D. Rules Adopted in 1991 But Not Yet Effective

2.165 Change in taxable year-A
2.40 Nonapportionable income-R
2.48 Apportionment of net business incomes of interstate pipeline companies-A
2.94 Tax sheltered annuities-A
3.095 Income tax status of interest and dividends from municipal, state and federal obligations received by individuals and fiduciaries-A
8.24 Reciprocal interstate shipments of wine-NR
11.001 Forward and definitions-A
11.05 Governmental units-A
11.11 Waste treatment facilities (industrial or governmental)-A
11.12 Farming, agriculture, horticulture and floriculture-A
11.16 Common or contract carriers-A
11.26 Other taxes in taxable gross receipts and sales price-A
11.29 Leases and rentals of tangible personal property-A
11.30 Credit sales, bad debts and repossessions-A
11.32 "Gross receipts" and "sales price"-A
11.46 Summer camps-A
11.50 Auctions-A
11.51 Grocers' guidelist-A
11.52 Coin-operated vending machines and amusement devises-A
11.57 Public utilities-A
11.63 Radio and television stations-A
11.65 Admissions-A
11.68 Construction contractors-A
11.72 Laundries, drycleaners, and linen and clothing suppliers-A
11.79 Leases of highway vehicles and equipment-A
11.80 Sales of ice-A
11.81 Industrial gases, welding rods and fluxing materials-A
11.83 Motor vehicles-A
11.84 Aircraft-A
11.85 Boats, vessels and barges-A
11.86 Utility transmission and distribution lines-R&R
11.87 Meals, food, food products and beverages-A
11.88 Mobile homes-A
11.91 Successor's liability-A
11.92 Records and record keeping-A
11.93 Annual filing of sales tax returns-A
11.94 Wisconsin sales and taxable transportation charges-A
11.96 Interest rates-A

E. Rules Effective in Period from December 16, 1990 to April 1, 1991 (effective date is given in parentheses)

1.11 Requirements for examination of returns-R&R (2/1/91)
2.02 Reciprocity-R&R (4/1/91)
2.95 Reporting of installment sales by natural persons and fiduciaries-A (4/1/91)
11.002 Permits, application, department determination-A (4/1/91)
11.01 Sales and use tax return forms-R&R (4/1/91)
11.08 Medical appliances, prosthetic devices and aids-A (4/1/91)
11.09 Medicines-A (4/1/91)
11.14 Exemption certificates, including resale certificates-A (4/1/91)
11.15 Containers and other packaging and shipping materials-A (4/1/91)
11.17 Hospitals, clinics and medical professions-A (4/1/91)
11.19 Printed material exemptions-A (4/1/91)
11.28 Gifts, advertising specialties, coupons, premiums and trading stamps-A (4/1/91)
11.40 Exemption of machines and processing equipment-A (4/1/91)
11.41 Exemption of property consumed or destroyed in manufacturing-A (4/1/91)
11.45 Sales by pharmacies and drug stores-A (4/1/91)
11.47 Commercial photographers and photographic services-A (4/1/91)
11.48 Landlords, hotels and motels-A (4/1/91)
11.49 Service stations and fuel oil dealers-A (4/1/91)
11.53 Temporary events-A (4/1/91)
11.54 Temporary amusement, entertainment or recreational events or places-A (4/1/91)
11.62 Barber or beauty shop operator-R&R (4/1/91)
11.66 Telecommunication and CATV services-A (4/1/91)
11.78 Stamps, coins and bullion-A (4/1/91)
11.925 Sales and use tax security deposits-A (4/1/91)
11.95 Retailer's discount-A (4/1/91)
11.97 "Engaged in business" in Wisconsin-A (4/1/91)
11.98 Reduction of delinquent interest rate under s. 77.62(1), Stats.-A (4/1/91)
14.01 Administrative provisions-A (2/1/91)
14.04 Property taxes accrued-A (2/1/91)
14.05 Gross rent and rent constituting property taxes accrued-A (2/1/91)

REPORT ON LITIGATION

This portion of the Wisconsin Tax Bulletin 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 has 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

Corporation Franchise or Income Taxes

INDIVIDUAL INCOME TAXES

Corporate liquidations—sec. 333. *Keith Breyer vs. Wisconsin Department of Revenue* (Court of Appeals, District III, January 15, 1991). The Wisconsin Department of Revenue appeals from a judgment of the Circuit Court of Outagamie County, which overturned a ruling of the Wisconsin Tax Appeals Commission. The Commission upheld the department's determination that the taxpayer had not timely elected to defer recognition of realized gain on property distributions he received in a corporate liquidation. On review, the Circuit Court concluded that timely filing of a written election was not essential for a taxpayer to exercise the option to defer recognition of gain. See *Wisconsin Tax Bulletin* 65, page 12, and *Wisconsin Tax Bulletin* 69, page 7, for summaries of the prior decisions.

The Court of Appeals concluded that the Commission correctly interpreted the applicable Wisconsin tax statutes. Section 71.333(4), Wis. Stats. (1983-84), limited the gain certain shareholders must recognize on corporate liquidations to the greater of (1) cash and securities received or (2) a shareholder's ratable share of the liquidating company's "accumulated earnings and profits." However, in order to qualify for a limited gain recognition, an electing shareholder must file a written election with the Department of Revenue within thirty days of the date the corporation adopted its liquidation plan. Sec. 71.333(3), Wis. Stats. (1983-84). The Court of Appeals also held that the Circuit Court improperly concluded that the timely filing of a written election was unimportant.

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

❐

Gain or loss—property transferred by gift. *Laird C. Cleaver vs. Wisconsin Department of Revenue* (Wisconsin Supreme Court, December 12, 1990). This is a review of a decision of the Court of Appeals affirming a judgment of the Circuit Court of Dane County, denying the taxpayer's claim for a state income tax refund for the taxable year 1977. See *Wisconsin Tax Bulletin* 59, page 7, and *Wisconsin Tax Bulletin* 66, page 9, for summaries of the prior decisions.

The issue in this case is whether sec. 1026 of the Deficit Reduction Act (DRA) enacted in 1984 affects the computation of Wisconsin adjusted gross income for tax year 1977 under sec. 71.02(2)(a), (b)3, and (e), Wis. Stats. (1977-78). Section 1026 of the DRA is a non-Internal Revenue Code provision which excludes net gifts made prior to the United States Supreme Court decision, *Diedrich v. Commissioner*, 457 U.S. 191 (1982), from the definition of gross income.

The Wisconsin Supreme Court concluded that the plain language of sec. 71.02(2)(a), (b)3 and (e), Wis. Stats. (1977-78), establishes that the taxpayer's Wisconsin adjusted gross income for 1977 is determined solely by looking to the Internal Revenue Code as it stood on December 31, 1976. Because sec. 1026 of the DRA was not in effect on December 31, 1976, it did not affect the taxpayer's responsibility for payment of the tax.

The taxpayer has not appealed this decision.

CORPORATION FRANCHISE OR INCOME TAXES

Filing requirement—franchise or income tax. *Freedom Savings & Loan Association, n/k/a Federated Financial Savings & Loan Association, vs. Wisconsin Department of Revenue* (Court of Appeals, District II, November 28, 1990). Freedom Savings & Loan Association appeals a Circuit Court judgment affirming a decision of the Wisconsin Tax Appeals Commission, which denied the taxpayer's petition for redetermination of taxes paid. See *Wisconsin Tax Bulletin* 65, page 13, and *Wisconsin Tax Bulletin* 70, page 12, for summaries of the prior decisions.

The issue in this case is whether the taxpayer's final tax return for the period October 1, 1985 to January 31, 1986, was for the 1985 or 1986 tax year. If the return was for the 1986 tax year, the taxpayer was subject to the special franchise tax enacted on April 15, 1985 and first applicable to the 1986 tax year. The tax is applicable to corporations ceasing to do business in this state and is measured by the corporation's entire net income, including interest income from federal instruments or obligations.

The Court of Appeals affirmed the Circuit Court's judgment, concluding that the taxpayer's final tax return was a 1986 tax return under which it was obligated to pay the special franchise tax.

The taxpayer has not appealed this decision.

❐

Liquidating corporations. *Ins. Serv. Liquidating, Inc. and Insurance Services, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, November 14, 1990). The issues in this case are:

A. To what extent the gain on the sale of corporate assets under a plan of liquidation was participated in by a Wisconsin resident shareholder within the meaning of sec. 71.337(1), Wis. Stats. (1985-86), if such shareholder was a Wisconsin resident at the time of the distribution of an installment note but subsequently moved out of state.

B. The constitutionality of sec. 71.337(1), Wis. Stats., as being invalid under Article IV, Section 2, Clause 1 of the United States Constitution and Section 1 of Article XIV of the Amendments to the United States Constitution.

