

- 11.29 Leases and rentals of tangible personal property-A (7/1/91)
- 11.30 Credit sales, bad debts and reposessions-A (7/1/91)
- 11.32 "Gross receipts" and "sales price"-A (7/1/91)
- 11.33 Occasional sales - general-NR (7/1/91)
- 11.34 Sales of business or business assets-NR (7/1/91)
- 11.35 Occasional sales exemption for nonprofit organizations-NR (7/1/91)
- 11.46 Summer camps-A (7/1/91)
- 11.50 Auctions-A (7/1/91)
- 11.51 Grocers' guidelist-A (7/1/91)
- 11.52 Coin-operated vending machines and amusement devices-A (7/1/91)
- 11.57 Public utilities-A (7/1/91)
- 11.63 Radio and television-A (7/1/91)
- 11.65 Admissions-A (7/1/91)
- 11.68 Construction contractors-A (7/1/91)
- 11.72 Laundries, drycleaners, and linen and clothing suppliers-A (7/1/91)
- 11.79 Leases of highway vehicles and equipment-A (7/1/91)
- 11.80 Sales of ice-A (7/1/91)
- 11.81 Industrial gases, welding rods and fluxing materials-A (7/1/91)
- 11.83 Motor vehicles-A (7/1/91)
- 11.84 Aircraft-A (7/1/91)
- 11.85 Boats, vessels and barges-A (7/1/91)
- 11.86 Utility transmission and distribution lines-R&R (7/1/91)
- 11.87 Meals, food, food products and beverages-A (7/1/91)
- 11.88 Mobile homes-A (7/1/91)
- 11.91 Successor's liability-A (7/1/91)
- 11.92 Records and record keeping-A (7/1/91)
- 11.93 Annual filing of sales tax returns-A (7/1/91)
- 11.94 Wisconsin sales and taxable transportation charges-A (7/1/91)
- 11.96 Interest rates-A (7/1/91)

#### D. Emergency Rules

- 3.11 Member of a reserve component of the armed forces serving in the Desert Shield or Desert Storm theater of operations-NR (effective 4/29/91)

## 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

David P. McCarthy and Susan C. Pearsall (p. 4)  
Independent contractor vs. employee

#### Corporation Franchise or Income Taxes

Appleton Papers, Inc. (p. 5)  
Business loss carryforward — merger

Sentry Financial Services Corporation (p. 5)  
Allocation of income — between affiliates

#### Sales/Use Taxes

Arndt Enterprises, Inc. (p. 5)  
Farming — ginseng raising

#### Other

M & I Bank of Plover (p. 5)  
DTCS — delinquent tax payment application — foreclosure proceeds

## INDIVIDUAL INCOME TAXES

**Independent contractor vs. employee.** *David Paul McCarthy and Susan Carter Pearsall vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, January 29, 1991). The issue in this

case is whether David P. McCarthy ("the taxpayer") was an independent contractor ("I/C") teacher as claimed on his joint Wisconsin return and related U.S. individual income tax return, including various schedules, for the calendar year 1988. The taxpayer and Susan C. Pearsall, his wife, are both parties to this appeal solely by virtue of their joint filing of a 1988 Wisconsin income tax return for nonresidents and part-year residents.

Based on the taxpayer's claimed I/C status, he filed a federal Schedule C, Profit or Loss from Business (Sole Proprietorship), reporting gross receipts and taking deductions therefrom. Despite this filing, he filed no Schedule SE, Social Security Self-Employment Tax form.

The taxpayer contended that he established independent contractor status under the "20-factor test" of Treasury Regulations promulgated under the Internal Revenue Code. However, these factors are intended only as guides. "The degree of importance of each factor varies depending on the occupation and the factual context in which services are performed." Treas. Reg. § 31.3401(d)-1(h).

Upon evaluating the 20 factors and considering the nature of teaching services in institutions of higher education, the Commission concluded that while some of the factors might indicate I/C status, there are more which would clearly indicate employment, and those factors which are inconclusive or inapplicable work to the taxpayer's detriment, since it is his burden to show the assessment is incorrect. The Commission held that the taxpayer's work arrangement during 1988 must be considered employment and, therefore, he was not entitled to file a Schedule C or deduct expenses of a sole proprietorship.

The taxpayers have not appealed this decision.

**CAUTION:** This is a small claims decision of the Wisconsin Tax Appeals Commission and may not be used as a precedent. This decision is provided for informational purposes only.



