



Wisconsin TAX BULLETIN



Voluntary Disclosure

See article on page 1,
and pages 25 to 34.

New Tax Laws to Be Addressed in Special Issue

The Governor introduced his Budget Bill for the 1997-99 biennium on February 12, 1997. This bill includes several provisions affecting Wisconsin taxes. Additional bills which affect Wisconsin taxes have also been introduced.

The Wisconsin Legislature is scheduled to complete work on the 1997-99 Budget Bill by June 26, 1997. If any provisions of the Budget Bill (or other bills) affecting Wisconsin taxes become law, a special issue of the *Wisconsin Tax Bulletin* explaining the new laws will be published later this summer. □

Making Purchases for Resale

Contrary to what some people believe, a seller's permit is not a "tax number" that exempts businesses from paying sales tax. However, there is a way for businesses to

make tax-exempt purchases of property or services they intend to resell. It's called a resale certificate.

The Wisconsin resale certificate (Form S-205) is signed by buyers and given to sellers to verify that a sale is exempt. If valid and accepted in good faith, the resale certificate relieves the seller of the burden of proving that sales of tangible personal property or taxable services are not sales at retail.

Sellers claiming exemptions for "sales for resale" are required to retain resale certificates in support of such exemptions.

Additional information about resale certificates may be found on pages 38 and 39 of Publication 201, *Wisconsin Sales and Use Tax Information*. You may obtain Publication 201 and Wisconsin resale certificates at any Wisconsin Department of Revenue office. □

Voluntary Disclosure Pays

If a person hasn't filed Wisconsin tax returns for prior years, or realizes that taxes were underpaid on previously filed Wisconsin returns, what should that person do? A contact by the Wisconsin Department of Revenue could result in costly civil and/or criminal penalties.

Don't wait for a letter or audit from the Department of Revenue. A better

alternative is to take advantage of the department's voluntary disclosure policies. Various penalties are waived and other benefits are obtained by voluntary disclosure.

Both of the department's voluntary disclosure policies are published in this Bulletin, on the following pages:

- Pages 25 to 27, relating to additional taxes or excessive credits on previously filed returns. (Note: this is a new policy.)
- Pages 28 to 34, relating to unfiled returns (including copies of sample agreements). (Note: This is the same information as published in January 1995, in *Wisconsin Tax Bulletin* 90). □

Focus on Publications: Wisconsin Taxpayer Bill of Rights

Wisconsin taxpayers have both responsibilities and rights. Department of Revenue (DOR) Publication 114, *Wisconsin Taxpayer Bill of Rights*, summarizes a Wisconsin taxpayer's rights under Wisconsin law, as they relate to individual income, corporation franchise or income, fiduciary income, sales and use, and withholding taxes. These rights include the right to:

- courteous treatment by DOR employees;
- information about Wisconsin tax laws;

In This Issue

	Page		Page
Articles —		Farmers Receive \$43.5 Million	6
New Tax Laws	1	Filing Fiduciary, Estate Returns	6
Purchases for Resale	1	Publications Available	8
Voluntary Disclosure	1	Costly to Evade Taxes	9
Focus on Publications: Taxpayer		Administrative Rules	10
Bill of Rights	1	Recently Adopted Rules	10
Bulletin Index Included	2	Report on Litigation	12
Need a Speaker?	2	Tax Releases	20
Claims for Refund	2	Attachments —	
Earned Income Credit	4	Voluntary Disclosure Policies	25
Information or Inquiries?	5	Addresses, Phone Numbers	35
Tax Information Available	5	Bulletin Index	39
Question and Answer	5	Order Blank	67
Estimated Tax Requirements	6		

- assistance from DOR with state tax forms;
- privacy and confidentiality;
- pay only the required tax;
- a prompt refund of overpaid taxes;
- fair treatment during tax audits;
- appeal DOR determinations; and
- reasonable tax collection arrangements.

A copy of Publication 114 is given to each taxpayer at the initial conference regarding a field audit. Copies are also available at various speeches given by DOR representatives to practitioners and other business organizations throughout the state. In addition, the publication is available at DOR offices, by mail, by fax, and by internet. See the article titled "Tax Publications Available" on page 8 of this Bulletin for information about how to obtain this and other DOR publications. □

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Wisconsin Tax Bulletin Annual Index Included

Once each year the *Wisconsin Tax Bulletin* includes an index of articles, tax releases, court cases, private letter rulings, and other materials that have appeared in past Bulletins. The index for issues 1 (October 1976) to 99 (October 1996) can be found on pages 39 to 66 of this Bulletin. □



Need a Speaker?

Are you planning a meeting or training program? The Department of Revenue's Speakers Bureau provides speakers to business, community, and educational organizations.

Department representatives are available to speak on a variety of topics that can be targeted toward your group's particular areas of interest, including:

- New sales/use, income, and corporate tax laws.
- How sales tax affects contractors, manufacturers, nonprofit organizations, or businesses in general.
- What to expect in an audit.
- Common errors discovered in audits.
- Manufacturing property assessment.

To arrange for a speaker, please write to Wisconsin Department of Revenue, Speakers Bureau, P.O. Box 8933, Madison, WI 53708-8933, or call (608) 266-1911. □

Claims for Refund of Franchise or Income Tax — Any Specific Form or Manner?

Are claims for refunds of income or franchise taxes, or for refunds of homestead and farmland preservation credits, **required** to be filed on a certain form and in a specific manner? The answer is "yes." These requirements, which became effective November 1, 1994, result from a law (1993 Wisconsin Act 205) which was passed in 1994. (**Note:** 1993 Wisconsin Act 205 does not apply to claims for refunds of sales and use taxes.)

Form

An amended Wisconsin tax return or credit claim requesting a refund must be filed on the proper form, as follows:

- If the original form was a Form 1, 1A, or WI-Z, the amended form must be a Form 1X.
- If the original form was a Form 4 or 5, the amended form must be a Form 4X.
- If the original form was a Form 1NPR, 2, 3, 3S, 4I, 4T, 5S, 1CNP, or 1CNS, or a Schedule H filed without a tax return, the amended form must be the same form as the original.
- If the original form was a tax return which included a Schedule H or FC and that schedule is changed, the amended form must include the revised Schedule H or FC.

(**Note:** An amended Wisconsin tax return or credit claim filed for a purpose other than to request a refund is not required to be filed on the form prescribed above, although the department prefers that the prescribed form be used. The above requirements also do not apply if the department has notified a taxpayer that a special form has been developed to address a specific tax issue.)

Manner

An amended Wisconsin tax return or credit claim must be filed in a specific manner, as explained below.

