ISI&E DIVISION OFFERS TAXPAYER ASSISTANCE

During the filing season of January through April 16, 1990, 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 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
*La Crosse	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
		(414) 524-3970 (after 2/3/90)	

Offices Providing Assistance on Mondays Only (unless otherwise noted)

Baraboo	1007 Washington	(608)356-8973	7:45-4:30
Beaver Dam	211 S. Spring St.	(414)887-8108	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
Grafton	220 Oak St.	(414)377-6700	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	1926 Hall Ave.	(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
Rhinelander	203 Schiek Plaza	(715)362-6749	7:45-4:30
Rice Lake	101 N. Wilson Ave.	(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	1418 Tower Ave.	(715)392-7985	8:00-4:30
Tomah	819 Superior Ave.	(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	710 Third St.	(715)842-8665	7:45-4:30
West Bend	120 N. Main St.	(414)338-4730	7:45-4:30
Wisconsin Rapids	1681 2nd Ave., S.	(715)421-0500	7:45-4:30

(a) Monday through Wednesday
* 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:

Thomas D. Kenton (p. 16)
Close-out sales

Joseph Sanfellippo (p. 16)
Leases and rentals—taxi cabs

INDIVIDUAL INCOME TAXES

Corporate liquidations—section 333. *Keith Breyer vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, July 27, 1989). The issue in this case is whether taxpayer-shareholder's failure to file with the department his written election to invoke certain tax benefits, available to shareholders in corporate liquidations, disqualified the taxpayer from obtaining those benefits.

The taxpayer was a shareholder in Kiemar Corporation. On October 5, 1984, Kiemar adopted a plan of liquidation, and on October 10, 1984, the taxpayer filed Form 964 with the IRS electing to have the gains on liquidation taxed under IRC sec. 333, a provision that affords a shareholder preferential federal tax treatment of such gains. At that time, a parallel provision under Wisconsin law gave shareholders favorable state tax treatment of liquidation gains if the shareholder, among other things, filed the election with department within 30 days after the adoption of the plan of liquidation (sec. 71.333(3), Wis. Stats.). In this case, the taxpayer didn't file any election with the department, and consequently the department denied the beneficial treatment the taxpayer later sought upon filing his returns.

The taxpayer made a motion for summary judgment, on the proposition that the department had no authority to, in effect, impose a tax penalty simply because of the failure to comply with statutory procedure. According to the taxpayer, because his federal adjusted gross income was reported correctly and because Wisconsin cannot make any adjustments (other than certain statutory modifications) to federal adjusted gross income if that income was reported correctly, the department here was precluded from making the adjustments it did.

The department made a motion for summary judgment, based on the argument that the failure to comply with statutory procedure bars the taxpayer from securing the tax benefits that a timely election would have permitted.

The taxpayer argued that his failure to file the election is of no consequence, because the department has no statutory authority to adjust the taxpayer's federal adjusted gross income except as specifically allowed as modifications under Wisconsin law. Because, the taxpayer reasoned, the adjustments made were not specifically authorized anywhere and because Wisconsin must start with the taxpayer's federal adjusted gross income if it is correct for federal purposes, the adjustments here were improper.

The Commission held that while it is true that Wisconsin adjusted gross income was defined by sec. 71.02(2)(i), Wis. Stats., as "federal adjusted gross income with the modifications prescribed in s. 71.05(1) and (4)," and that those modifications do not include any modifications relating to the failure to file an election of the sort involved here, the statute doesn't stand alone. It stands with the election provisions of sec. 71.333, Wis. Stats., and must be construed with reference to that section. The Commission concluded that sec. 71.333, Wis. Stats., controls the apparent conflict and, therefore, the taxpayer's failure to file the election meant that the department could adjust his federal adjusted gross income even though federally correct.

The taxpayer has appealed this decision to the Circuit Court.

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Farm loss limitations. *Stephen Kalish vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, July 27, 1989). The issue in this case is whether the taxpayer's losses, arising out of 2 limited partnership interests he held in thoroughbred breeding ventures, were subject to the farming loss limitation provisions of sec. 71.05(1)(a)26, Wis. Stats.

In 1986, the taxpayer owned interests in 2 limited partnerships. The first limited partnership was itself a general partner in a general partnership engaged in the business of thoroughbred breeding. The second limited partnership was directly engaged in the business of thoroughbred breeding. The taxpayer was not actively involved in the operations of either venture — his only involvement was his investments.

On his 1986 return, the taxpayer deducted $44,814 of losses from these operations against his other income, which he reported as $803,539. The department disallowed the entire deduction on the grounds that the losses were subject to sec. 71.05(1)(a)26, Wis. Stats., a provision limiting the deductibility of farming losses. Here, if applicable, the statute would serve to disallow all the taxpayer's losses because of his large nonfarm income.

The Commission held that the statute makes no distinction between those taxpayers who are not personally performing farming activities and those taxpayers who do and that, therefore, the taxpayer is subject to the statute's loss limitations. The Commission concluded that because the statute limits farming losses of whatever kind or character, active or passive alike, that it applies here as a limitation on or, more precisely in this case, a preclusion of the taxpayer's losses.

