pay fees of $350. For operating without a seller's permit, Cavadini was sentenced to 10 days in jail.

DO YOU HAVE SUGGESTIONS FOR 1992 TAX FORMS?

Do you have suggestions for improving the Wisconsin tax forms or instructions? Send your suggestions to the Wisconsin Department of Revenue, Director of Technical Services, P. O. Box 8933, Madison, WI 53708. Please be specific and send your suggestions in early. The department appreciates hearing from you and has already begun preparing forms and instructions for next year's filing.

INFORMATION OR INQUIRIES?

Madison - Main Office
Area Code (608)

Beverage, Cigarette, Tobacco Products	266-6701
Corporation Franchise/ Income	266-1143
Estimated Taxes	266-9940
Fiduciary, Inheritance, Gift, Estate	266-2772
Homestead Credit	266-8641
Individual Income	266-2486
Motor Fuel	266-3223
Property Tax Deferral Loan	266-1983
Sales, Use, Withholding	266-2776
Audit of Returns: Corporation, Individual, Homestead	266-2772
Appeals	266-0185
Refunds	266-8100
Delinquent Taxes	266-7879
Copies of Returns: Homestead, Individual	266-2890
All Others	266-0678
Forms Request: Taxpayers	266-1961
Practitioners	267-2025

District Offices

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

NEW IS&E DIVISION RULES AND RULE AMENDMENTS IN PROCESS

Listed below are proposed new administrative rules and amendments to existing rules that are currently in the rule adoption process. The rules are shown at their state in the process as of April 1, 1992. Part A lists rules which are being or have been reviewed by the Legislative Council Rules Clearinghouse. For the period from January 2, 1992 to April 1, 1992, Part B lists new rules and amendments which became effective, Part C lists emergency rules which became effective, and Part D lists rules which were withdrawn from promulgation. ("A" means amendment, "NR" means new rule, "R" means repealed, and "R&R" means repealed and recreated.)

A. Rules at or Reviewed by Legislative Council Rules Clearinghouse

2.475 Apportionment of net business incomes of interstate railroads, sleeping car companies and car line companies-NR
11.08 Medical applicances, prosthetic devices and aids-A
11.17 Hospitals, clinics and medical professions-A
11.18 Dentists and their suppliers-A
11.45 Sales by pharmacies and drug stores-A
11.86 Utility transmission and distribution lines -A

B. Rules Adopted (including effective date)

11.01 Sales and use tax return forms-A (2/1/92)
11.47 Commercial photographers and photographic services-A (2/1/92)

C. Emergency Rules Adopted (including effective date)

2.475 Apportionment of net business incomes of interstate railroads, sleeping car companies and car line companies-NR (2/17/92)

D. Rules Withdrawn From Promulgation (including date withdrawn)

11.05 Governmental units-A (2/20/92)
11.33 Occasional sales-A (2/20/92)
11.34 Occasional sales exemption for sale of a business or business assets-A (2/20/92)
11.50 Auctions-A (2/20/92)
11.69 Financial institutions-A (2/20/92)
11.83 Motor vehicles-A (2/20/92)
11.84 Aircraft-A (2/20/92)
11.85 Boats, vessels and barges-A (2/20/92)
11.88 Mobile homes-A (2/20/92)

REPORT ON LITIGATION

Summarized below are recent significant Wisconsin Tax Appeals Commission (WTAC) 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 WTAC's decision).

The following decisions are included:

Corporation Franchise or Income Taxes

Consolidated Freightways Corporation of Delaware (p.5)
Apportionment - motor carriers

NCR Corporation (p. 5)
Apportionment - factors
Dividends - deductible dividends
Foreign source income

Sales/Use Taxes

American Vending, Inc. (p.6)
Occasional sales - business assets

B. I. Moyle Associates, Inc. (p. 6)
Computer software - tangible vs. intangible
Nexus

Ebner Construciton, Inc. (p. 7)
Use tax - lability of user

John Lynch Chevrolet-Pontiac Sales, Inc. (p. 7)
Motor vehicle dealers - use tax

Morton Buildings, Inc. (p. 8)
Use - does not include

Prairie du Chien Car Wash Partnership, et. al. (p. 8)
Sale of a business or business assets

CORPORATION FRANCHISE OR INCOME TAXES

Apportionment - motor carriers. *Consolidated Freightways Corporation of Delaware vs. Wisconsin Department of Revenue* (Wisconsin Supreme Court, November 14, 1991).

A summary of the Wisconsin Supreme Court decision appeared in *Wisconsin Tax Bulletin* 75, page 11. The summary stated that it was not known whether the taxpayer would appeal the decision to the United States Supreme Court. The taxpayer did not appeal the decision.

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Apportionment - factors; Dividends - deductible dividends; Foreign source income. *NCR Corporation vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, February 10, 1992). The issues in this case are:

A. Whether Wisconsin's inclusion in the taxpayer's 1975-79 apportionable income of all of the dividends, interest, and royalties ("foreign source income") taxpayer-parent-corporation received from its overseas subsidiaries, all of which were unitary with the taxpayer, and its inclusion in the taxpayer's 1980 apportionable income of 50 percent of almost all of the foreign source dividends and all of the interest and royalties received from those subsidiaries, interfered with the federal uniformity interest in regulating foreign trade and subjected that foreign source income to inevitable multiple international taxation, in violation of the foreign commerce clause of the U.S. Constitution.

B. Whether Wisconsin's apportionment formula which, as applied in this case, treated all of the taxpayer's 1975-80 foreign source income as though it were produced solely by the efforts of the taxpayer, and which calculated Wisconsin's share of that income with reference only to the taxpayer's own apportionment factors, giving no credit for, or recognition to, the factors of the subsidiaries that paid the taxpayer the income, lacks the kind of coherence and consistency required by the due process and foreign commerce clauses of the U.S. Constitution and the Wisconsin apportionment statute.

C. Whether a Wisconsin "concentration" statute, which exempts certain dividends received by a corporation when the dividend-paying corporation has a sufficient Wisconsin "presence," a presence large enough to result in 50 percent of the payor's net income being used to compute taxable income in Wisconsin, but taxes such dividends received when the payor has less than this 50 percent presence, operates as a discrimination in favor of Wisconsin-concentrated businesses and their shareholder-corporations and against businesses not concentrated in Wisconsin and their shareholder-corporations (such as the taxpayer), in violation of the interstate commerce, foreign commerce, and equal protection clauses of the U.S. Constitution.

For the tax years 1975-80, the taxpayer, a U.S.-based, Ohio-headquartered corporation, and a manufacturer and seller of business machines with operations in Wisconsin, other states, and overseas, received payments reported as dividends, interest, and royalties ("foreign source income") from some 75 overseas-based subsidiaries, all of which were, with one exception, wholly-owned by the taxpayer. (The Japanese subsidiary was owned 70 percent.) The parties agreed that the overseas operations were unitary with the U.S. operations.

For the years 1975-79, the department included all of the foreign source income in the taxpayer's apportionable income, but none of the overseas subsidiaries' property, payroll, or sales in the property, payroll and sales factor of the taxpayer's apportionment formula.

In 1980, the department included all the foreign source interest and royalties, but excluded 50 percent of foreign source dividends received from subsidiaries in which the taxpayer owned 80 percent or more of the total combined voting stock, per sec. 71.04(4)(b), Wis. Stats. (1979-80).

The taxpayer argued that Wisconsin's apportionment formula, as applied in this case, led to unlawful multiple international taxation in violation of the foreign commerce clause. The taxpayer contended that the foreign source income should have been excluded altogether from apportionable income, or barring that, some portion, if not all, of the foreign subsidiaries' property, payroll, and sales should have been included in the property, payroll and sales factor of the taxpayer.

The taxpayer in 1975-80 also received other dividends, along with the foreign source dividends. These other dividends were paid by unrelated corporations which had less than 50 percent of their net incomes used in computing Wisconsin taxable income and were, therefore, not eligible for the dividends received deduction under sec. 71.04(4)(a), Wis. Stats. (1979-80). The taxpayer argued that the "50 percent-concentration" exemption unconstitutionally discriminated against the owners of nonconcentrated businesses, such as itself, in favor of the owners of Wisconsin-concentrated businesses.

The Commission concluded the following for Issues A, B, and C:

A. All of the taxpayer's foreign source income, being from a unitary source, is therefore apportionable business income, and there is nothing about counting that income as apportionable that causes inevitable double taxation in violation of the foreign commerce clause.

B. The California world-wide combined reporting method (as modified by the Commission to include a subsidiary's property, payroll, and sales in the apportionment factors based on the stock ownership percentage of the parent) measures the maximum amount of apportionable income a state can include in its formula and also derives the constitutional maximum amount

of apportioned income on which a state can levy its tax.
If whatever method Wisconsin has used results in more income apportioned than what the California method would apportion, the California results will prevail. If Wisconsin's method results in less income apportioned than the California method, the Wisconsin results will stand, because the state is always free to tax at less than the constitutional maximum.

C. Section 71.04(4)(a), Wis. Stats. (1979-80), which allows a deduction for dividends received from corporations if 50 percent or more of the net income or loss of the payor was used in computing Wisconsin taxable income, violates the equal protection clause.

Inside source dividends (dividends received from its subsidiaries) are not true dividends for years 1975-79.

Consequently, the state must exclude from apportionable income the amount of outside source dividends (dividends from unrelated corporations) for 1975-80 and the 1980 inside source dividends.

The department has appealed this decision to the Circuit Court.

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SALES/USE TAXES

Occasional sales - business assets. *American Vending, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, February 13, 1992). The issue in this case is whether the sale of the taxpayer's vending machine business occurred on September 1, 1988, qualifying as an exempt "occasional sale," or on August 18, 1988, or some earlier date, disqualifying it for exemption because the seller's permit was not surrendered within 10 days after the sale.

The taxpayer was incorporated in 1975 and, until September 1988, was engaged in the vending machine business, owning and servicing machines at various locations throughout Milwaukee. At all times relevant here, Anthony Keller ("Keller") was its owner, president, and sole employe.

On or about August 8, 1988, Stanley M. Kass ("Kass"), president of Skylark Automatic Vending, Inc. ("Skylark"), agreed that Skylark would purchase American Vending, Inc. ("American") for $75,000 plus inventory.
Keller and Kass agreed to payment of $5,550 for inventory on August 16, another $10,000 on August 18, and $35,000 on September 1, at which time a bill of sale was to be delivered transferring the business to Skylark. These payments were made as agreed, and the bill of sale was held by Keller undated until August 31, when it was dated, and then turned over to Kass either on August 31 or September 1, 1988, to transfer the business to Skylark and receive the final agreed initial payment of $35,000. That check was dated September 1, apparently to coincide with the availability of funds.

Because he would not be receiving the entire initial payment until September 1, Keller did not surrender American's seller's permit to the department until September 2, 1988, since to have done so earlier could have left him both without a permit and without a completed sale had the $35,000 payment not been made as promised on September 1.

At the time of the payment for inventory on August 16, Skylark began conditionally "operating" the business in anticipation of completion of its purchase on September 1, although Keller continued to service the machines. On the books of Skylark, however, American's vending business was purchased on September 1, 1988, following delivery of the bill of sale transferring the ownership of assets to Skylark. The final $30,000 of the purchase price was paid to American in January 1989.

The Commission concluded that the payment of $35,000 on September 1, 1988, was a condition precedent to the sale, which would not have been consummated without it, and the sale therefore could not and did not occur until that date. The permit surrender by the taxpayer on September 2 was therefore timely, and the sale qualified for exemption.

The department has not appealed this decision.

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Computer software - tangible vs. intangible; Nexus. *Wisconsin Department of Revenue vs. B.J. Moyle Associates, Inc.* (Dane County Circuit Court, November 12, 1991). This is a review of a decision by the Wisconsin Tax Appeals Commission which reversed the department's tax assessment against the taxpayer. For a summary of that decision, see *Wisconsin Tax Bulletin* 71, page 11. The issues in this case are:

A. Whether the computer programs leased by the taxpayer are tangible personal property subject to Wisconsin use tax, or are intangibles not subject to tax.

B. Whether Wisconsin had jurisdiction or nexus to impose use tax collection duties on the taxpayer.

The taxpayer is a Minnesota corporation. The taxpayer developed and marketed computer software for users of computers that improved operating system performance and user productivity. The taxpayer mailed information and/or software or a combination of printed manuals and computer tape on a regular basis to customers in this state.

The taxpayer did not sell computer software but rather granted the customers a license to use the product in accordance with the lease agreement on a monthly, yearly, or permanent basis. The taxpayer did not engage in pre-sale consultation and analysis of a customer's requirements and systems. The exact programs or modules of the taxpayer's product existed at the time that the customer placed an order. The taxpayer did not change the preexisting programs or modules based upon the customer's data or specific hardware or software environment.

When a customer calls the taxpayer to place an order, the customer typically describes its operating system environment to the salesperson who determines which program is appropriate for the customer. The taxpayer transmits a systems program to the customer in machine readable form by transferring a copy of the program from the master magnetic tape to a blank magnetic tape and then sending the tape to the customer by the U.S. Mails or common carrier. The blank magnetic tapes purchased by the taxpayer typically cost between $3.00 and

$6.00, a minimal cost in comparison to the license charge.

It would have been possible for the taxpayer to transmit its systems programs to its customers by means other than magnetic tape. For example, the taxpayer's systems programs could have been communicated over a telephone line without the tapes themselves ever being physically present in Wisconsin.

The taxpayer does not separately charge its customers for the magnetic tape it uses to transmit its systems programs to customers. The taxpayer instructs its customers to return the magnetic tapes as soon as the copies of the programs contained on the tapes have been read into its customers' computer systems and the customers, at the customers' option, have made backup copies of the program. Customers make their own backup copies of the program on their own tape or other media. The taxpayer then reuses the returned tapes to transmit the same or other programs to other customers.

The taxpayer typically licenses one of its system programs to between one and 500 different users. A typical sequence of events for utilizing a new program is that the program arrives in the customer's location on magnetic tape or diskettes, it is placed on the customer's magnetic tape drive or disk drive, the new program is transferred from the tape or diskette, and a copy is placed on the drive from which it can be used later. A copy of the tape or diskette is often retained by the customer for "archive" or backup purposes.

The taxpayer did not load the program into the customer's computer and did not visit the customer's site either before or after the licensing. The taxpayer provided maintenance and improvements of the programs to the vast majority of its customers. The monthly and yearly license fees included future improvement and maintenance. The permanent license fee included improvements and maintenance for the first year of the license. Thereafter, at the customer's option, improvements and maintenance may have been obtained annually.

The taxpayer responded by telephone when the customers, during installation of their software or post installation, had difficulties with the software or questions about the software.

During the period under review, the taxpayer did not register with the department to collect the use tax, and did not collect, report, or remit a sales or use tax to the department.

On August 22, 1985, the department issued a sales and use tax determination pursuant to sec. 77.59(9), Wis. Stats., for the period of January 1, 1981 through June 30, 1985, because the taxpayer did not file sales and use tax returns or register with the department.

The Circuit Court concluded as follows:

A. The taxpayer's lease of computer programs is the lease of an intangible, not subject to taxation pursuant to sec. 77.52 or 77.53, Wis. Stats. The taxpayer's gross receipts are not derived from the storage, use, or other consumption of tangible personal property or taxable services as described in sec. 77.52 or 77.53, Wis. Stats., and, thus, are not taxable pursuant to those sections.

B. Because the Circuit Court found that the computer programs leased by the taxpayer are intangibles, and thus not taxable pursuant to sec. 77.52 or 77.53, Wis. Stats., it found it unnecessary to decide the issue of whether Wisconsin has jurisdiction or nexus for assessing such a tax.

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

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Use tax - liability of user. *Ebner Construction, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, December 5, 1991). The issue in this case is whether the taxpayer, although found not to be liable for the sales tax imposed by sec. 77.52, Wis. Stats. (1987-88), is liable for the use tax imposed by sec. 77.53, Wis. Stats. (1987-88).

The taxpayer contracted with a retailer, Harter and Sons, for landscaping services. The taxpayer believed the contract price included 5% Wisconsin sales tax; however, no sales or use tax was paid to the state by either the retailer or the taxpayer. The taxpayer did not, and presumably could not, produce at the hearing a receipt from the retailer with the tax separately stated. The Commission found that the taxpayer, although not the retailer, was the consumer of the landscaping services purchased from the retailer, and was liable for use tax based on the price paid to the retailer for the landscaping services.

The taxpayer has not appealed this decision.

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Motor vehicle dealers - use tax. *John Lynch Chevrolet-Pontiac Sales, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, December 4, 1991). The issue in this case is whether the taxpayer, by its use of vehicles in its parts or service departments, is subject to a use tax measured by its purchase price (dealer cost) with no trade-in allowance or other reduction in the measure of tax.

During the period under review, the taxpayer was a Wisconsin corporation engaged in the business of selling new and used automobiles, repairing automobiles, and selling automobile parts. The taxpayer took a number of motor vehicles out of inventory to be used in the service and parts departments. The vehicles had been purchased for resale without tax. After approximately 6 months use, the vehicles were returned to inventory and sold to retail customers. The taxpayer reported use tax on these vehicles based on the measure of tax used for motor vehicles licensed in the name of the retail dealer.

The department assessed a use tax on the invoice price (sales price to dealership) of the vehicles taken from inventory and used in the parts or service departments of the taxpayer, allowing a credit for use tax previously reported by the taxpayer on these vehicles.

The taxpayer alleges the correct measure of use tax is the difference between its dealer cost (invoice amount) and the appraised

value of the vehicle at the time of its transfer to its used car division.

The Commission concluded that the Wisconsin statutes do not provide for such a reduction in the measure of use tax due on the transfer of motor vehicles between divisions within a corporate dealership. The taxpayer has not met the burden of showing that the trade-in allowances provided by secs. 77.51(4)(b)3 and 77.51(15)(b)4, Wis. Stats. (1989-90) clearly apply.

The taxpayer has not appealed this decision.

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Use - does not include. *Wisconsin Department of Revenue vs. Morton Buildings, Inc.* (Circuit Court for Dane County, February 10, 1992). This is a judicial review of a decision by the Wisconsin Tax Appeals Commission (Commission). The issue in this case is whether the taxpayer's bulk purchases of raw materials used in their manufacture of building components were subject to Wisconsin use tax whenever such building components were used by the taxpayer in Wisconsin real property construction activities. The taxpayer's purchases and manufacturing took place outside Wisconsin. (See *Wisconsin Tax Bulletin* 74, page 17, for a summary of the prior decision.)

The taxpayer is an Illinois corporation, having its principal offices in Morton, Illinois. The taxpayer is engaged in the business of manufacturing building components for prefabricated buildings for use by farm and industry, and assembling the components at customer locations in many states throughout the United States, including Wisconsin. All of the building components involved were used by the taxpayer to assemble buildings that became permanent improvements to real property in Wisconsin.

The taxpayer purchases all of the raw materials used to manufacture the building components in bulk outside of Wisconsin, and stores them in its own warehouses outside of Wisconsin. The taxpayer does not purchase raw materials for application to any particular contract.

At its several factories outside Wisconsin, the taxpayer's employes manufacture the building components and some of the hardware used in assembling the buildings from raw materials previously purchased in bulk. The taxpayer does not maintain or operate any manufacturing plants in Wisconsin. A small amount of raw materials, building components, and certain construction equipment used to assemble the buildings may be stored at four Wisconsin sales offices.

When an order for a building is received, the necessary raw materials and hardware are withdrawn from inventory and are consumed and transformed by the taxpayer in the manufacture of finished building components in accordance with the customer's specifications. The manufacture of the building components takes place entirely outside of Wisconsin prior to the transport of the finished building components into Wisconsin for installation at customer sites.

The taxpayer's employes assemble the building components into the finished building at the customer's site. On occasion, certain concrete work, plumbing, and other utility work may be subcontracted out by the taxpayer. On other occasions, the building owners may independently perform or contract for their own concrete, plumbing, and other utility work following the taxpayer's completion of the building.

The Circuit Court concurred with the Commission's reasoning that the building components manufactured by the taxpayer constitute new items of tangible personal property, distinct from the raw materials it purchased. The Court therefore concluded that the taxpayer's purchases outside Wisconsin of raw materials were not subject to the use tax imposed under sec. 77.53(1), Wis. Stats., because 1) the raw materials the taxpayer purchased were used and consumed outside Wisconsin when they were produced into building components, and 2) the taxpayer did not purchase the building components from a retailer.

The department has not appealed this decision.

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Sale of a business or business assets. *Prairie du Chien Car Wash Partnership, et. al. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, January 16, 1992). The issues in this case are whether the department correctly determined that the February 28, 1990 sale of the taxpayer's carwash did not qualify as an "occasional" sale and whether, if taxable, the department correctly determined the taxable receipts to be $170,000 rather than the $104,000 claimed by the taxpayers.

In 1986 the taxpayers organized a partnership to build and develop a carwash business, which continued in operation until it was sold on February 28, 1990. By letter postmarked March 21 and received by the department on March 22 by ordinary mail, the taxpayers surrendered their seller's permit.

The sale contract specifically allocated $170,000 of the $528,000 sale price to "equipment." Following the assessment here at issue, the sale contract was revised to reduce the "equipment" allocation to $104,000 and correspondingly increase allocations to "land" and "building."

The Commission concluded that the sale of the carwash did not qualify for exemption from the sales tax as an occasional sale of tangible personal property under sec. 77.54 (7), Wis. Stats. (1989), because the taxpayers did not deliver their seller's permit to the department for cancellation within 10 days after the last sale at that location of that personal property. The taxpayers presented clear, satisfactory, and substantial evidence that the actual value of the tangible personal property subject to tax (the carwash equipment sold) was $104,000 rather than the $170,000 determined by the department.

The taxpayers and the department have not appealed this decision.

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