- It must be in writing.
- It must be properly identified. If the amended form is not a Form 1X or 4X, the "Amended return" box must be checked if one is provided on the form, or "AMENDED" must be marked

at the top of the front page of the amended form.

- It must indicate the reporting period for which the changes are being made.
- It must contain a statement setting forth the specific grounds upon which the amended form is based.
- It must be mailed to the department at the address specified on the form or in its instructions, or if there is no address specified, it may be mailed to Wisconsin Department of Revenue, P.O. Box 8991, Madison, WI 53708-8991.

(**Note:** An amended return or credit claim requesting a refund may **not** be made a part of or attached to any original Wisconsin return or credit claim.)

Questions

Following are common questions, answers, and examples regarding the filing of refund claims.

Question 1: What if a taxpayer files a claim for refund on the wrong form?

Answer 1: If the claim for refund was timely filed, the department will return it to the taxpayer, along with the appropriate form and instructions indicating a date by which it must be completed and returned. To receive a refund, the taxpayer will be required to file the claim for refund on the prescribed form by the last date for timely filing the claim for refund, or within 30 days from the taxpayer's receipt of the appropriate form from the department, whichever is later.

Example 1: The taxpayers (husband and wife) filed an original 1993

Wisconsin individual income tax return on a Form 1A. On October 3, 1997, they file a claim for refund on a 1993 Wisconsin Form 1. Since they did **not** file their claim for refund on the proper form (Form 1X, Wisconsin Income Tax — Amended Return), the department returns their claim for refund, along with the appropriate Form 1X. The taxpayers have until April 15, 1998, to file their claim for refund on the Form 1X.

Example 2: Assume the same facts as Example 1, except that the taxpayers file their claim for refund on a 1993 Form 1 on April 15, 1998. The department returns their claim for refund, along with the appropriate Form 1X. The taxpayers have 30 days from their receipt of the Form 1X to file their claim for refund on the Form 1X.

Question 2: What if a taxpayer files a claim for refund in letter format?

Answer 2: The claim for refund will **not** be accepted in that format. When the department becomes aware of a timely filed claim for refund in any format other than on the prescribed form, the department will proceed as described in Answer 1.

Question 3: What should a taxpayer do if on the last day for filing a claim for refund the taxpayer does not have the prescribed form?

Answer 3: If the form is available through the department's Fax-A-Form system or via the Internet, the taxpayer may receive the form by calling the Fax-A-Form number, (608) 261-6229, or by accessing the department's World Wide Web site at <http://www.dor.state.wi.us>. The taxpayer may also obtain the required form at a department office or at another public building (e.g., a library).

If the taxpayer is unable to obtain the proper form by the last day for timely filing a claim for refund, the taxpayer may file a handwritten claim for refund with the department. That claim for refund must be postmarked to later than the last day for timely filing the claim. The department will send the proper form to the taxpayer, and the taxpayer will have 30 days from receipt of the form to file the claim for refund on the proper form.

Example: On April 15, 1998, the taxpayers (husband and wife) determine that they are entitled to a refund for 1993. They are unable to obtain a Wisconsin Form 1X in time to file their claim for refund. They may file a written claim for refund in letter format; the claim for refund must be postmarked no later than April 15, 1998. The department will handle the claim for refund as described in Answers 1 and 2.

Question 4: What if a taxpayer attaches a claim for refund to an original tax return?

Answer: A claim for refund attached to an original return is not valid. The claim for refund will not be considered as filed in the proper manner, since it is not filed separately from any original return or credit claim.

However, if the department identifies the invalid claim for refund before the last date for timely filing a claim for refund **and** the claim was filed on the prescribed form, the department will remove it from the original return and act on it as a valid claim.

If the department identifies the invalid claim for refund before the last date for timely filing a claim for refund, but the claim was not filed on the prescribed form, the depart-

ment will handle it as described in Answers 1 and 2.

If the department identifies the invalid claim for refund but the claim was filed late, the claim for refund will be rejected.

Example 1: The taxpayer (a single individual) attaches a 1993 amended Wisconsin Form 1X to a timely filed original 1996 individual income tax return. Because the 1993 amended return is attached to an original return, the claim for refund is not valid. However, if the department identifies the 1993 amended return on or before April 15, 1998, the department will act on it as a valid claim.

Example 2: In Example 1, if the department does not identify the 1993 amended return until after April 15, 1998, the claim for refund will be rejected.

Example 3: The taxpayer (a single individual) attaches a letter claiming a refund for 1993 to a timely filed original 1996 Wisconsin income tax return. The claim for refund is not valid, because it is attached to an original return, and also because it was not filed on the prescribed form. However, if the department identifies the invalid 1993 claim for refund on or before April 15, 1998, the department will handle the claim as described in Answers 1 and 2. □



191,000 Receive Wisconsin Earned Income Credit

More than 191,000 Wisconsin families received state earned income credit (EIC) benefits amounting to \$54.8 million in 1996. The state credits are in addition to federal EIC benefits paid to Wisconsin families.

This is an 11.4% increase over the \$49.2 million distributed through the state program last year. The average credit was \$287 in both 1995 and 1996, but the number of families benefiting rose by nearly 20,000. Many groups, including community-based organizations, employers, and others, deserve thanks for helping to expand awareness of the program.

Wisconsin is one of only a handful of states offering an earned income credit in addition to the federal credit. The state program, created in 1989, is based on a percentage of the federal EIC, depending on the number of children: 4% of the federal amount for claimants with one qualifying child, 14% for those with two children, and 43% for claimants with three or more children.

For 1996 EIC payments, the income cap for both federal and state EIC programs is \$25,078 for families with one child and \$28,495 for families with two or more children. To qualify for the state credit for 1996, claimants must have been full-year Wisconsin residents and must have had one or more children living at home for at least six months of 1996 (grandchildren can also qualify). One or both parents (or grandparents) must have worked full or part time during 1996.

The earned income credit is a component of "Wisconsin Works" or "W-2," Wisconsin's welfare reform strategy. It is anticipated that about 13,000 additional claims will be filed in 1997 as a result of the W-2 initiative. The combined benefits of federal and state EIC benefits for new entrants into the labor market can be substantial.

Help completing federal and state tax forms is available from Internal Revenue Service offices and Wisconsin Department of Revenue offices

located throughout the state. Locations and phone numbers of state Revenue Department offices are listed in state tax booklets and local telephone directories (under "Wisconsin, State of"). Help with the state EIC is also available by calling (608) 266-2772. Additional information about the federal EIC is available by calling 1-800-829-1040. □

Information or Inquiries?

