

## 2. Exempt income includes:

- a. Wages from working on their tribal reservation.
- b. Income from business or real estate located on their tribal reservation.
- c. Interest, dividends, and other income from intangibles regardless of where the bank accounts, etc., are located.
- d. Prizes or awards (except those identified as taxable in 1.c, d, e and f above).
- e. Retirement income.

## B. Law applicable to Indians living off their tribal reservation:

All income is taxed in the same manner as for other Wisconsin residents and nonresidents even though the Indian may be working on his or her tribal reservation. However, income from active duty in the military earned by a domiciliary of a tribal reservation is exempt from Wisconsin income tax, even though the Indian resides off the tribal reservation.

**Facts and Question 1:** An Indian, who is single, lives on his or her tribal reservation in Wisconsin and has the following income:

Wages earned on the tribal reservation	\$ 5,000
Wages earned off the tribal reservation	12,000
Long-term capital gain from the sale of real property located on the tribal reservation	2,000
Interest income from a bank off the tribal reservation	500
Dividend income from a corporation off the tribal reservation	100
Long-term capital loss from the sale of real property located off the tribal reservation	(3,000)

What is the taxable income for Wisconsin income tax purposes?

**Answer 1:** \$11,500. Taxable income includes wages earned off the tribal reservation (\$12,000) less \$500 of the long-term capital loss from the sale of property located off the tribal reservation (\$3,000). (The amount of capital loss that can be applied against noncapital gain income is limited to \$500 per year. Unused capital losses may be carried over to later years.) Wages earned on the tribal reservation (\$5,000), long-term capital gain on the sale of property located on the tribal reservation (\$2,000) and other intangible income (\$600) are exempt from Wisconsin income tax for an Indian living on his or her tribal reservation.

**Facts and Question 2:** An Indian, who is single and lives off his or her tribal reservation in Wisconsin, has the following income:

Wages earned on the tribal reservation	\$10,000
Wages earned off the tribal reservation	5,000
Loss from a partnership located on the tribal reservation	(3,000)
Long-term capital gain on sale of property located on the tribal reservation (\$1,000 less 60% exclusion = taxable gain of \$400)	400
<b>Total</b>	<b>\$12,400</b>

What is the taxable income reportable to Wisconsin?

**Answer 2:** \$12,400. An Indian living off his or her tribal reservation, but in Wisconsin, is subject to Wisconsin income tax on all income or loss.

**Facts and Question 3:** An Indian is a domiciliary of South Dakota. The Indian takes temporary employment in Wisconsin and works on a reservation in Wisconsin. Is the Indian subject to Wisconsin income tax on the income earned on the Wisconsin reservation?

**Answer 3:** Yes. Because the Indian is not working on his or her tribal reservation and is not domiciled in Wisconsin, income earned on the Wisconsin reservation is subject to Wisconsin income tax in the same manner as for other nonresidents. Nonresidents of Wisconsin are subject to Wisconsin income tax on personal service income earned in Wisconsin.

**Facts and Question 4:** An Indian is a member of the U.S. Army, stationed in South Carolina. Prior to entering the Army, the Indian lived on his or her tribal reservation. The Indian has not abandoned his or her Wisconsin domicile. Is the Indian subject to Wisconsin income tax on the income earned from the Army?

**Answer 4:** No. Because of the Soldiers' and Sailors' Civil Relief Act of 1940, Wisconsin does not have the jurisdiction or authority to tax income which an Indian who is domiciled on his or her tribal reservation earns from active duty in the U.S. Army, while stationed outside the reservation (*Wisconsin Dept. of Revenue vs. Annette L. Turner*, Circuit Court of Dane County, January 21, 1987).

**Facts and Question 5:** Are prizes, awards, and gambling winnings received by an Indian living on his or her tribal reservation subject to Wisconsin taxation?