The taxpayer has not appealed this decision.

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HOMESTEAD CREDIT

Property taxes accrued—joint ownership. *Andrew Tomaszewski vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, June 30, 1989). The only issue in this case is the amount of property taxes the claimant should be allowed in computing his homestead credit for the years 1985, 1986, and 1987. It is the claimant's position that he should be allowed 100% of the property taxes paid as property taxes. It is the department's posi-

tion that he should be allowed 50% of the property taxes as property taxes, but that the remaining 50% of the property taxes should be treated as rent on the property.

For each of the years 1985, 1986, and 1987, the claimant lived in a homestead he owned in joint tenancy with his wife, Anna Tomaszewski. For each of those years, Andrew and Anna Tomaszewski maintained separate residences, although they were not legally separated or divorced. The claimant paid all the real estate taxes on his homestead.

The department adjusted the claimant's 1985 through 1987 homestead credit claims by allowing him one-half of the property taxes on the homestead in full as property taxes and allowing him the other one-half of the property taxes as rent, since he was a one-half owner of the property, but paid all the property taxes.

The Commission ruled that under the provisions of sec. 71.09(7)(a)7, Wis. Stats. (1985-86), and sec. Tax 14.02(5)(b), Wis. Adm. Code, a homestead credit claimant, whose spouse maintains a separate residence, may only claim for homestead credit purposes that portion of the real estate taxes he paid on his homestead that reflects his actual ownership interest, even though his spouse held a joint tenancy interest in the property. Therefore, the department acted properly in adjusting the claimant's homestead credit claims for the years 1985-87 by allowing him 50% of the real estate taxes as "property taxes accrued" and the other 50% as rent.

The claimant has not appealed this decision.

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CORPORATION FRANCHISE OR INCOME TAXES

Apportionment—motor carriers. *Consolidated Freightways Corporation of Delaware vs. Wisconsin Department of Revenue* (Circuit Court of Dane County, August 31, 1989). This matter is before the Circuit Court on petition for administrative review under Chapter 227, Wis. Stats. The taxpayer, Consolidated Freightways Corporation of Delaware (CF) seeks to overturn a January 17, 1986, determination of the Wisconsin Tax Appeals Commission, which upheld the department's August 30, 1979, assessment of additional franchise tax and interest for calendar years 1974 through 1977. What is disputed is the method by which CF's income is apportioned. See Wisconsin Tax Bulletin 46, page 13, for a review of this case.

CF's first claim alleged that the department's two factor rule apportioning income based on originating revenues taxes income from activities in other states. For this proposition, CF relied on sec. 71.07(2), Wis. Stats., which requires that CF ". . . be taxed only on such income as is derived from business transacted and property located within the state . . ."

CF, in its second argument, claimed that the department's apportionment formula violates federal constitutional requirements. These requirements are (1) that there be a substantial nexus with the state; (2) that the tax be fairly apportioned; (3) that the apportionment be nondiscriminatory; (4) that the apportionment be based on activities in the taxing state. In this case, both parties agreed that there is a sufficient nexus between CF and Wisconsin to permit Wisconsin to jurisdictionally tax CF's income.

CF claimed that the department's formula is unfair because it taxes income earned by activities in other states and its use of an originating revenue factor distorts Wisconsin's share of income.

CF also alleged that the tax discriminates against interstate commerce because companies such as CF typically have longer hauls than Wisconsin companies and, therefore, they are taxed more heavily than Wisconsin companies. CF further claimed that the adoption of sec. Tax 2.47, Wis. Adm. Code, was the result of influence by the Wisconsin Motor Carrier Association. CF further claimed that Wisconsin does not tax according to activities in Wisconsin.

The Court concluded that CF failed to establish that the income apportioned to the state is out of all appropriate proportion to the business transacted by CF in the state as required by *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 180-181 (1983). Therefore, the Court found that the tax is fairly proportioned. As the department pointed out, the tax is apportioned according to the percentage of originating revenues and ton miles and not according to any distinction between in-state and out-of-state trucking companies. As long as the tax is computed at the same rate, regardless of the final destination, and administered evenly, the Supreme Court has refused to find a state tax discriminatory solely because the tax burden might be borne primarily by out-of-state companies. It is not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business.

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

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Filing requirements—franchise or income tax return. *Freedom Savings & Loan Association n/k/a Federated Financial Savings & Loan Association vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, September 14, 1989). The issue in this case is whether the return the taxpayer filed for the period subsequent to September 30, 1985, is for the 1985 tax year or is for the 1986 tax year. If the return is for the 1985 tax year, the return filed is an income tax return in which interest income from federal instruments or obligations would not be subject to an income tax, and the taxpayer would be entitled to the refund claimed. If the return is for the 1986 tax year, the return filed is a franchise tax return, in which interest income from federal instruments and obligations is included in the measure of the franchise tax, and the department's action was proper in denying the taxpayer's claim for refund.

The taxpayer, Freedom Savings & Loan Association, was during the period at issue, the period subsequent to September 30, 1985, a Wisconsin savings and loan asso-

ciation, headquartered and doing business in Wisconsin and taxable as a Wisconsin corporation.