This Bulletin includes a comprehensive listing of addresses and telephone numbers to use if you wish to contact the Department of Revenue about any of the taxes administered by the Income, Sales, and Excise Tax Division. The listing appears on pages 35 to 38 and is arranged by the type of tax or credit involved. □

Tax Information Is Available

In addition to making available the *Wisconsin Tax Bulletin* and tax forms and instructions that taxpayers use to report and pay their taxes or obtain refunds, the Wisconsin Department of Revenue also has available other information. This information includes the items listed below.

Topical and Court Case Index

This two-part index will help you locate reference material to research your Wisconsin tax questions relating to income, franchise, withholding, sales/use, gift, inheritance/estate, and excise taxes. The *Topical and Court Case Index* is available on a subscription basis for \$18 per year, plus tax. This includes a volume published in January and an addendum published in June (see the order blank on page 67 of this Bulletin).

The first part of the index, the "Topical Index," lists by tax type, alphabetically by subject, references to Wisconsin statutes, administrative rules, Wisconsin tax publications, *Sales and Use Tax Reports*, Attorney General opinions, and *Wisconsin Tax Bulletin* articles, tax releases, and private letter rulings.

The second part, the "Court Case Index," lists by tax type, alphabetically by issue, decisions of the Wisconsin Tax Appeals Commission, Circuit Court, Court of Appeals, and Wisconsin Supreme Court.

Wisconsin Package WI-X

Package WI-X contains copies of most Wisconsin individual and fiduciary income tax, corporation franchise and income tax, sales and use tax, withholding tax, partnership, estate tax, and motor vehicle fuel tax forms. Most of the forms may be reproduced for use in filing the form.

Package WI-X is published annually and is generally available at the end of January. The cost is \$7 per copy, plus tax. Mail your request and payment to Wisconsin Department of Revenue, Forms Request Office, P.O. Box 8903, Madison, WI 53708-8903.

Tax Publications

See the separate article titled "Tax Publications Available," on page 8 of this Bulletin.

Sales and Use Tax Report

The *Sales and Use Tax Report* includes general information about Wisconsin sales and use tax, including explanations of new laws and updated listings of counties that have adopted the county tax.

The *Sales and Use Tax Report* is published quarterly on an as-needed basis. It is mailed without charge to all persons holding a seller's permit or use tax certificate. In addition, the *Sales and Use Tax Report* is generally reproduced in the *Wisconsin Tax Bulletin*.

Wisconsin Administrative Code

The Revenue (Tax) section of the Wisconsin Administrative Code contains administrative rules that interpret Wisconsin tax laws administered by the Department of Revenue.

The initial fee to obtain all current rules in the Tax section of the Wisconsin Administrative Code is \$20, plus tax. Updates to the Tax section as changes occur are available for an additional fee of \$20 per year, plus tax. A binder to hold the Code is available for \$8, plus tax. These can all be ordered by using the order blank on page 67 of this Bulletin. □

Question and Answer

Q I have a computer which is connected to the Internet. Can I get Wisconsin tax forms from the Internet?

A Yes. Visit the Wisconsin Department of Revenue's Web Site at <http://www.dor.state.wi.us>. Most major Wisconsin tax forms are available through the Internet.

Q I have access to a fax machine. Can I get Wisconsin tax forms by fax?

A You can get Wisconsin tax forms by fax by calling (608) 261-6229 from the telephone connected to your fax machine. Department publications are also available by fax. □

1997 Estimated Tax Requirements for Individuals, Estates, and Trusts

Taxpayers who expect to owe \$200 or more of tax and temporary recycling surcharge on a 1997 Wisconsin income tax return are required to pay 1997 Wisconsin estimated tax. There are exceptions for certain estates and trusts, as explained below. A 1997 Form 1-ES, Wisconsin Estimated Tax Voucher, is filed with each estimated tax payment.

For calendar year taxpayers, the first estimated tax payment is due on April 15, 1997. Installment payments are also due on June 16, 1997, September 15, 1997, and January 16, 1998. For fiscal year taxpayers, installment payments are due on the 15th day of the 4th, 6th, and 9th months of the fiscal year and the 1st month of the following fiscal year.

Estates and grantor trusts which are funded on account of a decedent's death are only required to make estimated tax payments for taxable years which end two or more years after the decedent's death. For example, an individual died on March 25, 1996. A grantor trust which was funded on account of the individual's death is not required to make estimated tax payments for any taxable year ending before March 25, 1998.

A trust which is subject to tax on unrelated business income is generally required to pay 1997 Wisconsin estimated tax if it expects to owe \$500 or more on a 1997 Wisconsin franchise or income tax return (Form 4T). A 1997 Form 4-ES, Wisconsin Corporation Estimated Tax Voucher, is filed with each estimated tax payment. Installment payments for such trusts are due on the 15th day of the 3rd, 6th, 9th, and 12th months of the taxable year.

If a taxpayer does not make the estimated tax payments when required or underpays any installment, interest may be assessed. ☐



Farmers Receive \$43.5 Million in Farmland Credits

Approximately \$43.5 million in direct benefits were distributed to Wisconsin farmers in 1996 through the farmland preservation credit program and the farmland tax relief credit program. About 23,000 Wisconsin farmers claimed farmland preservation credits amounting to \$28.4 million, and 60,650 farmers received farmland tax relief credits totalling \$15.1 million.

Farmland Preservation Credit

Benefits averaging \$1,203 per claimant (28% of their property tax liabilities) were distributed through the farmland preservation credit program. The goals of this program are to preserve Wisconsin farmland, encourage local land use planning and soil conservation practices, and provide property tax relief to farmland owners. About 38% of owners with at least 35 acres participated in the farmland preservation credit program in 1996.

To qualify for relief under this program, farmland must be zoned for exclusive agricultural use or be subject to a preservation agreement between the farmland owner and the state. About 82% of the claims were for land under zoning and 18% were for land covered by agreements. In addition, participants must comply with soil and water conservation standards developed by county land conservation committees, based on guidelines set by the state Land Conservation Board.

Farmland Tax Relief Credit

Farmland tax relief credits averaging \$247 were paid in 1996. These credits equal 10% of the first \$10,000 of property taxes on qualifying farmland. This program, which is in addition to the farmland preservation credit program, provides direct benefits to virtually all Wisconsin farmland owners with 35 or more acres. ☐

Filing Wisconsin Fiduciary and Estate Tax Returns

Wisconsin Fiduciary Returns

Who Must File

Every personal representative or special administrator of the estate of a Wisconsin decedent must file a Wisconsin fiduciary income tax return (Form 2) if the gross income of the estate is \$600 or more. Nonresident estates must file Wisconsin fiduciary returns if they have gross income of \$600 or more from Wisconsin sources.