**Answer 5:** The following indicates the taxable status of various types of prizes, awards, and gambling winnings:

- (a) Prizes and awards related to employment on the Indian's tribal reservation - Not taxable
- (b) Prizes and awards related to employment off the Indian's tribal reservation - Taxable
- (c) Prizes and awards not related to employment (except those listed in (d) through (f) below) - Not taxable
- (d) Winnings from the Wisconsin lottery - Taxable
- (e) Winnings from a multistate lottery ticket purchased in Wisconsin - Taxable
- (f) Wager winnings from pari-mutuel race tracks in Wisconsin - Taxable

**Facts and Question 6:** May the retirement plan penalties provided by sec. 71.83(1)(a)6, Wis. Stats. (1987-88), be imposed on an Indian living and working on his or her tribal reservation?

**Answer 6:** No. Section 71.83(1)(a)6, Wis. Stats. (1987-88), provides for the imposition of a penalty equal to 33% of the federal penalty imposed under sections 72(q) and (t), 4973, 4974, 4975, or 4980A of the Internal Revenue Code. The penalties provided under this section are to be assessed, levied, and collected in the same manner as income taxes. Because such penalties are to be treated as income taxes, Wisconsin does not have jurisdiction to impose them on an Indian living and working on his or her tribal reservation.

**Facts and Question 7:** An Indian and his or her Indian spouse live on their tribal reservation. Both work on their tribal reservation and have earned income. They also have income from real estate located off the reservation, but in Wisconsin. The income from this property is subject to Wisconsin income tax. Is the couple allowed the Wisconsin married couple credit?

**Answer 7:** For 1987 and subsequent taxable years, the couple is not allowed the Wisconsin married couple credit. Section 71.07(6), Wis. Stats. (1987-88), provides that earned income for purposes of computing the married couple credit must be reduced by any amount of earned income which is not subject to tax. Because the wages earned by the couple are not taxable by Wisconsin, the couple's earned income for purposes of the married couple credit is zero and no credit may be claimed.

**(Note:** For the 1986 taxable year, Indians were allowed to claim the Wisconsin married couple credit based on earned income which was not taxable by Wisconsin.)

**Facts and Question 8:** A taxpayer is an Indian living on his tribal reservation with his spouse. His spouse is not an Indian. The taxpayer is self-employed on the tribal reservation and has \$20,000 of income from the business. His wife works off the reservation and has wages of \$15,000. Does Wisconsin's marital property law apply?

**Answer 8:** Yes, Wisconsin's marital property law does apply. The income of both spouses is taxable as marital property income.

The husband is considered to be earning one-half of the income he earned on the reservation ( $\$20,000 \div 2 = \$10,000$ ), which is nontaxable, and one-half of the income earned by his wife off the reservation ( $\$15,000 \div 2 = \$7,500$ ), which is taxable. The wife is considered to be earning one-half of the income earned by her husband on the reservation ( $\$20,000 \div 2 = \$10,000$ ), which is taxable to her as a non-Indian, and one-half of the income she earned off the reservation ( $\$15,000 \div 2 = \$7,500$ ), which is also taxable.

Therefore, if they file a joint Wisconsin income tax return, they will be taxed on one-half of the husband's self-employment income and all of the wife's income from working off the reservation ( $\$10,000 + \$15,000$  or  $\$25,000$ ). If they file separate Wisconsin returns, the

wife will be taxed on one-half of the income earned on the reservation by her husband and one-half of the income earned by her off the reservation ( $\$10,000 + \$7,500$  or  $\$17,500$ ). The husband will be taxed on  $\$7,500$  (one-half of the income earned by his wife off the reservation).

This answer assumes that no marital property agreement, unilateral statement, or court order changes their marital property income to individual property. In addition, it assumes that neither spouse is an "innocent spouse" for Wisconsin income tax purposes.

**Facts and Question 9:** In November 1988 Congress passed the Technical and Miscellaneous Revenue Act (TAMRA), adding sec. 7873 to the Internal Revenue Code. This section provides that no tax shall be imposed on income derived by a member of an Indian tribe directly or through a qualified Indian entity, or by a qualified Indian entity from a fishing rights related activity of such tribe. This provision is effective for all taxable periods beginning before, on, or after the date this provision was enacted. Does this provision apply for Wisconsin tax purposes?