Ins. Serv. Liquidating, Inc. ("Taxpayer"), formerly known as Insurance Services, Inc., was a Wisconsin corporation which liquidated on March 7, 1984, pursuant to a Plan of Liquidation adopted on January 10, 1984. Insurance Services, Inc., formerly known as ISI Receiving Corp. ("Purchaser"), is a Wisconsin corporation which purchased all of the assets of Taxpayer on March 7, 1984. The terms of sale required Purchaser to assume certain of Taxpayer's liabilities, including any present or future federal or state tax liabilities, and to pay Taxpayer $2,103,844.26 of which $213,844.26 was paid in cash and $1,890,000 was paid in non-negotiable, but assignable, notes. On March 7, 1984, the same date as the sale described above, Taxpayer distributed all of the proceeds of the sale to its shareholders. Following Taxpayer's distribution of the sale proceeds, Purchaser made principal payments to shareholders on the notes (with interest as required).

When the sale of Taxpayer's assets and the distribution of proceeds occurred, all of Taxpayer's shareholders were Wisconsin residents. All of them continued to be Wisconsin residents during all times material hereto, except that Richard A. Stack became a Florida resident on February 1, 1985, and continued to be a Florida resident during all times material hereto. Mr. Stack filed income tax returns with the department for years 1984, 1985, and 1986. On his 1985 and 1986 returns, he did not report the principal payments he received on such note during those years, since he was a resident of Florida at the time he received the payments. Mr. Stack received payments constituting 23.087% of the sales price of the assets sold by Taxpayer, while he was a resident of Florida, and gain to him contained in such payments was beyond the taxing jurisdiction of the state of Wisconsin.

Taxpayer and Purchaser also contend that the phrase "to the extent such gain or loss is participated in by Wisconsin resident shareholders," contained in sec. 71.337(1), Wis. Stats., is invalid under Article IV, Section 2, Clause 1, of the United States Constitution and Section 1 of Article XIV of the Amendments to the United States Constitution.

The Commission concluded as follows:

A. Taxpayer, at the time of its liquidation, met all of the requirements of sec. 71.337(1), Wis. Stats., for not recognizing any gain or loss from the sale of its assets in the course of its liquidation and thus did not have to recognize the gain upon the sale of its assets when the shareholders who "participate" in such gain are Wisconsin residents.

B. The income tax statutes of the State of Wisconsin are deemed to be constitutional until they are declared otherwise by a court of competent jurisdiction, and the Wisconsin Tax Appeals Commission does not have the jurisdiction to determine such constitutionality.

The department has appealed this decision to the Circuit Court.

❑

Nexus. *William Wrigley, Jr. Co., vs. Wisconsin Department of Revenue* (Wisconsin Supreme Court, February 19, 1991). This is a review of a Court of Appeals decision which reversed an order of the Circuit Court of Dane County. The Circuit Court, reversing an order of the Wisconsin Tax Appeals Commission, held that under 15 USC sec. 381, the department does not have the power to tax the net income of the taxpayer for the years 1973 to 1978, as its activities in Wisconsin were "inextricably connected to 'solicitation,'" as that term is used in 15 USC sec. 381. The Circuit Court did not decide the interest rate to be applied to the tax.

Upon appeal, the Court of Appeals determined that the solicitation of orders does not encompass post-sale activities which are not "inextricably related" to the solicitation of orders, and since the taxpayer engaged in such activities, Wisconsin is not prohibited from taxing it. The Court of Appeals also held that the franchise tax was "delinquent," and therefore subject to an eighteen percent penalty interest under sec. 71.13(1)(a), Wis. Stats. (1985-86).

See *Wisconsin Tax Bulletins* 50, 55, 59, and 66 for summaries of prior decisions in this case.

This case presents two issues for review:

A. Whether the taxpayer's activities in Wisconsin went beyond the "solicitation of orders" as that term is used in 15 USC sec. 381, so that Wisconsin could assess and collect a tax on its net income for the years 1973 to 1978.

B. If the taxpayer's activities are taxable, whether the assessed taxes are "delinquent" and therefore subject to an eighteen percent penalty interest rate pursuant to sec. 71.13(1)(a), Wis. Stats. (1985-86).

The Wisconsin Supreme Court concluded that the taxpayer's activities in Wisconsin did not go beyond the "solicitation of orders" as that term is used in 15 USC sec. 381, and therefore the department may not assess and collect a tax on its net income for the years 1973 to 1978. The Supreme Court held that each of the taxpayer's activities in Wisconsin during 1973-1978 were incidental to the solicitation of orders of gum, and any activities that could be considered as not being inextricably bound up in solicitation are so minor as to be *de minimis*. Because it held that the department is prohibited from taxing the taxpayer's net income, the Supreme Court did not reach the second issue.

The department has appealed this decision to the United States Supreme Court.

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SALES/USE TAXES

Farming—ginseng raising. *Arndt Enterprises, Inc. vs. Wisconsin Department of Revenue* (Court of Appeals, District IV, January 31, 1991). This is an appeal from an order of the Circuit Court of Dane County, affirming a decision of the Wisconsin Tax Appeals Commission. The issue is whether a canopy system used in growing ginseng is a "machine" under sec. 77.54(3), Wis. Stats., and thus exempt from sales and use tax. See *Wisconsin Tax Bulletin* 65, page 14, and *Wisconsin Tax Bulletin* 70, page 15, for summaries of the prior decisions.

The taxpayer argues first that the component parts of the ginseng canopy — the wooden posts, cables, cable splicers, and ginseng cloth — are not subject to tax because the entire apparatus is a machine within the meaning of sec. 77.54(3), Wis. Stats. The taxpayer also contends that the jacks used to stretch the cables are part of the canopy, and that the wire used to construct cages to protect and house the animals in its mink farming operations is not subject to tax under sec. 77.54(3), Wis. Stats., because it is part of a machine.

The Court of Appeals concluded that the ginseng canopy is not a machine within the meaning of sec. 77.54(3), Wis. Stats., because it does not have fixed and moving parts for doing some kind of work. The poles, cloth, and cable do not move, and the canopy is simply a shelter for the plants. The Court also held that the jacks are tools used to adjust the canopy, rather than part of the canopy itself, and they are thus not exempt from tax pursuant to Wis. Adm. Code sec. Tax 11.12(4)(a)6.a, which provides that the exemption under sec. 77.54(3) does not apply to "tools used in construction or for making repairs" of farm machines. Finally, the Court of Appeals concluded that the wire mink cages are not farm machinery but rather storage areas for animals.

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

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Leases and rentals—taxicabs. *Edward Craig, Jr. vs. Wisconsin Department of Revenue* (Circuit Court of Dane County, September 27, 1990). This is a petition for review of a Wisconsin Tax Appeals Commission (Commission) decision, which affirmed the department's denial of the taxpayer's request for redetermination of a sales tax assessment against him. The issues in this case are:

A. Whether it was reasonable for the Commission to find that gross receipts from the leasing of motor vehicles for use as taxicabs are subject to sales and use tax under sec. 77.52(1), Wis. Stats.

B. Whether the department is equitably estopped from collecting sales tax from the taxpayer by its not having advised him of the taxability of the lease payments.

During the period under review, 1980 through 1986, the taxpayer was a sole proprietor in the business of leasing taxicabs within the city of Milwaukee under the licensing ordinances of that city. The taxpayer leased his taxicabs to independent taxicab drivers under oral agreements. The drivers did not sublease the vehicles. Standard practice did not allow a driver to lease a taxicab to someone else. The taxpayer reported his lease receipts for income tax purposes but did not report and pay to the department Wisconsin sales tax which the department claims should have been paid on the gross lease receipts under sec. 77.52(1), Wis. Stats. The taxpayer claimed that he only became aware of a sales tax obligation in October 1986, after receiving a letter from the department regarding sales tax.

The Circuit Court concluded as follows:

A. *Reasonableness of Commission's Decision* The process of statutory interpretation led the Commission to decide that the taxpayer was a retailer whose leases of automobiles to lessee/taxicab drivers were retail sales of tangible personal property for use or consumption of the lessees, but not for resale, and, therefore, taxable sales at retail. The Commission's findings are adequate and its interpretations of the statutes as they apply to the facts are reasonable.

B. *Equitable Estoppel* The Commission reasonably determined that the taxpayer has failed to establish the elements which would warrant the application of estoppel in this case.

The taxpayer has not appealed this decision.

❐

Manufacturing—exemption. *Fort Howard Corporation f/k/a Fort Howard Paper Company vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, January 15, 1991). The issue in this case is whether raw materials used by the taxpayer in the manufacture of toilet paper and napkins destined for sale, otherwise exempt from sales and use tax under sec. 77.54(2), Wis. Stats., lose their exemption to the extent attributable to defective product or "seconds" distributed free to the taxpayer's employes.