Every trustee of a Wisconsin trust must file a Wisconsin fiduciary income tax return (Form 2) if the trust has:

1. any taxable income for the tax year, or
2. gross income of \$600 or more, regardless of the amount of taxable income.

A nonresident trust must file a Wisconsin fiduciary income tax return if the trust has:

1. any Wisconsin taxable income for the year, or

2. gross Wisconsin income of \$600 or more, regardless of the amount of taxable income.

Trusts must file on a calendar-year basis, and the due date is the following April 15. (Exception: a limited number of charitable trusts may file on a fiscal-year basis.) Estates may choose any fiscal year, but the first return may not cover more than a 12-month period, and the taxable year must end on the last day of a month. The due date for fiduciary returns for estates is 3½ months after the close of the fiscal year.

Closing Certificates

Every executor, administrator, personal representative, or trustee applying to a court in Wisconsin having jurisdiction for discharge must obtain a Closing Certificate for Fiduciaries from the department. Before the certificate will be issued, all required income, gift, sales, use, and withholding tax returns and reports, with the exception of the final income tax return of the estate or trust, must be filed.

With the next-to-final fiduciary return, estates must submit a copy of the probate inventory and a copy of the decedent's will. Trustees must submit a statement as to why the trust is closing, copies of annual court accountings for the past three years, and a copy of the trust agreement (or will creating such trust) if not submitted with a prior return.

If an estate does not have enough income to require filing and needs a Closing Certificate for Fiduciaries, or if the estate will be filing only one fiduciary return when the estate is closed and needs the closing certificate before filing that return, use the following procedures:

1. Complete the top third of page 1 of Form 2.

2. Insert the appropriate statement at line 1:

- a. "Gross income is less than \$600 and no 1041 is required." or
- b. "A first and final return will be filed upon closing the estate."

3. Complete the "Information Required" section of page 2 of Form 2.

4. Sign and date the Form 2.

5. Attach copies of the inventory and will.

The department shall determine that all income, withholding, sales, use, gift, and delinquent taxes are paid. A Closing Certificate for Fiduciaries will then be issued. This does not relieve the executor, administrator, personal representative, or trustee from filing the final fiduciary income tax return. If a probate final account is filed with the court, a copy must be attached to the final return.

For the fiscal year ending June 30, 1996, the department issued nearly 10,000 Closing Certificates for Fiduciaries.

Wisconsin Estate Tax Returns

(Note: Effective for deaths occurring on or after January 1, 1992, there is no longer a Wisconsin inheritance tax. It is replaced with a Wisconsin estate tax.)

Filing Requirement

An estate is required to file a Wisconsin estate tax return (Form W706) if it is required to file a federal estate tax return. An estate is required to file a federal estate tax return (Form 706) if the gross estate

at date of death plus gifts in excess of \$10,000 made to each donee per calendar year since December 31, 1976, exceeds \$600,000.

The Wisconsin estate tax is equal to the credit for state death taxes allowed on the federal estate tax return (line 15 of federal Form 706). This credit is computed under section 2011 of the Internal Revenue Code (IRC). Estates owning property both within and outside Wisconsin owe a percentage of the credit to Wisconsin based on gross Wisconsin property divided by gross total property.

Due Date

The personal representative, special administrator, trustee, or distributee must file the Wisconsin estate tax return by the due date, which is 9 months after the date of death or the extended due date allowed by the Internal Revenue Service (IRS).

If the return is filed after the due date, there is a penalty equal to 5% of the tax, with a minimum of \$25 and a maximum of \$500.

Payment of Tax

The tax is due 9 months after the decedent's date of death, even if an extension has been obtained to file the return.

If the tax is not paid within 9 months of the decedent's death, interest is imposed at 1% per month from the date of death.

Examples:

1. The decedent died February 15, 1996. An extension of time to file the federal estate tax return was obtained from the IRS. The Wisconsin estate tax return and payment of the tax were submitted on December 31, 1996,

which was within the extension period. Tax of \$1,200 was due. The total amount due is \$1,326, computed as follows:

Tax	\$1,200
Interest (1% x 10½ months)	<u>126</u>
Total amount due	<u>\$1,326</u>

2. The decedent died February 15, 1996 and did not obtain an extension to file from the IRS. The Wisconsin estate tax return was filed December 31, 1996, and showed no tax due. This estate owes the minimum penalty of \$25.

Installment Payments

Effective for deaths occurring on or after July 29, 1995, some estates may qualify to pay the Wisconsin estate tax in installments. If a percentage of the federal estate tax may be paid in installments under IRC section 6166, the same percentage of Wisconsin estate tax may be paid under the same installment schedule. However, an election to pay in installments for federal estate tax purposes does not automatically constitute an election for Wisconsin purposes. **Written notice of the election to pay the Wisconsin estate tax in installments must be filed with the Wisconsin Department of Revenue within nine months after the decedent's death.** The provisions on acceleration of installment payments under IRC section 6166(g) also apply for Wisconsin purposes.

Interest is computed at the rate of 12 percent per year from date of death. Distributees of real estate must provide to the department a certified copy of a lien for unpaid taxes and interest on the property to secure payment, and record the lien in the office of the register of deeds of the county in which the property is located. Distributees of personal

property must provide either a lien or a financial guarantee bond equal to the estimated tax and interest, if the tax has not been determined. Upon determination of the tax, distributees of personal property must either provide a lien or a financial guarantee bond sufficient to secure payment of the tax and interest, or pay the excess over the amount of tax and interest secured by the bond.

Any distributee who fails to provide the security required or disposes of one-third or more of the property on which the tax is secured must pay the tax in full.

Certificate Determining Estate Tax

Upon receipt of the Wisconsin estate tax return and review for correctness, the department will issue a Certificate Determining Estate Tax. If the IRS increases or decreases the federal estate tax, the person entitled to the refund or liable for the additional tax is required to notify the department within 30 days. □

Tax Publications Available

Over 50 publications are available, free of charge. To receive any of the publications by mail, write, call, or fax a request to Wisconsin Department of Revenue, Forms Request Office, P.O. Box 8903, Madison, WI 53708-8903 (telephone (608) 266-1961, fax (608) 261-6239).