**Answer 9:** Yes. Section 3042 of TAMRA provides that sec. 7873, IRC is to apply for state tax purposes in the same manner as for federal tax purposes.

## II. Taxation of Indians - Wisconsin Corporate Franchise or Income Tax

**Statutes:** Sections 71.23, 71.25 and 71.43, Wis. Stats. (1987-88).

**Background:** The following definitions apply:

"Indian corporation" means a corporation in which Indians own 51% or more of the voting stock. For purposes of this ownership test, count only those Indian shareholders who are enrolled members of the same tribe.

"Indians" means all persons of Indian descent who are enrolled members of any federally recognized tribe.

"Reservation" means all land within the boundaries of the Bad River, Forest County Potawatomi, Lac Courte Oreilles, Lac du Flambeau, Menominee, Mole Lake, Oneida, Red Cliff, St. Croix, and Stockbridge-Munsee reservations as well as any Winnebago Indian communities.

"Tribal reservation" means the reservation of the tribe of which an Indian is an enrolled member (e.g., the tribal reservation for an enrolled member of the Oneida tribe is the Oneida reservation).

**Policy:** An Indian corporation located on the tribal reservation of its shareholders is exempt from Wisconsin franchise or income tax. However, if the corporation has sufficient business activity (see sec. Tax 2.82, Wis. Adm. Code) off the reservation and in Wisconsin so that it is considered to be doing business in Wisconsin, it is subject to Wisconsin franchise or income tax in the same manner as other corporations doing business in Wisconsin. This means that

such part of the corporation's income as is earned off the reservation will be taxable to Wisconsin as determined using the appropriate apportionment method provided by sec. 71.25, Wis. Stats. (1987-88).

A non-Indian corporation having property and/or doing business on a reservation is subject to Wisconsin franchise or income tax on or measured by income earned both on and off the reservation.

**Facts and Question 1:** An Indian corporation is a manufacturer of furniture. The furniture is manufactured on the reservation and is stored on the reservation until it is sold. Sales are made both on and off the reservation from a central distributing center on the reservation. The only activity off the reservation is the solicitation of orders. Orders are approved at a location on the reservation. Is the corporation subject to Wisconsin franchise or income tax?

**Answer 1:** No. The corporation does not have sufficient business activity off the reservation to be considered doing business in Wisconsin.

**Facts and Question 2:** An Indian corporation is in the business of landscaping. The corporation has business activity off the reservation and in Wisconsin that constitutes "nexus" in Wisconsin under sec. Tax 2.82, Wis. Adm. Code, requiring that the corporation file a Wisconsin corporation franchise or income tax return. How does the corporation determine what portion of its income is taxable to Wisconsin?

**Answer 2:** An Indian corporation, considered to be operating in Wisconsin for franchise or income tax purposes, will determine its taxable income reportable to Wisconsin using the appropriate apportionment method provided by sec. 71.25, Wis. Stats. (1987-88). Generally, this is the 3-factor formula utilizing a property factor, payroll factor and sales factor.

### III. Taxation of Indians - Wisconsin Withholding Tax

**Statutes:** Sections 71.63 and 71.64, Wis. Stats. (1987-88).

**Background:** The following definitions apply:

"Indians" means all persons of Indian descent who are enrolled members of any federally recognized tribe.

"Reservation" means all land within the boundaries of the Bad River, Forest County Potawatomi, Lac Courte Oreilles, Lac du Flambeau, Menominee, Mole Lake, Oneida, Red Cliff, St. Croix, and Stockbridge-Munsee reservations as well as any Winnebago Indian communities.

"Tribal reservation" means the reservation of the tribe of which an Indian is an enrolled member (e.g., the tribal reservation for an enrolled member of the Oneida tribe is the Oneida reservation).

**Policy:** Employers located on a reservation are not required to withhold Wisconsin income tax from the wages of an Indian who lives and works exclusively on his or her tribal reservation.