During the period under review, 1981 through 1983, the taxpayer was engaged in the business of manufacturing paper and paper products such as napkins and toilet paper in Wisconsin, and therefore was subject to the sales and use tax provisions of Chapter 77 of the Wisconsin Statutes. The taxpayer's process of making napkins and toilet paper is the manufacture of tangible personal property within the meaning of sec. 77.54(2), Wis. Stats.

The first step in the taxpayer's manufacture of napkins and toilet paper takes place in the pulp processing department, where the end product is paper "stock." The second step takes place in the taxpayer's paper machine department, where the stock is dried into paper and wound on a large core; this is known as a "parent roll." The third and final step is the process of taking the paper from the parent roll and turning it into

a final product such as napkins or toilet paper.

Occasionally, the paper machine produces a defective parent roll or "cull." Some of this cull is recycled by sending it back to the pulp processing department to be made into new paper stock. Some of the cull is converted into nonsaleable or "seconds" toilet paper and napkins, and distributed free to the taxpayer's employes. The taxpayer does not use any seconds toilet paper or napkins at its plant, nor does it give any seconds to customers or to anyone other than its employes.

The Commission concluded that the taxpayer's raw materials used to manufacture napkins and toilet paper, including the portion attributable to defective items distributed free of charge to employes, is used in the manufacture of goods destined for sale, and therefore is exempt from sales and use tax under sec. 77.54(2), Wis. Stats.

The department has not appealed but has filed a notice of nonacquiescence in regard to this decision.

❐

Parking and storage—aircraft; containers, packaging and shipping materials—plastic garment bags. *Luetzow Industries vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, November 14, 1990). The issues in this case are:

A. Whether the taxpayer, the owner of an aircraft hangar it leased to an entity the taxpayer claims was a federally-certified air carrier of persons and property in interstate commerce, was liable for sales taxes on the hangar rental receipts it received in 1984-1986 under a statute that taxes gross receipts derived from "providing parking space for ... aircraft for a consideration" (sec. 77.52(2)(a), Wis. Stats. (1983-84)), or exempt under a statute that exempts "gross receipts from the sale of and the storage, use or other consumption of [a]ircraft ... sold to persons using such aircraft as certified ... carriers of persons or property in interstate ... commerce" (sec. 77.54(5), Wis. Stats. (1983-84)).

B. Whether the taxpayer, also in the business of manufacturing plastic garment bags, was liable for sales taxes on the gross receipts from its 1984-1987 sales of the bags to dry cleaning establishments which used the bags to return clean laundry to their customers, or exempt under a statute that exempts "gross receipts from the sale of ... bags ... used by the purchaser to transfer merchandise to customers" (sec. 77.54(6), Wis. Stats. (1983-84)).

Based on the facts as stated in the statement of issues above, the Commission concluded:

A. Hangar rental receipts are taxable. Read in the light of its dual purposes, and in the context of the statutory design, the Commission held that sec. 77.52(2)(a), Wis. Stats., does not shelter aircraft hangar owners, such as the taxpayer, from sales tax on hangar rental charges. The only shelter the statute provides is from sales or use tax on aircraft transactions. The statute should not be read to exempt non-aircraft transactions, such as a hangar lease, which is a real estate transaction, just because the transaction happens to have some relationship with an article that is otherwise exempt.

B. The garment bags are taxable. The taxpayer argued that because the garment bags are used to transfer laundry to patrons of dry cleaning establishments, the gross receipts it received on the sale of the bags to the dry cleaners are exempt under sec. 77.54(6), Wis. Stats. The Commission held that transfers of laundry from dry cleaners to patrons are not "transfers of merchandise," because merchandise is "something bought and sold," and laundry is not bought and sold, only serviced. Accordingly, the sales of the bags are non-exempt transactions, taxable under the general sales tax statute.

The taxpayer has appealed this decision to the Circuit Court.

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Computer software—tangible vs. intangible; nexus. *B.I. Moyle Associates, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, December 12, 1990). The issues in this case are:

A. Whether, during the period April 1, 1982, through June 30, 1985, Wisconsin had jurisdiction or nexus to impose use tax collection duties on the taxpayer.

B. Whether, during the period January 1, 1981, through March 31, 1982, Wisconsin had jurisdiction or nexus to impose use tax collection duties on the taxpayer.