For Wisconsin taxable year 1984, and for prior taxable years, the taxpayer filed its Wisconsin franchise tax returns on a calendar year basis, ending on December 31. For taxable year 1985, the taxpayer filed its Wisconsin franchise tax return on a fiscal year basis showing a taxable year beginning January 1, 1985, and ending September 30, 1985.

On January 31, 1986, the taxpayer was absorbed by Elm Grove Savings & Loan Association ("Elm Grove Savings") pursuant to sec. 215.53, Wis. Stats. Following the absorption, Elm Grove Savings was the surviving association. Contemporaneously with the absorption of the taxpayer by Elm Grove Savings, Elm Grove Savings changed its name to Federated Financial Savings & Loan Association ("Federated Financial"). Freedom Savings & Loan Association's existence was terminated as of the date of its absorption by Elm Grove Savings, January 31, 1986.

On October 15, 1986, the taxpayer filed a final Wisconsin franchise or income tax return for the reporting period subsequent to September 30, 1985.

The Commission concluded that the final tax return the taxpayer filed for the period subsequent to September 30, 1985, is a franchise tax return for the 1986 tax year in which interest income from federal instruments and obligations is included in the measure of the franchise tax, and that the department's action was proper in denying the taxpayer's claim for refund.

The taxpayer has appealed this decision to the Circuit Court.

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Manufacturer's sales tax credit. *L & W Construction Company, Inc. v. Wisconsin Department of Revenue* (Court of Appeals, District II, March 22, 1989). The sole issue in this case is whether a corporate taxpayer which is a general partner in a partnership is entitled to claim the corporate tax credit allowed for the sales and use tax paid by the partnership.

L & W is a corporate general partner in two Wisconsin partnerships. For tax year 1983, the partnerships each paid the cost, plus sales and use tax, of fuel and electricity used in their manufacturing processes. Each partnership deducted the amount of this sales and use tax in calculating partnership income or loss. L & W filed a 1983 corporate income tax return and claimed a tax reduction credit based on the amount of sales and use taxes related to its own manufacturing activities. The Wisconsin Department of Revenue disallowed the amount of the claimed sales tax credit attributable to the partnerships. Both the Wisconsin Tax Appeals Commission and the Circuit Court affirmed this determination.

L & W appealed, arguing that it is entitled to the tax credit under the "aggregate theory" of partnership law. Under the "aggregate theory" of partnership law, L & W argued, it "paid" a portion of the partnerships' sales taxes based on its ownership interest and, therefore, it is entitled to claim this amount as a tax credit under sec. 71.043(2), Wis. Stats., against its income tax liability, pursuant to Wisconsin's Uniform Partnership Act, ch. 178, Wis. Stats.

The Court affirmed the Circuit Court's judgment, concluding that sec. 71.043(2), Wis. Stats., does not permit a corporation to claim an income tax reduction for sales and use tax paid by a partnership in which the corporation is a general partner, but rather that the income tax reduction is only available to corporations that directly pay such sales and use taxes.

The taxpayer has not appealed this decision.

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SALES/USE TAXES

Farming—ginseng raising. *Arndt Enterprises, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, August 29, 1989). The issue in this case is whether the taxpayer's sales and use of ginseng cloth, cable, cable splicers, cable stretchers, and wire were exempt as "machines, including accessories, attachments . . . and parts therefor, used directly in farming" within the meaning of sec. 77.54(3), Wis. Stats.

During the period under review, March 1, 1982, through February 28, 1986, the taxpayer, a Wisconsin corporation, was doing business in the Wisconsin and sold ginseng equipment to ginseng farmers growing ginseng as a commercial crop. The taxpayer is in the business of growing ginseng for commercial sale and selling ginseng supplies, including ginseng cloth, cable, cable stretchers (also known as "jacks"), and cable splicers to ginseng farmers. The taxpayer purchases the same supplies for its own use in growing ginseng. The taxpayer purchased, used, and sold ginseng cloth, cable, cable stretchers, and cable splicers in this state without paying a sales or use tax during the period under review; and purchased materials for the raising of mink.

The most unique aspect of growing ginseng is the need to provide 70-75% shade, either by poly-fabric (ginseng cloth) or wood lath. Ginseng is highly photo-sensitive plant. Production of ginseng seed and root is diminished severely by exposure to sunlight and the plants cannot tolerate such exposure beyond several days. Shading is the most important element of the climate to be regulated when the plant is not grown in the wild. Accordingly, commercial ginseng growing requires the erection of shade regulating devices to simulate the woodland environment.

The taxpayer uses and sells a woven fabric which when placed over the ginseng garden limits sunlight exposure to less than 25% and, optimally, provides 82-85% shading. The cloth, referred to as a "tarp" (i.e., "tarpaulin"), is stretched over the ginseng garden by tying it to adjustable cables which are mounted on cedar posts at a level of about six feet above ground.

A cable stretcher or "jack," is a tool used to tighten the cloth over the garden. It is moved from cable to cable and field to field. "Side" tarps are raised or lowered manually to control the flow of air under the dome tarps,