Employers located on a reservation must withhold Wisconsin income tax from the wages of (1) non-Indian employees, regardless of whether such employees live on or off the reservation, (2) Indian employees who live off their tribal reservation, and (3) Indian employees who live on their tribal reservation but work off the reservation. Such withholding is required because these employees have a potential Wisconsin income tax obligation. See Part I titled "Taxation of Indians - Wisconsin Individual Income Tax."

Employers located off a reservation are required to withhold from the wages of Indians, unless the Indian lives and works exclusively on his or her tribal reservation.

**(Note:** The above policy applies to all employers, regardless of whether the business is owned by Indians or non-Indians.)

**Question 1:** Are wages paid to an Indian who lives off his or her tribal reservation, but works on the tribal reservation, subject to Wisconsin withholding tax?

**Answer 1:** Yes. Wisconsin income tax must be withheld from wages paid to an Indian living off his or her tribal reservation, regardless of where he or she works. This is because the Indian has a Wisconsin income tax obligation.

**Question 2:** An employer has business operations in two locations. One location is on a reservation, the other location is not on a reservation. The employer has Indian employees who live on the reservation on which the business has a location, but who work at both business locations. Must the employer withhold Wisconsin income taxes from the wages of these Indian employees?

**Answer 2:** Yes. The employer must withhold from wages the Indian employees earn for working at the business location off the reservation. The amount of withholding should be based on only the wages earned off the reservation.

### IV. Taxation of Indians - Sales and Use Tax

**Statutes:** Sections 77.53 and 77.54(1), Wis. Stats. (1987-88).

**Background:** The following definitions apply:

"Indians" means all persons of Indian descent who are enrolled members of any federally recognized tribe. "Indians" also includes Indian tribes, Indian housing authorities, Indian corporations (corporations in which Indians own at least 51% of the voting stock), and Indian partnerships (partnerships in which 51% of the investment is made by Indians, 51% of the entity is owned by Indians and 51% of profits or losses accrue to Indians). For purposes of the ownership tests, count only those Indians who are enrolled members of the same tribe.

“Reservation” means all land within the boundaries of the Bad River, Forest County Potawatomi, Lac Courte Oreilles, Lac du Flambeau, Menominee, Mole Lake, Oneida, Red Cliff, St. Croix, and Stockbridge-Munsee reservations as well as any Winnebago Indian communities.

“Sales” means sales of tangible personal property or taxable services.

“Tribal reservation” means the reservation of the tribe of which an Indian is an enrolled member (e.g., the tribal reservation for an enrolled member of the Oneida tribe is the Oneida reservation).

### Policy:

#### A. Tax Treatment of Sales to Indians and Non-Indians

1. Sales to an Indian are taxable if delivery of the item to the Indian occurs off the Indian’s tribal reservation, regardless of whether the retailer (seller) is an Indian or non-Indian.
2. Sales to an Indian are exempt from tax if delivery of the item to the Indian occurs on the Indian’s tribal reservation, regardless of whether the retailer (seller) is an Indian or non-Indian.

However, if the Indian retailer knows that the property or service is intended for consumption, use, or storage in Wisconsin but off the Indian’s tribal reservation, the retailer is required to collect use tax on such property or services.

3. Sales to a non-Indian are taxable, regardless of whether delivery of the item to the non-Indian occurs on or off a reservation and whether the retailer (seller) is an Indian or non-Indian.

NOTE: Sales of tangible personal property or taxable services by Indian retailers to non-Indians where delivery occurs off the reservation are subject to the sales tax. If delivery of such sales occurs on the reservation, the sales are not subject to sales tax. However, the Indian retailer is required to collect and remit use tax on such sales pursuant to sec. 77.53(3), Wis. Stats. (1987-88).

#### B. Construction Activities

1. The following construction activities on a reservation are exempt:
  - a. The sale of construction materials to an Indian contractor if (1) delivery of the materials to the Indian contractor occurs on the Indian contractor’s tribal reservation and (2) the construction materials will be used on the Indian contractor’s tribal reservation.

However, if the materials are later used off the Indian contractor’s tribal reservation, the contractor will be subject to the Wisconsin use tax, unless b. below applies.

- b. The sale and delivery to an Indian or non-Indian contractor on or off the reservation, where the objectives of the federal regulatory scheme and the express federal policy of encouraging self-sufficiency preclude the state from imposing a tax on the construction activity and where the construction is financed by the federal government or one of its agencies, as set forth in *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832 (1982).

Caution: A retailer should not accept or grant this exemption without first obtaining an opinion from the Department of Revenue as to whether the transaction qualifies for exemption. An opinion may be obtained by writing to: Wisconsin Department of Revenue, Administration Technical Services, Post Office Box 8933, Madison, WI 53708.

2. Construction materials are taxable if sold to a non-Indian contractor who incorporates the materials into realty on a reservation, regardless of whether the materials were delivered to the contractor off the reservation in Wisconsin or another state, or on the reservation (unless exempt from tax under the conditions in 1.b. above).
3. Some Indian tribes impose a tribal use tax on construction materials used by persons doing business on the reservation. This tribal use tax is in addition to, rather than in place of, the Wisconsin sales and use tax. Also, the statutes do not authorize a credit for tribal tax against the Wisconsin sales and use tax. It is possible to have both the tribal use tax and the Wisconsin sales or use tax (and 1/2% of county sales or use tax if applicable) imposed on the use of construction materials on the reservation.

Facts and Question 1: An Indian retailer sells sporting equipment to a non-Indian and delivery to the non-Indian occurs off the reservation. Is the sale subject to Wisconsin sales tax?

Answer 1: Yes. Sales by Indian retailers are subject to the Wisconsin sales tax when delivery occurs off the reservation.

Facts and Question 2: A non-Indian retailer makes a sale of clothing to an Indian living on his or her reservation. The Indian takes possession of the clothing off the reservation. Is the sale subject to Wisconsin sales tax?

Answer 2: Yes, because the transfer of possession of the clothing occurs off the reservation.

Facts and Question 3: An Indian retailer sells auto parts to a person (purchaser) who is of Indian descent but is *not* an enrolled member of the tribe. This person is therefore not an “Indian” according to the definition in “Background” above. The purchaser takes possession of the auto parts on the Indian retailer’s reservation. Is this sale subject to Wisconsin sales or use tax?

**Answer 3:** The Indian retailer is required to collect use tax because the person (purchaser) is not an "Indian."

**Facts and Question 4:** A non-Indian contractor acquires road building materials (e.g., gravel) from an out-of-state seller without payment of Wisconsin sales tax. The contractor uses the materials to repair a federal highway on a reservation. Is Wisconsin use tax payable by the contractor on the materials used in real property construction activities (i.e., repairing a highway on the reservation)?

**Answer 4:** Yes. The contractor is the consumer of materials used in real property construction activities and is therefore required to pay use tax on such materials consumed.

**Facts and Question 5:** An Indian tribe operates a recreation center that provides bingo games on the reservation. Are the charges for admissions to the center to Indians and non-Indians subject to Wisconsin sales or use tax?

**Answer 5:** The charges to Indians are not taxable if the bingo games occur on the Indians' tribal reservation.

Under sec. 77.53, Wis. Stats. (1987-88), there is a use tax on sales of bingo admissions by Indian retailers to non-Indian customers.

#### V. Taxation of Indians - Wisconsin Inheritance Tax

**Statutes:** Section 72.11, Wis. Stats. (1987-88).

**Background:** The following definitions apply:

"Indians" means all persons of Indian descent who are enrolled members of any federally recognized tribe.

"Reservation" means all land within the boundaries of the Bad River, Forest County Potawatomi, Lac Courte Oreilles, Lac du Flambeau, Menominee, Mole Lake, Oneida, Red Cliff, St. Croix, and Stockbridge-Munsee reservations as well as any Winnebago Indian communities.

"Tribal reservation" means the reservation of the tribe of which an Indian is an enrolled member (e.g., the tribal reservation for an enrolled member of the Oneida tribe is the Oneida reservation).