C. If so, whether the licensing transactions that occurred during the period January 1, 1981 through March 31, 1982, were leases of tangible personal property subject to use taxes or transfers of intangible property not subject to use taxes.

The taxpayer is a Minnesota corporation, whose business during the period April 1, 1982 through June 30, 1985, consisted of licensing computer programs. The taxpayer's only "contacts" with Wisconsin during the period were the mailing of promotional literature from Minnesota into Wisconsin, the acceptance in Minnesota of orders placed from Wisconsin by telephone or mail, the fulfillment of those orders from Minnesota by shipment through the mail or by common carrier of copies of the program instruction manuals and the magnetic tapes containing the programs, the recepit in Minnesota of the license fees paid by Wisconsin customers, the temporary presence of the taxpayer's magnetic tapes in Wisconsin until the Wisconsin customers installed the programs into their computers and then returned those tapes to Minnesota, and in some cases the providing from Minnesota of future improvements or enhancements of the programs licensed, as well as telephone "support" as necessary to solve customer problems arising during and after the installation of the programs. The taxpayer's "contacts" with Wisconsin during the period January 1, 1981 through March 31, 1982, included those listed above and in addition included the performance of some computer consulting services in Wisconsin.

The programs the taxpayer licensed were "systems programs" that activate and control the computer hardware to facilitate its

use and to control the use and sharing of the basic resources of a computer system.

The Commission concluded as follows:

A. For transactions after March 31, 1982, Wisconsin had no nexus. The only "presence" the taxpayer had in Wisconsin was the temporary presence of the means or medium of delivery of the magnetic tapes embodying and transmitting the computer programs.

B. For transactions before April 1, 1982, Wisconsin had nexus. During that period, the taxpayer engaged in some computer programming consulting services in Wisconsin. As the taxpayer has the burden of proving the assessment at issue to be incorrect, the Commission held that the taxpayer's services constituted "doing business" in Wisconsin, thus creating a taxing nexus between the taxpayer and Wisconsin.

C. Computer programs are not tangible property. Since the use of the taxpayer's computer programs in Wisconsin constituted the use of intangible personal property, the license transactions are non-taxable irrespective of nexus.

The department has appealed this decision to the Circuit Court.

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Gross receipts—patronage dividends. *Nelson Telephone Cooperative vs. Wisconsin Department of Revenue and State of Wisconsin Tax Appeals Commission* (Circuit Court of Dane County, December 7, 1989). The sole issue in this case is whether capital credits or patronage refunds by a cooperative out of net proceeds in excess of operating costs and expenses may be applied to reduce gross receipts subject to tax.

The taxpayer urged application of the exemption from "gross receipts" set out in sec. 77.51(4)(b)2, Wis. Stats. To be available, the exemption requires a refund of cash or credit arising from "... adjustments in sales price after the sale has been completed ...." The department argued for disallowance of the exemption because the statute does not *specifically* refer to "patronage rebates," "patronage credits," or "patronage dividends." Under controlling case law "... everything is taxable at the retail level unless specifically exempted." *Dept. of Revenue v. Milwaukee Refining Corp.*, 80 Wis (2), 44, 49, (1977).

The Circuit Court concluded that while the exemption provided in sec. 77.51(4)(b)2, Wis. Stats., requires an adjustment in "sales price," net proceeds as determined by the taxpayer involve more than sales price alone. The Court also concluded that the result urged is incongruous, and that the credit provided to patrons of the taxpayer is not an adjustment in sales price so as to allow a reduction of "gross receipts" under sec. 77.51(4)(b)2, Wis. Stats.

The taxpayer has not appealed this decision.

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Waste reduction and recycling. *Wisconsin Department of Revenue vs. Parks-Pioneer Corporation* (Circuit Court of Dane County, February 21, 1991). This is a petition for review of a decision of the Wisconsin Tax Appeals Commission, which found that certain machinery and equipment used in the taxpayer's business is exempt from Wisconsin sales and use taxes under the exemption for recycling activities set forth in sec. 77.54(26m), Wis. Stats. See *Wisconsin Tax Bulletin* 68, page 10, for a summary of that decision.