## CORPORATION FRANCHISE OR INCOME TAXES

**Business loss carryforward — merger.** *Wisconsin Department of Revenue vs. Appleton Papers, Inc.* (Court of Appeals, District IV, March 28, 1991). The Wisconsin Department of Revenue appeals from a judgment and an order of the Circuit Court of Dane County, affirming a Wisconsin Tax Appeals Commission decision. The issue is whether a corporation may carry forward a tax credit earned by a predecessor corporation under sec. 71.043(3), Wis. Stats. (1982-84). See *Wisconsin Tax Bulletin* 63, page 10, and *Wisconsin Tax Bulletin* 69, page 9, for summaries of the prior decisions.

The taxpayer, Appleton Papers, Inc. (API/2) was created as a product of a merger. Germaine Monteil Cosmetics Corporation merged five of its subsidiaries into itself and changed its name to Appleton Papers, Inc. One of the defunct subsidiaries was also known as Appleton Papers, Inc. (API/1). API/1 ran a paper business in Wisconsin. In 1981 it earned a credit against its tax liability for sales and use taxes that it paid on fuel and electricity consumed in its manufacturing process. The full credit could not be used because the credit exceeded API/1's 1981 tax liability. API/2, which now operated the same paper manufacturing business that had been operated by API/1, claimed API/1's unused sales and use tax credit on its franchise tax returns. The department disallowed the credit. On appeal, the Commission reversed the department, and the Circuit Court affirmed the Commission's decision.

The Court of Appeals concluded that sec. 71.043(3), Wis. Stats. (1982-84), does not grant corporations the tax benefit of carrying forward a sales and use tax credit earned by a predecessor corporation.

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

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**Allocation of income — between affiliates.** *Wisconsin Department of Revenue*

*vs. Sentry Financial Services Corporation, and Sentry Financial Services Corporation vs. Wisconsin Department of Revenue* (Court of Appeals, District IV, March 28, 1991). The Wisconsin Department of Revenue appeals from a judgment and an order of the Circuit Court of Portage county, affirming a decision of the Wisconsin Tax Appeals Commission. The taxpayer, Sentry Financial Services Corporation (SENCO), cross-appeals. The issues in the case are whether SENCO's sale of a plane to the Sentry Corporation was a "bargain sale" within the meaning of sec. 71.11(7m), Wis. Stats. (1981-82), thus giving the department authority to reallocate income between subsidiary and parent corporations to more "clearly reflect" their income, and whether the gain on the transaction was nonrecognizable under sec. 71.311(1)(b), Wis. Stats. (1981-82), which declares certain intra-family corporate distributions to be tax-free. See *Wisconsin Tax Bulletin* 68, page 9, for a summary of the prior decision.

The case arose from a 1982 transfer by SENCO of a corporate airplane to its parent company, Sentry Corporation (SENCOR) in exchange for a payment of \$453,560. SENCO had purchased the plane in 1972 and leased it to SENCOR's parent company, Sentry Insurance, for ten years. SENCO, taking the position that the 1982 transaction was simply a "buyout" at the end of the Sentry lease, did not report any taxable gain on the transaction. The department considered the transaction to be a "bargain sale" between interrelated businesses within the meaning of sec. 71.11(7m), Wis. Stats., and thus allocated a taxable gain to SENCO. The Commission held, and the Circuit Court affirmed, that the transaction was a "bargain sale" between commonly owned corporations, but that the gain on the transaction was not taxable, because of the nonrecognition-of-gain provisions of sec. 71.311(1)(b), Wis. Stats.

The Court of Appeals concluded that the Commission's "bargain sale" conclusion is supported by substantial evidence and thus applies, but that because there is no evasion of tax and no distortion of income not sanctioned by the nonrecognition provisions of sec. 71.311(1)(b), Wis. Stats.,

the department erred when it allocated income to SENCO under sec. 71.11(7m), Wis. Stats.

The department has not appealed this decision.

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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).

A summary of the Court of Appeals decision appeared in *Wisconsin Tax Bulletin* 71, page 10. The summary stated that the taxpayer had appealed the decision to the Wisconsin Supreme Court. The Wisconsin Supreme Court denied the petition for review on April 9, 1991.

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## OTHER

**DTCS — delinquent tax payment application — foreclosure proceeds.** *M.&I. Bank of Plover vs. Robert R. and Marcia E. Mabie, and Wisconsin Department of Revenue* (Circuit Court of Portage County, February 28, 1991). The State of Wisconsin requested the Circuit Court to reconsider a previous Order, vacate its decision, and render an Order requiring the payment of the surplus proceeds of a foreclosure sale, to the State. The issue in this case is whether the surplus proceeds of the foreclosure sale initiated by a private mortgage lender are exempt under sec. 815.20, Wis. Stats. (1989-90), from collection by the department, pursuant to tax liens.