**Policy:** If the decedent is an Indian who lives on his or her tribal reservation at the time of death, property transferred to distributees is exempt from Wisconsin inheritance tax, if the property is located on the reservation. Stocks, bonds, bank accounts, and other personal property are considered to be located on the reservation if the decedent resides on his or her tribal reservation at the time of death. Real property located in Wisconsin but off the tribal reservation is subject to inheritance tax, regardless of where the decedent's residence is at the time of death.

If the decedent is an Indian who lives off his or her tribal reservation at the time of death and is a resident of Wisconsin, property transferred to distributees is subject to Wisconsin inheritance tax in

the same manner as for other decedents who were Wisconsin residents.

Property is not exempt from Wisconsin inheritance tax solely because it is transferred to a distributee who is an Indian living on or off his or her tribal reservation.

**Facts and Question 1:** An Indian living on the tribal reservation dies and his or her property is distributed. The property consists of a home on the reservation, bank accounts, and a cottage located off the reservation. The distributees are all Indians living in Wisconsin, on their tribal reservations. Will any of the property distributed be subject to Wisconsin inheritance tax?

**Answer 1:** Yes. The transfer of the cottage located off the reservation is subject to Wisconsin inheritance tax, regardless of whether the decedent or the distributees are Indians.

**Facts and Question 2:** A decedent, who is an Indian, was living off his or her tribal reservation at the time of death. The decedent's only assets were several parcels of land located on the tribal reservation. These assets were distributed to other Indians living on their tribal reservations. Are the transfers subject to Wisconsin inheritance tax?

**Answer 2:** Yes. Since the decedent lived off his or her tribal reservation at the time of death and was a resident of Wisconsin, all property transferred is subject to Wisconsin inheritance tax, regardless of where the property is located or where the distributees reside.

#### VI. Taxation of Indians - Wisconsin Gift Tax

**Statutes:** Section 72.75, Wis. Stats. (1987-88).

**Background:** The following definitions apply:

"Indians" means all persons of Indian descent who are enrolled members of any federally recognized tribe.

"Reservation" means all land within the boundaries of the Bad River, Forest County Potawatomi, Lac Courte Oreilles, Lac du Flambeau, Menominee, Mole Lake, Oneida, Red Cliff, St. Croix, and Stockbridge-Munsee reservations as well as any Winnebago Indian communities.

"Tribal reservation" means the reservation of the tribe of which an Indian is an enrolled member (e.g., the tribal reservation for an enrolled member of the Oneida tribe is the Oneida reservation).

**Policy:** If the donor is an Indian who lives on his or her tribal reservation on the date of making a gift, property transferred to donees is exempt from Wisconsin gift tax if the property is located on the tribal reservation. Stocks, bonds and other personal property are considered to be located on the tribal reservation if the donor resides on his or her tribal reservation at the time of making the gift. Gifts of real property located in Wisconsin, but off the donor's tribal

reservation, including real property on Wisconsin reservations of other tribes, are taxable in the same manner as for other donors who are Wisconsin residents.

If the donor is an Indian who lives off his or her tribal reservation on the date the gift is made and is a resident of Wisconsin on such date, property transferred to donees is subject to Wisconsin gift tax in the same manner as for other donors who are Wisconsin residents.

Property is not exempt from gift tax solely because the donee is an Indian, regardless of where he or she lives.

**Facts and Question 1:** An Indian living on his or her tribal reservation makes a gift to a non-Indian donee of property located on the tribal reservation. Is the transfer subject to Wisconsin gift tax?

**Answer 1:** No. Because the Indian lives on his or her tribal reservation and the property transferred is located on that reservation, the gift is exempt, regardless of whether the donee is an Indian or non-Indian.

**Facts and Question 2:** An Indian living on a reservation other than his or her tribal reservation makes a gift of stock to another Indian. Is the transfer subject to Wisconsin gift tax?

**Answer 2:** Yes. For the gift to be exempt, the donor would have to be living on his or her tribal reservation at the time of making the gift.