The department contends that the Legislature only intended to exempt machinery and equipment exclusively and directly involved in the recycling process, not to exempt collection and transportation activities. The taxpayer contends that its machinery and equipment were exempt because they were used exclusively and directly for recycling activities. The department also contends that the starting fluid used to start diesel engines on cranes used in the taxpayer's yard is not machinery, equipment, or parts therefor within the meaning of sec. 77.54(26m), Wis. Stats., while the taxpayer argues that since the starting fluid is used in running machinery or equipment it is a "part therefor" within the meaning of the statute.

The Circuit Court concluded that sec. 77.54(26m), Wis. Stats., plainly exempts machinery and equipment, including parts therefor, which are used exclusively and directly in "activities" which are a part of recycling, and that collecting, transporting, and weighing the materials to be recycled are activities within the field of the act of recycling. The Court also found that the starting fluid is necessary to the operation of the taxpayer's cranes, and therefore, it is a part thereof exempt under sec. 77.54(26m), Wis. Stats.

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

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Leases and rentals—taxicabs. *Joseph Sanfelippo vs. Wisconsin Department of Revenue* (Circuit Court of Dane County, February 27, 1991). This is a petition for judicial review of a decision of the Wisconsin Tax Appeals Commission (Commission), which affirmed the department's denial of the taxpayer's request for redetermination of a sales tax assessment for the years 1981-84. See *Wisconsin Tax Bulletin* 65, page 16, for a summary of that decision.

The taxpayer seeks reversal of the Commission's decision on two grounds: (1) the Commission misinterpreted the governing statute in concluding that the taxpayer's receipts from renting taxicabs he owns to cab drivers are subject to sales tax on the basis that the leases of the cabs were made by the taxpayer "at retail," and (2) even if the receipts are subject to taxation, the department is estopped from collecting the tax from him. The taxpayer's principal contention is that when he leases the cabs to the drivers, he is providing them with personal property which they, in turn, "resell" to the cab customers, and it is the transaction between driver and fare-paying passenger which is at retail, not the transaction the department attempts to tax.

The Circuit Court concluded that the transactions between the taxpayer and his drivers are not taxable, because it is the transactions between the drivers and their customers which are the final and ultimate employment of the cabs which withdraws them from the marketplace of goods and services and are thus the retail sale subject to sales tax. Because it concluded that the transactions on which sales tax were imposed by the department's assessment are not taxable, the Court did not address whether the department is estopped from collecting the tax.

The department has 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. In situations where the facts vary from those given herein, the answers may not apply. 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

Homestead Credit

Corporation Franchise or Income Taxes

Sales/Use Taxes

INDIVIDUAL INCOME TAXES

1. Effect of a Farmland Preservation Credit on Property Taxes Allowable for the School Property Tax Credit

STATUTES: Section 71.07(9), Wis. Stats. (1989-90)

BACKGROUND: The Wisconsin farmland preservation credit is a refundable credit to owners of qualified Wisconsin farmland. The credit is based on property taxes accrued on qualified farmland (including improvements). Based on a letter ruling received from the Internal Revenue Service dated February 25, 1980, the amount of farmland preservation credit is a recovery of the property tax upon which the credit is based.

Section 71.07(9), Wis. Stats. (1989-90), provides for the Wisconsin school property tax credit. The Wisconsin school property tax credit is equal to a percentage of the property taxes paid on the taxpayer's principal residence during the tax year.

QUESTION: The property taxes used to compute a farmland preservation credit may include the property taxes on the taxpayer's principal residence located on the farm. In these cases, does the receipt of the farmland preservation credit affect the amount of property taxes which can be used to compute the Wisconsin school property tax credit?

ANSWER: Yes, but only when receipt of the farmland preservation credit and payment of the property taxes used to compute that credit occur during the same tax year. When payment of the tax and recovery of a portion of the tax (through the farmland preservation credit) occur during the same year, the portion of the farmland preservation credit allocable to taxes on the principal residence will reduce the amount of taxes which can be used to compute the Wisconsin school property tax credit.

(Note: This means that the property taxes which may be used to compute a Wisconsin school property tax credit are the same as those which may be deducted as an itemized deduction for federal tax purposes on federal Schedule A.)

Example 1:

Facts and Question:

1. A calendar year taxpayer paid 1989 property taxes accrued of $6,000 during 1990.

2. Of the $6,000 of property taxes, $4,800 (80%) are determined to be farm property taxes and $1,200 (20%) are determined to be taxes on the taxpayer's principal residence.

3. During 1990, the taxpayer received a 1989 farmland preservation credit of $2,000 which was based on the 1989 property taxes accrued of $6,000.