxable year 1977. This reading is supported by the legislative history of section 1026. For a similar policy to apply in Wisconsin, the state legislature would need to enact a similar provision. To date it has not done so. Consequently, the meaning of gross income stands as interpreted by the *Diedrich* court for the 1977 tax year.

The taxpayer has appealed this decision to the Court of Appeals.

Assessments — failure to file. *Urban P. Van Susteren vs. Wisconsin Department of Revenue* (Court of Appeals, November

17, 1988). Urban Van Susteren appeals from an order of the Circuit Court of Outagamie County affirming a decision and order of the Tax Appeals Commission upholding an income tax assessment against him for tax years 1979, 1980, 1981, and 1982, including a fifty percent penalty pursuant to sec. 71.11(6)(b), Wis. Stats. (1985-86). The validity of the penalty is the only issue argued by the taxpayer.

The Court of Appeals concluded that the department did not establish by clear and convincing evidence that the taxpayer failed to make income tax reports with intent to defeat or evade the income tax assessment required by law and therefore reversed the order and remanded with directions to the trial court to reverse the decision and order of the Commission. (See WTB 50 for a summary of the Wisconsin Tax Appeals Commission decision.)

The department has appealed this decision to the Wisconsin Supreme Court.



CORPORATION FRANCHISE OR INCOME TAXES

Franchise tax — constitutionality. *Mobil Oil Corporation v. Michael W. Ley, Secretary of the Wisconsin Department of Revenue* (Court of Appeals, October 27, 1987). Mobil Oil Corporation appeals a summary judgment granted to Michael Ley in its suit by seeking a declaratory judgment that the Wisconsin corporate franchise tax is unconstitutional. The issue is whether the constitutional restrictions on the income tax under Article VIII, Section 1, of the Wisconsin Constitution apply to the Wisconsin corporate franchise tax measured by a corporation's net income.

Mobil contends that the Wisconsin Constitution requires that an income tax may be assessed only on profit or gain and not against capital or gross receipts. Mobile argues that these restrictions on

income tax apply to the Wisconsin corporate franchise tax because that tax is measured in the same manner as an income tax.

Mobil also contends that the windfall profit tax, which is paid by the producer at the wellhead at the time crude oil is produced, is invested capital and a cost of Mobil's production of crude oil. It asserts that this cost is then added to inventory and, when the crude oil is sold, becomes part of Mobil's cost of goods sold, which must be offset against gross receipts to determine net income. Mobil argues that by refusing to allow the windfall profit tax deductions under sec. 71.04(3), Wis. Stats., the Wisconsin Legislature is taxing income that is not profit. It concludes that unless an offset against gross receipts is permitted or Mobil is allowed to deduct the windfall profit tax from gross income to calculate net income, the state is taxing Mobil's capital or property contrary to Article VIII, Section 1 of the Wisconsin Constitution.

Mobil also argues that because net income has been selected as the method by which the amount of the tax is calculated, all constraints on the Legislature in imposing an income tax apply to the corporate franchise tax as well. It contends that one looks to the natural and reasonable affect of the tax, not to the language in which the Legislature frames the statute.

The Court of Appeals concluded that the Wisconsin Legislature was within its discretion to measure the corporate franchise tax by the corporation's net income without deducting the windfall profit tax. The Legislature was not required to adopt the method as suggested by Mobil in calculating the franchise tax, nor was it required to include any specific exemptions. This conclusion is in accord with other jurisdictions that, although interpreting somewhat different language, have allowed wide discretion in state legislatures' use of franchise and excise taxing power.

Furthermore, Mobil's argument that a tax, which looks and operates like an income tax, is by necessity an income tax, misses the issue. Clearly, the state is taxing the

income of the corporation by levying the corporate franchise tax, sec. 71.01(2), Wis. Stats. However, the issue is not whether the corporate franchise tax is a tax on income, but whether the constraints on the Legislature's power to levy an income tax apply to a corporate franchise tax measured by income. The limitations on the Legislature's ability to tax income do not apply to the corporate franchise tax. Accordingly, the Wisconsin corporate franchise tax calculated by net income without credit for the windfall profit tax paid does not violate Article VIII, Section 1 of the Wisconsin Constitution authorizing the Legislature to tax "privileges."

The taxpayer appealed this decision to the Wisconsin Supreme Court. The Wisconsin Supreme Court denied the petition for review on May 3, 1988.



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). A summary of this case appeared in WTB 57. It was reported that the taxpayers had appealed the decision of the Court of Appeals to the Supreme Court. The Wisconsin Supreme Court denied the petition for review on May 3, 1988. A further petition for review was dismissed by the United States Supreme Court on October 3, 1988.



Nexus. *William Wrigley, Jr., Co. vs. Wisconsin Department of Revenue* (Circuit Court of Dane County, October 19, 1988). The William Wrigley, Jr. Co. (Wrigley) is seeking a review of a decision dated November 25, 1987, of the Wisconsin Tax Appeals Commission which upholds the imposition of a franchise tax on its sales in

Wisconsin for the years 1973 through 1978. The Department of Revenue is seeking a review of that part of the Commission's decision disallowing the imposition of interest on the tax in question at the delinquent tax rate.

These issues were first decided by the Commission on November 18, 1986. (See WTB 50 for a summary of the Commission's decision.) On August 20, 1987, the Circuit Court remanded the case to the Commission for further proceedings. On November 25, 1987, the Commission affirmed its decision and order of November 18, 1986. (See WTB 55 for summaries of the remand by the Circuit Court and the Commission's decision.)

The Circuit Court concluded that by reason of the operation of 15 U.S.C. § 381, Wisconsin was without power to impose a tax upon Wrigley's net income during the years in question. Therefore, the Commission's determination was reversed. Because Wisconsin was prohibited from imposing the tax in question, it was unnecessary to reach the department's contention that interest should have been assessed at a higher rate than that allowed by the Commission.

The department has appealed this decision to the Court of Appeals.



SALES/USE TAXES

Refunds and remedies of taxpayer — claims for refund. *Dairyland Harvester, Inc. and Badgerland Harvester Systems, Inc., f/k/a Badgerland Harvester Products vs. Wisconsin Department of Revenue* (Circuit Court of Dane County, June 13, 1988). Dairyland Harvester, Inc., and Badgerland Harvester Systems, Inc., jointly bring a petition for review of the Tax Commissioner's holding that Dairyland and Badgerland were not "persons" within the meaning of sec. 77.59(4), Wis. Stats., and, therefore, did not have standing to file a claim against

the Department of Revenue for an offset of sales taxes erroneously paid.

The Court must decide the issue of whether or not Badgerland and Dairyland are "persons" within sec. 77.59(4), Wis. Stats.

The department held that the taxpayers are not "persons" within sec. 77.59(4), Wis. Stats., because they were not the

ones who were required to pay the sales tax and were not the ones who paid the sales tax to the department. It was A. O. Smith, the department says, who was required to pay the sales tax and who in fact did pay such tax.

The Court held that A. O. Smith was the retailer and the seller and, therefore, the required person under sec. 77.58(3)(a), Wis. Stats., to file sales and use tax re-

turns. The taxpayers were not the required persons to pay the sales and use taxes to the department and cannot file a claim for a refund or an offset for sales taxes erroneously paid.

The taxpayers have appealed this decision to the Court of Appeals.

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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 adjustment. All references to section numbers are to the Wisconsin Statutes unless otherwise noted.)

The following Tax Releases are included:

Individual Income Taxes

1. Differences in Wisconsin and Federal Tax Treatment of Educational Assistance Program Benefits (p. 10)
2. Farm Loss Carryover (p. 11)
3. Moving Expenses Allowable When Taxpayer Retains Wisconsin Domicile (p. 12)

Individual and Corporation Franchise or Income Taxes

1. Appeal of Interest Charge for Underpayment of Estimated Taxes (p. 12)

Farmland Preservation Credit

1. Farmland Preservation Credit - Who Is the Claimant? (p. 12)

Homestead Credit

1. Homestead Credit: Methods for Determining Property Taxes on Property Used for Business Purposes (p. 13)

Sales/Use Taxes

1. Occasional Sales by Nonprofit Organizations (p. 14)

All Taxes

1. Time for Filing or Payment When the Statutory Due Date Falls on a Saturday, Sunday, or Legal Holiday (p. 16)

INDIVIDUAL INCOME TAXES

1. Differences in Wisconsin and Federal Tax Treatment of Educational Assistance Program Benefits

Statutes: Sections 71.01(6), Wis. Stats. (1987-88), 71.02(2)(d)11 and 12, Wis. Stats. (1985-86)

Facts and Question: Section 127 of the Internal Revenue Code (IRC) provides that gross income of an employee does not include amounts paid or expenses incurred by an employer for educational assistance to the employee if the assistance is furnished pursuant to a qualified educational assistance program.

Generally, the Wisconsin Statutes require that Wisconsin individual income taxpayers use the IRC as amended to December 31 of the prior year to determine Wisconsin net income. For example, for the 1988 taxable year, the IRC as amended to December 31, 1987, with some modifications, is used to determine 1988 Wisconsin net income.

Is the amount of exclusion allowable for Wisconsin for payments under an educational assistance program the same as for federal tax purposes?

Answer: Because Wisconsin generally uses the provisions of the IRC as amended to December 31 of the prior year, there are differences in some years in the amount of exclusion allowable. The maximum amount that may be excluded from gross income under an educational assistance program is as follows:

Tax Year	Maximum Allowable Exclusion	
	Federal	Wisconsin
1985	\$5,000	\$5,000
1986	\$5,250	0
1987	\$5,250	\$5,250
1988	\$5,250	0

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