## VII. Taxation of Indians - Wisconsin Cigarette Taxes

**Statutes:** Sections 139.30, 139.323, 139.325 and 139.38, Wis. Stats. (1987-88).

**Wis. Adm. Code:** Sections Tax 9.08 and 9.09, March 1984 Register.

**Background:** The following definitions apply:

“Indians” means all persons of Indian descent who are enrolled members of any federally recognized tribe.

“Reservation” means all land within the boundaries of the Bad River, Forest County Potawatomi, Lac Courte Oreilles, Lac du Flambeau, Menominee, Mole Lake, Oneida, Red Cliff, St. Croix, and Stockbridge-Munsee reservations as well as any Winnebago Indian communities.

“Tribal reservation” means the reservation of the tribe of which an Indian is an enrolled member (e.g., the tribal reservation for an enrolled member of the Oneida tribe is the Oneida reservation).

**Policy:** A state may not tax cigarettes sold on the reservation by an Indian tribe or its authorized retailer to resident tribal members for consumption on the reservation. The Department of Revenue will refund 70% of the taxes imposed under sec. 139.31(1), Wis. Stats. (1987-88), on all other sales by an Indian tribe or its authorized dealers if:

- A. The Tribal Council has filed a claim for refund with the department.
- B. The Tribal Council has approved the retailer.
- C. The land on which the sale occurred was designated a reservation on or before January 1, 1983.
- D. The cigarettes were not delivered by the retailer to the buyer by means of a common carrier or the U.S. postal service.
- E. The retailer has not sold the cigarettes to another retailer or any other person acquiring stamped cigarettes from manufacturers or distributors for resale.

The procedures for paying and refunding the tax depend upon whether or not the Indian tribe has entered into a refund agreement with the Department of Revenue.

- A. The following procedures apply for tribes with whom the department has entered into a refund agreement:
  1. Only tax-paid stamped cigarettes may be sold by a cigarette distributor (licensed permittee) to the Tribal Council or its authorized retailers.
  2. All Wisconsin taxes paid on cigarettes sold by the Tribal Council or its authorized retailers on the reservation to resident Indian members of the tribe are refunded to the Tribal Council upon the filing of a valid claim on behalf of the enrolled members.
  3. Seventy percent of all Wisconsin cigarette taxes paid on other cigarette sales by the Tribal Council or its authorized retailers are refunded to the Tribal Council upon the filing of a valid claim.
- B. The following procedures apply to tribes with whom the department has not entered into a refund agreement:
  1. Cigarettes a Tribal Council or authorized retailer intends to sell to resident Indian members of the tribe may be purchased tax-free without stamps from a cigarette distributor (licensed permittee). All other cigarettes purchased must be of tax-paid stamped cigarettes.
  2. Seventy percent of all Wisconsin cigarette taxes paid by the Tribal Council or its authorized retailers will be refunded to the Tribal Council upon filing a valid claim.
  3. If the authorized retailer sells tax-free cigarettes, detailed records of both taxable and tax-free transactions must be maintained. The required content of these records is set forth in sec. Tax 9.09(6), Wis. Adm. Code.

**Question 1:** May an Indian retailer personally deliver cigarettes to consumers off the reservation if the sale occurs on the reservation?

**Answer 1:** Yes. If the delivery is not by means of common carrier, contract carrier or the U.S. postal service, there is no other prohibition of personal delivery of cigarettes sold on the reservation.

**Question 2:** Would the Tribal Council be entitled to the 70% state tax refund under the circumstances in Question 1?

**Answer 2:** Yes. The 70% state tax refund would apply.

**Question 3:** May an Indian retailer accept an order over the telephone or otherwise, make delivery off the reservation, collecting payment at the time of delivery, provided there is a record of a sale at the retail business prior to delivery/collection?

**Answer 3:** No. An Indian retailer may not accept an order over the telephone or otherwise for future delivery off the reservation because this type of transaction does not meet the definition of a sale pursuant to sec. 139.323(4), Wis. Stats. (1987-88). "Sale" does not include the solicitation of orders for, or the sale for, future delivery.

#### VIII. Taxation of Indians - Wisconsin Liquor, Wine, Beer, Motor Fuel, Special Fuel and Aviation Fuel Taxes

**Statutes:** Sections 78.01(2)(c), 78.40(2)(b), 78.555, 139.02 and 139.03, Wis. Stats. (1987-88).

**Background:** The following definitions apply:

"Indians" means all persons of Indian descent who are enrolled members of any federally recognized tribe. Exemptions which apply to "Indians" will also apply to sales to Indian tribes, Indian housing authorities, Indian corporations (corporations in which Indians own at least 51% of the voting stock), and Indian partnerships (partnerships in which at least 51% of the investment is made by Indians, 51% of the entity is owned by Indians and 51% of profits or losses accrue to Indians). For purposes of the ownership tests, count only those Indians who are enrolled members of the same tribe.

"Reservation" means all land within the boundaries of the Bad River, Forest County Potawatomi, Lac Courte Oreilles, Lac du Flambeau, Menominee, Mole Lake, Oneida, Red Cliff, St. Croix, and Stockbridge-Munsee reservations as well as any Winnebago Indian communities.

"Tribal reservation" means the reservation of the tribe of which an Indian is an enrolled member (e.g., the tribal reservation for an enrolled member of the Oneida tribe is the Oneida reservation).

**Policy:** Indians living on or off their tribal reservations are not exempt from Wisconsin liquor, wine, beer, motor fuel, special fuel, and aviation fuel taxes, regardless of whether these items are purchased from retailers located on or off their tribal reservations.

**Note:** Menominee Tribal Enterprises has been held to be an agency of the federal government, and therefore may purchase motor fuel,

special fuel, and aviation fuel without paying tax to the supplier. Motor fuel, special fuel, and aviation fuel placed by Menominee Tribal Enterprises into its own vehicles or aircraft will not be subject to tax. Menominee Tribal Enterprises will charge the tax on motor fuel, special fuel, or aviation fuel it sells to Indians and other persons, regardless of whether they live on or off the reservation. Menominee Tribal Enterprises will remit the tax in such instances to the Wisconsin Department of Revenue.

Also, in certain instances, any Indian tribe or related entity may be allowed to purchase fuel without tax if there is a federal preemption under the rationale of *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), which held that fuel taxes could not be imposed by an Indian or non-Indian retailer on logging activities conducted exclusively within the reservation on tribal land. A claim for exemption under "federal preemption" should not be accepted by a retailer without first obtaining an opinion from the Department of Revenue. Opinions may be obtained by writing to the department at P.O. Box 8905, Madison, WI 53708.

**Facts and Question 1:** An Indian retailer doing business on his or her tribal reservation sells motor fuel to Indians and non-Indians. Is the retailer required to charge Wisconsin motor fuel tax to (a) Indians, or (b) non-Indians?

**Answer 1:** Yes. An Indian retailer must charge Wisconsin fuel tax to all purchasers, whether they are Indian or non-Indian.

**Facts and Question 2:** An Indian retailer doing business on his or her tribal reservation sells special fuel to Indians and non-Indians. Is the retailer required to charge Wisconsin special fuel tax to (a) Indians, or (b) non-Indians?

**Answer 2:** Yes. If the Indian retailer sells special fuel for use in motor vehicles, he or she would buy the special fuel without tax. Upon resale to both Indians and non-Indians for use in their licensed motor vehicles the retailer would collect the Wisconsin special fuel tax and remit the tax to the department.

**Facts and Question 3:** An Indian retailer doing business on his or her tribal reservation sells beer, liquor, or wine to Indians and non-Indians. Is the retailer exempt from the Wisconsin beer, liquor or wine tax on sales to (a) Indians, or (b) non-Indians?

**Answer 3:** No. As a licensed retailer, the retailer purchases these alcoholic beverages from Wisconsin wholesalers on a tax-paid basis. Upon resale, the retailer may pass on the Wisconsin alcoholic beverage tax to all purchasers, whether they are Indian or non-Indian. Indians living on or off the reservation are not exempt from these taxes, regardless of whether the items are purchased from retailers located on or off the reservation.

□