The department filed a claim to the surplus proceeds of the foreclosure, based upon three delinquent tax warrants filed in Portage County against the former joint owner of the property sold, Robert Mabie. He and his spouse, Marcia Mabie, also filed a claim to the surplus funds, based upon the homestead exemption under sec. 815.20, Wis.

Stats. (1989-90). Marcia Mabie was paid one-half of the surplus proceeds.

The Circuit Court concluded that the surplus proceeds are not protected by the homestead exemption. The lien acquired

by the department is a statutory lien, and property is not exempt in any proceeding brought by any person against the holder of a statutory lien. The Circuit Court thus vacated its previous Order and found that

the balance of the surplus proceeds should be delivered to the department.

This decision has not been appealed.

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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

1. Sale of an Installment Obligation by a Nonresident of Wisconsin (p. 6)
2. Taxability of Interest from Veterans' Administration Life Insurance Policy (p. 7)
3. Taxable Status of IRA Distribution Where Principal Contributed to the IRA Was Exempt from Wisconsin Tax (p. 7)

### Corporation Franchise or Income Taxes

1. Bad Debt Deduction Allowable to Credit Unions (p. 7)
2. Sales Factor - No Throw Back of Sales Due to Nexus With Destination State (p. 9)

### Sales/Use Taxes

1. Advertising and Related Transactions (p. 10)
2. Charge for Disposal of Tangible Personal Property (p. 13)
3. Donation vs. Sale at Retail (p. 14)
4. Municipal Water Softener (p. 15)
5. Sales and Purchases by Federal Credit Unions (p. 15)
6. Services Performed on Utility Right-of-Way (p. 16)
7. Taxability of Computer Software (p. 16)
8. Tire Fee on New Vehicles (p. 19)
9. Trade-In of Solely-Owned and Leased Automobiles (p. 19)

## INDIVIDUAL INCOME TAXES

1. Sale of an Installment Obligation by a Nonresident of Wisconsin

Statutes: Sections 71.01(6) and 71.04(1)(a), Wis. Stats. (1989-90)

Wis. Adm. Code: Section Tax 2.95, March 1991 Register

Note: This Tax Release applies only with respect to sales and exchanges of installment obligations occurring on or after April 1, 1991.

Background and Question: Section 71.04(1)(a), Wis. Stats. (1989-90), provides that income or loss of nonresident individuals from the sale of real property or tangible personal property shall follow the situs of the property. Income or loss of nonresident individuals derived from land contracts, mortgages, stocks, bonds, and securities or from the sale of similar intangible personal property shall follow the residence of such persons.

Internal Revenue Code section 453B(a) provides that any gain or loss resulting from the disposition of an installment obligation shall be considered as resulting from the sale or exchange of the property in respect of which the installment obligation was received.

Is the gain or loss from the sale of an installment obligation by a nonresident taxable to Wisconsin?

Answer: Gain or loss on the sale of an installment obligation by a nonresident is taxable to Wisconsin where the installment obligation resulted from the sale of real property or tangible personal property located in Wisconsin. Gain or loss on the sale of an installment obligation by a nonresident is not taxable to Wisconsin where the installment obligation resulted from the sale of intangible personal property or from the sale of real property or tangible personal property located outside Wisconsin. Since Wisconsin has adopted the definition of adjusted gross income as defined by the Internal Revenue Code, section 453B(a) of the Internal Revenue Code controls to classify the sale of an installment obligation as the sale of real property, personal property, or intangible personal property before applying the situs of income rules prescribed by Wisconsin law.

Example: In 1989 a nonresident of Wisconsin sold real estate located in Wisconsin for \$140,000. The adjusted basis of the property was \$70,000 which resulted in a gross profit percentage of 50%. The taxpayer received \$40,000 down and an installment note for \$100,000. The gross profit of \$20,000 (\$40,000 x 50%) was included in 1989 Wisconsin taxable income. An additional \$50,000 was paid off in 1990 of which \$25,000 (\$50,000 x 50%) was included in 1990 Wisconsin taxable income. The installment obligation is sold for \$55,000 in May 1991. The gain on the sale of the installment obligation which is taxable to Wisconsin for 1991 is computed as follows: