

E. Rules Adopted in 1990 But Not Yet Effective

- 1.11 Requirements for examination of returns-R&R
- 2.02 Reciprocity-R&R
- 2.95 Reporting of instalment sales by natural persons and fiduciaries-A
- 11.002 Permits, application, department determination-A
- 11.01 Sales and use tax return forms-R&R
- 11.08 Medical appliances, prosthetic devices and aids-A
- 11.09 Medicines-A
- 11.14 Exemption certificates (including resale certificates)-A
- 11.17 Hospitals, clinics and medical professions-A
- 11.41 Exemption of property consumed or destroyed in manufacturing-A
- 11.45 Sales by pharmacies and drug stores-A
- 11.47 Commercial photographers and photographic services-A
- 11.48 Landlords, hotels and motels-A
- 11.49 Service stations and fuel oil dealers-A
- 11.53 Temporary events-A
- 11.54 Temporary amusement, entertainment, or recreational events or places-A
- 11.62 Barbers and beauty shop operators-R&R
- 11.66 Telecommunication and CATV services-A
- 11.78 Stamps, coins and bullion-A
- 11.925 Sales and use tax security deposits-A
- 11.95 Retailer's discount-A
- 11.97 "Engaged in business" in Wisconsin-A
- 11.98 Reduction of delinquent interest rate under s. 77.62(1), Stats.-A
- 14.01 Administrative provisions-A
- 14.04 Property taxes accrued-A
- 14.05 Gross rent and rent constituting property taxes accrued-A

F. Rules Withdrawn from Promulgation

- 2.41 Separate accounting method-A
- 2.46 Apportionment of business income of interstate air carriers-R&R

- 2.49 Apportionment of net business incomes of interstate finance companies-R&R
- 4.54 Security requirements-NR
- 4.55 Ownership and name changes-NR
- 9.67 Cigarette tax credit-R&R
- 9.68 Ownership and name changes-NR
- 11.04 Constructing buildings for exempt entities-A

WE ARE FREQUENTLY ASKED ...

Question: If I purchase a business from an established retailer, can I use the seller's permit of that retailer?

Answer: No. A seller's permit is not transferable. You must apply for a new seller's permit using Wisconsin Form A-101, Application for Permit.

Question: If a restaurant automatically adds a gratuity to a bill, is the entire amount of the bill subject to sales tax?

Answer: Yes. If a gratuity is added automatically to your bill, the entire amount, including the gratuity, is subject to sales tax. This also applies to country clubs that automatically add a tip to a member's monthly food and beverage bill.

Question: Are fees received for auctioneering subject to sales tax?

Answer: No. Auctioneering is not a taxable service. However, the sales of items at an auction may be taxable. Refer to sec. Tax 11.50, Wis. Adm. Code, for more information.

Question: Are containers used for food or beverages, such as paper cups and lids, wrapping paper, styrofoam containers, paper and plastic bags, tape, and similar items purchased by restaurants subject to sales tax?

Answer: No. The sale of these items to restaurants is not taxable if the items are used to hold other items which are sold by restaurants and which are subject to sales tax, such as coffee, sandwiches, french fries,

or soft drinks. The container must be supplied free of charge and as a convenience to the customer.

INFORMATION OR INQUIRIES?

Madison - Main Office
Area Code (608)

- Beverage, Motor Fuel,
- Cigarette, Tobacco Products266-6701
- Corporation Franchise/Income ..266-3645
- Estimated Taxes266-9940
- Fiduciary, Inheritance, Gift266-1231
- Homestead Credit266-8641
- Individual Income266-2486
- Property Tax Deferral Loan266-1983
- Sales, Use, Withholding266-2776
- Audit of Returns: Corporation,
Individual, Homestead266-2772
- Appeals266-0185
- Refunds266-8100
- Delinquent Taxes266-7879
- Copies of Returns:
Homestead, Individual266-2890
- All Others266-0678
- Forms Request:
Taxpayers266-1961
- Practitioners267-2025

District Offices

- Appleton (414) 832-2727
- Eau Claire (715) 836-2811
- Milwaukee (414) 227-4000

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

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Minimum tax — 1986

Maria E. Norwood (p. 10)
Losses — allocation between spouses

Corporation Franchise or Income Taxes

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Chilstrom Erecting Corp. (p. 12)
Unitary business

Freedom Savings and Loan Association (p. 12)
Filing requirement — franchise or income tax

The Goodyear Tire and Rubber Company (p. 13)
Dividends — consent

Northern States Power Company (p. 13)
Appeals — failure to raise issue in proceedings

Transportation Leasing Co. (p. 14)
Allocation of income — apportionable vs. nonapportionable

United States Shoe Corporation (p. 14)
Business loss carryforward — mergers

Sales/Use Taxes

Arndt Enterprises, Inc. (p. 15)
Farming — ginseng raising

Republic Airlines, Inc. (p. 15)
When and where sale takes place

INDIVIDUAL INCOME TAXES

Minimum tax — 1986. *Wisconsin Department of Revenue vs. Edward J. and Eleanor L. Blakely, and Richard N. and Marlene O. Mastenbrook* (Circuit Court of Dane County, September 18, 1990). This decision arises from a petition by the department for review of a Wisconsin Tax Appeals Commission decision granting the taxpayers' motion for summary judgment. The Commission determined that under sec. 71.60, Wis. Stats. (1986), the taxpayers do not owe Wisconsin minimum tax (WMT) for 1986. See *Wisconsin Tax Bulletin* 68, page 6, for a summary of that decision.

The issue presented in this case is whether or not the Commission's decision that the taxpayers do not owe Wisconsin minimum tax for 1986 under sec. 71.60(1), Wis. Stats. (1986), is reasonable and in accordance with law. The Commission's analysis focused on two issues raised by the department and the taxpayers:

- 1) In the context of sec. 71.60(1), Wis. Stats. (1986), should "section 55 of the Internal Revenue Code as amended to December 31, 1986" be interpreted as sec. 55 as amended by the Tax Reform Act of 1986 (TRA) ("new" sec. 55), or as pre-TRA sec. 55 ("old" sec. 55)?
- 2) For purposes of sec. 71.60, Wis. Stats. (1986), do the taxpayers owe actual federal alternative minimum tax (AMT) under sec. 55 of the Internal Revenue Code (1986), and thus owe WMT?

The Circuit Court concluded as follows:

- 1) "Old" Sec. 55 v. "New" Sec. 55 The Commission reasonably relied on case law, legislative history and policy, and the Governor's recommendation in finding that *old* sec. 55 applies. The 1986 TRA amendments to sec. 55 were enacted on October 22, 1986, but not effective federally until 1987. In interpreting "section 55 of the Internal Revenue Code as amended to December 31, 1986," the Commission looked to the date on which amendments to sec. 55 became operative, that is, when they actually became part of the Code, rather than the date of enactment. From the

Commission's perspective, new sec. 55 did not become part of the Code until 1987 and old sec. 55 remained part of the Code until superseded. Thus, old, not new, sec. 55 was part of the "Internal Revenue Code as amended to December 31, 1986."

- 2) *Do the Taxpayers Owe Federal Alternative Minimum Tax For 1986?* The Commission's interpretation of old sec. 55 for purposes of WMT is clearly both legally correct and eminently reasonable. The Commission concluded that the taxpayers do not "owe" 1986 AMT for purposes of sec. 71.60(1), Wis. Stats. (1986), because, for WMT purposes, Wisconsin law does not prohibit an alternative calculation of federal tax liability showing only regular tax owing and no AMT, as long as total federal income tax liability remains the same as that indicated on the federal income tax forms submitted to the Internal Revenue Service. The Commission supported its logic by observing that nothing in the Code, related regulations, or judicial interpretations prohibits the taxpayers from filing in the alternative method. There is no provision of Wisconsin law that inextricably binds a taxpayer to the identical method of reporting as exhibited on forms filed with the Internal Revenue Service.

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

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Losses — allocation between spouses. *Maria E. Norwood vs. Wisconsin Department of Revenue* (Circuit Court of Milwaukee County, June 15, 1990). This is a judicial review of a decision and order of the Wisconsin Tax Appeals Commission, in which the Commission determined that the taxpayer is allowed only a 50% deduction of the rental losses in 1983, 1984, and 1985, relating to three properties owned by her and her ex-husband. The issue for the Circuit Court to decide is whether the taxpayer, a joint tenant, is entitled to deduct 100% of the rental losses on the properties for 1983, 1984, and 1985.

The taxpayer and her husband were, at all times during the years under review, owners in joint tenancy of the three properties. In 1977, shortly after the taxpayer and her husband purchased the properties, there was a verbal agreement that the taxpayer would care for the properties. As a result, the taxpayer collected the rents and made all payments. In 1983, the taxpayer's husband left the family home. Shortly thereafter, the taxpayer filed for divorce. In the divorce proceeding, the Family Court Commissioner issued a temporary order, stating that the taxpayer was to collect all rents and make all payments on her residence and the other two properties. In 1986, the taxpayer and her husband signed a settlement agreement. The agreement awarded the rental properties to the taxpayer. Further, the agreement awarded her a life estate in the duplex she used as a residence.

The Court concluded that since the taxpayer and her husband were owners of the property as joint tenants, they had equal interests in the properties and must share the rental loss deductions equally. The Circuit Court, therefore, affirmed the decision of the Commission.

The taxpayer has not appealed this decision.

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CORPORATION FRANCHISE OR INCOME TAXES

Business loss carryforward — loss incurred prior to Wisconsin operations; Allocation of income — nonapportionable income. *Agricultural Building Company vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, October 9, 1990).

The taxpayer, Agricultural Building Company (ABC), is a Delaware corporation having its principal place of business in Mendota, Illinois. It is engaged in the manufacture and installation of grain handling equipment. During the relevant taxable years, it utilized a March 31 fiscal year.

ABC was incorporated in 1979 as Schroetlin Enterprises, Inc. (Schroetlin). At that time it acquired all of the stock of Agricultural Building Company from William and Dorothy Jackson. In exchange for the stock, Schroetlin agreed to pay the Jacksons total consideration of two million dollars (\$2,000,000) to be paid as follows: \$100,000 cash down and the balance in the form of two promissory notes having a total face value of \$1,900,000, together with interest at the rate of 10% per annum. The Jacksons also continued to owe certain amounts to ABC after the closing. Following its acquisition of the ABC stock, Schroetlin merged ABC into Schroetlin pursuant to sec. 332 of the Internal Revenue Code of 1954 (Code) and elected to adjust the basis of the ABC assets pursuant to Code sec. 334(b). Schroetlin changed its name to Agricultural Building Company.

In the original sale agreement, the entire purchase price was allocated to inventory, fixed assets, and equipment. However, the Internal Revenue Service disputed this allocation. In settlement of that dispute, the corporation agreed to allocate a portion of the purchase price to goodwill, three patent agreements, and a debt agreement. The amounts allocated to the patent agreements and the debt agreement were amortized for tax and book purposes. The amount allocated to goodwill was amortized for book purposes but not for tax purposes. The amortization deductions and the interest expense deductions related to the notes were partially responsible for the net operating losses incurred by ABC prior to FYE March 31, 1985 (FYE 1985).

During FYE 1985, ABC performed one contract having a connection with Wisconsin, the renovation of a grain elevator in DeForest, Wisconsin. This included the manufacture of the component parts in Illinois and their installation in Wisconsin. The total gross sales attributable to this project were \$1,299,966. ABC realized little if any net profit on the transaction. ABC had not performed any contracts in Wisconsin prior to FYE 1985.

In 1984, ABC determined that it was not economically feasible to pay the entire purchase price for the stock of ABC to the Jacksons. Therefore, ABC and the Jacksons

negotiated a reduction in the purchase price for the stock. The entire obligation under the notes was satisfied in exchange for a cash payment of \$618,000 together with forgiveness of \$27,527 of accounts receivable owed by the Jacksons to ABC. The balance of the obligations were cancelled. The result of this adjustment in the purchase price was that the principal amounts ultimately paid to the Jacksons were essentially equal to the value of the fixed assets, equipment, and inventory that had been purchased. This transaction took place during FYE 1985.

For federal income tax purposes, ABC reflected additional income from this transaction in the amount of \$621,596 on its return for FYE 1985. As a result of accumulated net operating losses, there was no federal taxable income for FYE 1985. Without recognition of this item of income, ABC would have had a loss of \$16,106 (without application of the net operating loss deduction). The deductions on the FYE 1985 return included \$60,225 of amortization and \$63,942 of interest expense related to the purchase of the stock. For Wisconsin income tax purposes, ABC took the position that it was entitled to claim the net operating loss deduction and, therefore, that it had no Wisconsin taxable income for FYE 1985.

The department took the position that since there were no operations in Wisconsin prior to 1985, the net operating loss deduction was not allowable, and it requested the filing of an amended FYE 1985 Wisconsin Franchise Tax Return. ABC then took the position that even if the net operating loss deduction was disallowed, there would still not be any Wisconsin income since the \$621,596 is nonapportionable (non-business) income. ABC filed an Amended Wisconsin Franchise Tax Return for FYE 1985 reporting the \$621,596 as nonapportionable income. The department disagreed with ABC's position and issued a Notice of Assessment.

The Commission concluded that:

- A. "Business Income" means income arising from transactions or activity in the regular course of the taxpayer's trade or business and includes income from tan-