Publications can also be received via your fax machine, using the department's Fax-A-Form system by calling (608) 261-6229 from a fax telephone. Some publications are also available via the Internet, by accessing the department's World Wide Web site at

<http://www.dor.state.wi.us>

Income and Franchise Taxes

- 102 Wisconsin Tax Treatment of Tax-Option (S) Corporations and Their Shareholders (11/96)
- 103 Reporting Capital Gains and Losses for Wisconsin by Individuals, Estates, Trusts (10/96)
- 104 Wisconsin Taxation of Military Personnel (8/96)
- 106 Wisconsin Tax Information for Retirees (8/96)
- 109 Tax Information for Married Persons Filing Separate Returns and Persons Divorced in 1996 (10/96)
- 112 Wisconsin Estimated Tax and Estimated Surcharge for Individual, Estates, Trusts, Corporations, Partnerships (11/96)
- 113 Federal and Wisconsin Income Tax Reporting Under the Marital Property Act (10/96)
- 115 Wisconsin Federal/State Electronic Filing Handbook (9/96)
- 116 Income Tax Payments Are Due Throughout the Year (12/95)
- 119 Limited Liability Companies (LLCs) (11/96)
- 120 Net Operating Losses for Individuals, Estates, and Trusts (11/96)
- 121 Reciprocity (10/95)
- 122 Tax Information for Part-Year Residents and Nonresidents of Wisconsin for 1996 (10/96)
- 123 Business Tax Credits for 1996 (11/96)
- 600 Wisconsin Taxation of Lottery Winnings (11/93)
- 601 Wisconsin Taxation of Pari-Mutuel Wager Winnings (3/94)

Sales and Use Taxes

- 200 Sales and Use Tax Information for Electrical Contractors (2/97)

- 201 Wisconsin State and County Sales and Use Tax Information (1/97)
- 202 Sales and Use Tax Information for Motor Vehicle Sales, Leases, and Repairs (2/97)
- 203 Sales and Use Tax Information for Manufacturers (12/94)
- 205 Do You Owe Wisconsin Use Tax? (Individuals) (2/97)
- 206 Sales Tax Exemption for Non-profit Organizations (9/90)
- 207 Sales and Use Tax Information for Contractors (2/96)
- 210 Sales and Use Tax Treatment of Landscaping (5/94)
- 211 Sales and Use Tax Information for Cemetery Monument Dealers (2/97)
- 212 Businesses: Don't Forget About Use Tax (2/97)
- 213 Travelers: Don't Forget About Use Tax (2/97)
- 214 Do You Owe Wisconsin Use Tax? (Businesses) (2/97)
- 216 Filing Claims for Refund of Sales or Use Tax (9/95)
- 217 Auctioneers — How Do Wisconsin Sales and Use Taxes Affect Your Operations? (3/96)
- 219 Hotels, Motels, and Other Lodging Providers — How Do Wisconsin Sales and Use Taxes Affect Your Operations? (6/96)
- 220 Grocers — How Do Wisconsin Sales and Use Taxes Affect Your Operations? (8/96)

Audits and Appeals

- 501 Field Audit of Wisconsin Tax Returns (2/96)
- 505 Taxpayers' Appeal Rights of Office Audit Adjustments (6/96)
- 506 Taxpayers' Appeal Rights of Field Audit Adjustments (2/96)
- 507 How to Appeal to the Tax Appeals Commission (4/96)

Other Topics

- 111 How to Get a Private Letter Ruling From the Wisconsin Department of Revenue (3/96)
- 114 Wisconsin Taxpayer Bill of Rights (1/97)
- 117 Guide to Wisconsin Information Returns (10/96)
- 118 Electronic Funds Transfer Guide (4/96)
- 130 Fax A Form (8/96)
- 400 Wisconsin's Temporary Recycling Surcharge (11/96)
- 410 Local Exposition Taxes (11/94)
- 500 Tax Guide for Wisconsin Political Organizations and Candidates (1/97)
- 502 Do You Have Wisconsin Tax Questions? (2/97)
- 503 Wisconsin Farmland Preservation Credit (12/96)
- 504 Directory for Wisconsin Department of Revenue (10/96)
- 508 Wisconsin Tax Requirements Relating to Nonresident Entertainers (8/94)
- 509 Filing Wage Statements and Information Returns on Magnetic Media (3/94)
- 700 Speakers Bureau presenting ... (2/93)
- W-166 Wisconsin Employer's Withholding Tax Guide (3/96) □

It's Costly to Evade Taxes

Mark E. Breneman, 25, Madison, was found guilty in February 1997, of one count of tax evasion related to the purchase of a GMC truck. According to the criminal complaint, he purchased a 1993 GMC truck for \$17,000 but listed the purchase price as \$6,146 when he registered it in June 1995 with the Department of



Transportation. He evaded \$597 in state sales taxes. Breneman was also charged with filing another false Application for Title/Registration regarding a 1986 Ford Mustang which he purchased for \$5,250 in October 1993. He reported a purchase price of \$500 and evaded sales taxes of \$261.

Breneman pled no contest to one count as part of a plea agreement. Dane County Circuit Court Judge Jack Aulik ordered him to make restitution to the state for tax and penalties of \$1,287.34, to pay a \$500 fine plus \$195 court costs, and to perform 48 hours of community service within the next six months. If the community service is not performed, Breneman must spend two days in the Dane County Jail.

A person who buys a vehicle from a non-dealer must report the purchase price and pay the use tax when registering the vehicle with the State of Wisconsin. The Department of Revenue implemented a new program in November 1996 which uses Vehicle Identification Numbers to determine if buyers paid the correct amount of tax. Buyers who are found to have under-reported the purchase price are assessed for the tax due, interest of 12% per year, and a 50% negligence penalty. Wisconsin law also provides for criminal penalties of up to 30 days in jail and up to \$500 in fines for under-reporting the purchase price of a vehicle.

Steven R. Hansen, Stoughton, was found guilty, also in February, of one count of tax evasion related to the purchase of a Chevrolet Blazer. According to the criminal complaint, Hansen purchased a 1992 Blazer for \$16,000 but listed the purchase price as \$5,000 when he registered it with the Department of Transportation, evading \$605 in state sales taxes.

Dane County Circuit Court Judge Michael Nowakowski fined Hansen

\$200 plus costs. In addition to the criminal penalties, civil penalties and interest were assessed on the amount under-reported.

In January 1997, Roland Travers, 60, Elkhorn, was charged by the Dane County District Attorney's Office with three counts of failure to file Wisconsin income tax returns. According to the criminal complaint, Travers failed to file income tax returns for 1993, 1994, and 1995. During those years he was a construction laborer, and he earned more than \$50,000 each year.

If convicted on all counts, Travers faces up to 27 months in jail and up to \$30,000 in fines. Failure to file a Wisconsin income tax return when due is a crime punishable by up to nine months imprisonment and up to \$10,000 in fines. In addition to the criminal penalties, assessment and collection of the taxes, penalties, and interest due follows a conviction for criminal violations.

In February 1997, Alcohol and Tobacco Enforcement agents of the Department of Revenue and Milwaukee police detectives recovered 48 cases of whiskey which had been reported stolen from a Milwaukee liquor wholesaler in January. The recovered property had a wholesale value of approximately \$10,000.

The investigators recovered the liquor at Food Town, a food and liquor store in Milwaukee. Although store owners denied any knowledge of how the liquor got to their store, one of the owners was taken into custody, to be charged with receiving stolen property and possession of un-invoiced alcohol beverages. Investigators also seized 14 cartons of cigarettes which were not covered by invoice, and which are suspected to have been stolen. ☐

Administrative Rules in Process

Listed below are proposed new administrative rules and changes to existing rules that are currently in the rule adoption process. The rules are shown at their stage in the process as of April 1, 1997, or at the stage in which action occurred during the period from January 2, 1997 to April 1, 1997.

Each affected rule lists the rule number and name, and whether it is amended (A), repealed (R), repealed and recreated (R&R), or a new rule (NR).

Proposed Rules Being Drafted

- 11.002 Permits, application, department determination-A
- 11.01 Sales and use tax return forms-A
- 11.15 Containers and other packaging and shipping materials-A
- 11.35 Occasional sales by non-profit organizations on or after January 1, 1989-A
- 11.39 Manufacturing-A
- 11.41 Exemption of property consumed or destroyed in manufacturing-A
- 11.66 Telecommunications and CATV services-A
- 11.97 "Engaged in business" in Wisconsin-A

Rules Sent to Legislative Council Rules Clearinghouse

- 11.12 Farming, agriculture, horticulture and floriculture-A

Rules Adopted and in Effect (March 1, 1997)

- 11.83 Motor vehicles-A

Rule on Hold Pending Court Decision

- 11.04 Constructing buildings for exempt entities-A ☐

Recently Adopted Rules Summarized

Summarized below is information regarding sec. Tax 11.83 (Motor vehicles), revised effective March 1, 1997.

In addition to the summaries of the changes, the text of some of the revised rules is reproduced, excluding notes and examples. In the amendments, material lined through (~~lined through~~) represents deleted text, and underscored (underscored) material represents new text.

To order up-to-date administrative rules of the Department of Revenue, you can use the order blank on page 67 of this Bulletin to obtain the Revenue section of the Wisconsin Administrative Code.

Tax 11.83(1), (2), (3)(d), (4)(b), (6), (7)(a), (11)(c), and (12) are amended to conform language and format to Legislative Council Rules Clearinghouse standards. In addition, Tax 11.83(2)(a) and (b) and Tax 11.83(11)(c) are further amended to clarify when the provisions of those paragraphs apply.

Tax 11.83(5) is amended to clarify the language in sec. 77.53(17), Wis. Stats.

Tax 11.83(8) is repealed and recreated to reflect the amendments to secs. 77.53(1), 77.56(2), and 77.71(2), Wis. Stats., and the creation of sec. 77.53(1m), Wis. Stats., by 1995 Wisconsin Act 27.

The text of Tax 11.83(2)(a), (2)(b), (5), (8), and (11)(c) is as follows:

11.83(2)(a) ~~Gross receipts from the~~ The sale of a motor vehicle minus any trade-in allowance, if the sale and trade-in are one transaction. A separate or independent sale of a motor vehicle by either the buyer or seller of another motor vehicle is not a trade-in, even if the proceeds from the sale are immediately applied by the seller to a purchase of another motor vehicle. A dealer does not realize taxable receipts from a transaction in which one motor vehicle is traded for another of lesser value, called a "trade-down," unless cash or services are received by the dealer.

(2)(b) ~~Gross receipts from charges for~~ The delivery, handling, and preparation of a motor vehicle being sold and ~~any~~ the sale of a warranty, relating to the sale of a motor vehicle that is taxable.

(5) TEMPORARY USE IN WISCONSIN. Motor vehicles purchased outside Wisconsin, which are not registered or titled or required to be registered or titled in Wisconsin, brought into Wisconsin by a nondomiciliary for that person's own storage, use or other consumption while temporarily in Wisconsin are not subject to use tax when the motor vehicle is not stored, used or otherwise consumed in Wisconsin in the conduct of a trade, occupation, business or profession or in the performance of personal services for wages or fees.

(8) VEHICLES USED BY LICENSED WISCONSIN MOTOR VEHICLE DEALERS.

(a) *General.* Motor vehicles purchased without tax for resale by a Wisconsin motor vehicle dealer licensed under s. 218.01, Stats., and used for a purpose in addition to retention, demonstration or display, except motor vehicles loaned to any school or school district for a driver training educational program conducted by the school or school district, are subject to Wisconsin use tax. Motor vehicles used by the dealership solely for retention, demonstration and display, while holding them for sale in the regular course of business, or solely for leasing to others, such as customers and employees, are not subject to Wisconsin use tax.

(b) *Amount subject to use tax.* The amount subject to use tax on a motor

vehicle used by a licensed motor vehicle dealer for a purpose in addition to retention, demonstration or display is one of the following:

1. Motor vehicles held for sale which are assigned to a specific dealer employee subject to withholding from federal income tax on wages are subject to Wisconsin use tax on \$96 per motor vehicle registration plate per month.

2. Motor vehicles held for sale and not assigned to a specific dealer employee subject to federal withholding on wages are subject to Wisconsin use tax on the lease value of the motor vehicle computed on a calendar month basis. If a motor vehicle is used by the dealer for a period of less than one calendar month, the amount subject to use tax is the daily lease value calculated by multiplying the applicable monthly lease value by a fraction, the numerator of which is the number of days used by the dealer for a purpose in addition to retention, demonstration or display and the denominator of which is the number of days in the calendar month. Lease value is computed using the internal revenue service lease value table contained in internal revenue service regulation s. 1.61-21(d)(2). In the lease value table, the "automobile fair market value" is one of the following:

a. The amount an individual would have to pay in an arm's length transaction to purchase the motor vehicle. The amount includes all amounts attributable to the purchase of the automobile such as sales tax and title fees.

b. The motor vehicle dealer's cost of purchasing the automobile, including all expenses attributable to that purchase, provided the automobile is owned by the dealer and the purchase was made at arm's length.

3. Motor vehicles not held for sale, including motor vehicles properly capitalized for Wisconsin income or franchise tax purposes, are subject to use tax based on the sales price of the motor vehicle as defined in s. 77.51(15), Stats. However, if the motor vehicles were purchased without tax using a resale or other exemption certificate and the first use, in addition to retention, demonstration or display,

occurs more than 6 months after the purchase by the dealer, the dealer may use the fair market value of the motor vehicle at the time of first use as the amount subject to tax.

(c) *Recordkeeping.* It is presumed that all dealer plates issued by the department of transportation to a licensed motor vehicle dealer are used each month on motor vehicles assigned to employees subject to withholding for federal income tax purposes for a purpose in addition to retention, demonstration or display and are subject to use tax as provided in par. (b)1, unless one of the following applies:

1. The motor vehicle dealer keeps adequate records showing that the dealer plates were not used during the month on motor vehicles for a purpose in addition to retention, demonstration or display.

2. The motor vehicle to which the dealer plate is assigned is subject to use tax as computed in par. (b)2. or 3.

(d) *Transitional provision.* For motor vehicles, not assigned to employees or salespersons subject to federal withholding on wages, that are used by the dealer for a purpose in addition to retention, demonstration and display both prior to September 1, 1995, and on and after September 1, 1995, upon which a sales or use tax was paid on the purchase price of the motor vehicle by the dealer, the imposition of use tax as described in par. (b)2. does not apply.

(11)(c) A supplier ~~cannot~~ may not accept a resale certificate in good faith on items which are not physically transferred to the purchaser's customer, except when the purchaser does all of the following:

1. Inventories the property;
2. Certifies that the purchaser sells ~~significant amounts of~~ the property ~~over the counter to walk-in trade; and~~ in the regular course of business.

3. ~~The purchaser specifies~~ Specifies on the resale certificate each type of item the purchaser sells ~~over the counter in the regular course of business.~~ ☐



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 following decisions are included:

Individual Income Taxes

Retirement benefits exempt
Donald and Janet Groschel
(p. 12)

Retirement funds exempt —
constitutionality
John D. and Jane A. Hennick
(p. 12)

Tax Appeals Commission — class
action claims
*J. Gerard and Delores M.
Hogan, et al.* (p. 13)

Corporation Franchise and Income Taxes

Extension of time — filing
franchise or income tax return
Huebsch Chevrolet, Inc.
(p. 13)

Leases — 1986 and prior — safe
harbor rules
*Northern States Power
Company* (p. 14)

Refunds — claims after field audit
refund
*National Presto Industries,
Inc.* (p. 14)

Transition rules — federalization
*Lincoln Savings Bank, S.A.,
f/k/a Lincoln Savings and
Loan Association* (p. 15)

Sales and Use Taxes

Penalties — negligence —
incorrect return
*Dolphin Swimming Pool Co.,
Inc.* (p. 16)

Service enterprises — bathtub
refinishing
*Thaddeus J. Hartlaub, d/b/a
Worldwide Refinishing
Systems* (p. 17)

Time-share property
Telemark Development, Inc.
(p. 17)

Fuel Taxes

Assessments — authority
Assessments — statute of
limitations
Jones Oil Company, Inc.
(p. 18)

Drug Taxes

Drug tax — constitutionality
Darryl J. Hall (p. 18)

INDIVIDUAL INCOME TAXES

— Retirement benefits exempt. *Donald and Janet Groschel vs. Wisconsin Department of Revenue* (Circuit Court for Waukesha County, November 25, 1996). The issue in this case is whether annuity payments received by Donald Groschel are exempt from Wisconsin income taxation.

The Wisconsin Tax Appeals Commission concluded that the payments are not exempt, and the taxpayers appealed the decision to the Circuit Court. See *Wisconsin Tax Bulletin* 100 (January 1997), page 21, for a summary of the Commission's decision.

The Circuit Court dismissed the case, based on a stipulation and agreement entered into by both the taxpayers and the department. The case is closed. □

— Retirement funds exempt — constitutionality. *John D. and Jane A. Hennick vs. Wisconsin Department of Revenue* (Court of Appeals, District I, November 5, 1996). The taxpayers appeal from a judgment of the Circuit Court for Milwaukee County, affirming the Wisconsin Tax Appeals Commission's decision that denied their claim for an income tax refund for taxes paid on income from a private pension. See *Wisconsin Tax Bulletin* 95 (January 1996), page 23, for a summary of the Circuit Court decision.

The taxpayers argue that sec. 71.05(1)(a), Wis. Stats. (1989-90), which exempts certain public employe pension income from taxation, violates the uniformity clause of the Wisconsin Constitution and the equal protection clauses of the United States and Wisconsin Constitutions.

Mr. Hennick receives pension income due to his employment from 1956 through 1983 with a private entity, the Public Expenditure Survey of Wisconsin. In 1993, the Hennicks filed amended tax returns for the years 1989 through 1992 seeking a refund, and the department denied their claim for refund.

The Court of Appeals concluded that sec. 71.05(1)(a), Wis. Stats., does not violate the uniformity clause of the Wisconsin Constitution, because that clause applies only to taxation of property, not income.

The Court also concluded that sec. 71.05(1)(a), Wis. Stats., does not violate the equal protection clauses of the Wisconsin and United States Constitutions. When dealing with equal protection challenges, legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. When no suspect classifications are present, that presumption is even greater. Further, where a tax measure is involved, the presumption of constitutionality is strongest. The burden is upon the challenger to prove abuse of legislative discretion beyond a reasonable doubt. The standard used for determining whether the Legislature has abused its discretion is not whether some inequality results from the classification, but whether there exists any reasonable basis to justify the classification.

First, there are no "inherently suspect distinctions" involved in sec. 71.05(1)(a), Wis. Stats. Second, the statute is not without a reasonable basis, namely, that the exclusion was thought by its framers as desirable to correct or ameliorate pay inequities for Milwaukee municipal employes. Finally, the taxpayers only demonstrated that Mr. Hennick's pension income was taxed differently. As the Commission accurately explained, "the mere establishment of a difference in the taxation treatment accorded certain types of incomes does not *per se* indicate that those differences result from distinctions made through legislative enactments which are not reasonable."

The taxpayers have not appealed this decision. □

— **Tax Appeals Commission — class action claims.** *Wisconsin Department of Revenue vs. J. Gerard and Delores M. Hogan, et al.* (Circuit Court for Dane County, February 11, 1997).

The Circuit Court, having been advised that the Wisconsin Tax Appeals Commission (Commission) had entered an order effectuating a February 7, 1997 stipulation of the parties before that body, reversed those portions of the Commission's oral decisions dated May 24, 1994 and June 24, 1994 which are inconsistent with the court of Appeals' decision dated December 21, 1995. See *Wisconsin Tax Bulletin* 96, (April 1996), page 15, for a summary of the Court of Appeals decision.

The Circuit Court also remanded the record in this case to the Commission for such further proceedings as it may deem appropriate. □

CORPORATION FRANCHISE AND INCOME TAXES

— **Extension of time — filing franchise or income tax return.** *Huebsch Chevrolet, Inc., vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, December 18, 1996). The issue in this case is whether the taxpayer is liable for the late filing fee and negligence penalty because it failed to file with its 1993 Wisconsin return a copy of the Form 7004 it filed with the Internal Revenue Service ("IRS") for the same year, as required by sec. 71.24(7), Wis. Stats. (1993-94).

On April 17, 1995, the taxpayer mailed to the department its 1993 corporate franchise or income tax return for its fiscal year ending July 31, 1994 ("1993 return"). In waiting to file until April 17, 1995, the taxpayer relied on a federal Form 7004, Application for Automatic Extension of Time to File Corporation Income Tax, that it filed with the IRS and that it claims it filed with the department in a timely manner. On its 1993 return, the taxpayer reported an amount due of \$3,886 and paid the same.

When it filed its 1993 return, the taxpayer did not include a copy of the Form 7004 it had filed with the IRS for the same tax year.

Under the date of July 1, 1995, the department assessed the taxpayer \$280.69 in underpayment interest, \$401.04 in delinquent interest, a \$30 late filing fee, and a \$930.69 negligence penalty. The taxpayer filed a petition for redetermination challenging the delinquent interest, negligence penalty, and late filing fee. The department denied the petition for redetermination, and the taxpayer appealed the denial to the Wisconsin Tax Appeals Commission with

regard only to the negligence penalty and the late filing fee.

Even though the taxpayer had a copy of the requested Form 7004 at all relevant times, neither the taxpayer nor its representative produced a copy of the requested Form 7004 until the hearing in this matter.

The Commission concluded that the taxpayer is liable for the late filing fee and the negligence penalty because the taxpayer failed to file with its 1993 Wisconsin return a copy of the Form 7004 it filed with the IRS for the same year, as required by sec. 71.24(7), Wis. Stats. (1993-94).

The taxpayer has 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. □

Leases — 1986 and prior — safe harbor rules. *Wisconsin Department of Revenue vs. Northern States Power Company* (Circuit Court for Eau Claire County, November 15, 1996). The department appealed the Wisconsin Tax Appeals Commission's decision that allowed Northern States Power Company (NSP) to deduct from its gross income transactional costs related to its acquiring of safe harbor leases in 1982. See *Wisconsin Tax Bulletin* 98 (July 1996), page 23, for a summary of the Commission's decision.

During 1982, the federal Internal Revenue Code (IRC) sec. 168(f)(8) allowed leases, which would not have otherwise qualified as leases for federal income tax purposes, to be treated as leases to permit the seller/lessee of property to transfer

to a buyer/lessor the benefits of federal depreciation deductions and federal investment tax credits. Wisconsin, however, does not allow the deductions. Sec. 71.04(15)(b), Wis. Stats. (1981-82).

Safe harbor leases allow a company needing new equipment to reduce its cost for the equipment by effectively selling its federal tax consequences of equipment ownership to another company which can use those benefits. The sale of the tax consequences is accomplished by safe harbor leases, under which ownership is treated as being sold and the equipment is treated as being leased back. The transaction is essentially on paper only since the ownership and possession of the equipment remains with the original company. For federal tax purposes, however, the other company is treated as the owner and obtains the federal depreciation deductions and investment tax credits related to the equipment. Under Wisconsin law, the company is not entitled to these deductions and credits.

In 1982, NSP, based on Wisconsin law, did not claim any of the federal depreciation deductions and investment tax credits related to its safe harbor leases. It did, however, claim \$212,762 for transactional costs (for example, legal fees) related to securing the safe harbor leases. The department disallowed all but \$3,520 of the deduction. The amount allowed represented amortization of legal fees. The Commission reversed the department.

The Circuit Court concluded that the Commission's decision is supportable by the Wisconsin Statutes and the Internal Revenue Code. Because the transactional costs are deductible under IRC sec. 167, they are similarly allowable as a deduction under sec. 71.04(15)(a), Wis. Stats. (1981-82).

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

Refunds — claims after field audit refund. *National Presto Industries, Inc., vs. Wisconsin Department of Justice* (Circuit Court for Eau Claire County, January 16, 1997). National Presto Industries, Inc. (Presto) filed a petition with the Circuit Court for review of the Wisconsin Tax Appeals Commission's dismissal of its petition for a refund for 1985.

The Commission decision to dismiss Presto's petition was based on its finding that sec. 71.75(4), Wis. Stats., was applicable to the facts of this case. The Commission concluded Presto could not seek a refund for 1985 because the field audit of 1985, 1986, and 1987 produced a refund. The Commission also held that the law did not require the department to advise Presto of appeal rights because in essence it had already done so as part of the audit process.

Presto is a Wisconsin corporation with its principal place of business located in Eau Claire, Wisconsin. Presto is subject to Wisconsin franchise and income taxes and was so at the times material to this dispute.

In 1992, a field audit of Presto's taxable years 1985, 1986, and 1987 was conducted by the Wisconsin Department of Revenue (department). On November 4, 1992, the department issued a notice of field audit action which reported the three years separately but which combined them for the purposes of computing a net figure. Specifically, Presto was found to have underpaid taxes for 1985 and 1986, and interest at the rate of 12% was assessed against Presto separately on the amounts owed each year. The department determined that Presto substantially overpaid taxes in year 1987, and

interest was computed in favor of Presto at the rate of 9% against that amount. The department issued Presto a refund check for the 1987 overpayment plus interest owed, less Presto's computed underpayments for 1985 and 1986 plus interest Presto owed.

During September 1994, Presto concluded the department erred on its calculation and determination of Presto's taxes for 1985 only, and Presto on September 13, 1994, notified the department it was claiming a refund for the year 1985.

On November 10, 1994, the department responded to the refund claim by denying it on the basis that under sec. 71.75(4), Wis. Stats., no refund shall be made for "... any year that has been the subject of a field audit if the audit resulted in a refund or no change to the tax owed or resulted in an assessment that is final." The letter went on to state that because the audit report of November 4, 1992, resulted in Presto's receipt of a refund, there was no assessment and sec. 71.75(5), Wis. Stats., was inapplicable. The letter contained no other information with regard to any rights Presto had to appeals or further review of this decision.

Presto did nothing in response to this letter from the department until June 13, 1995, when it wrote a letter taking issue with the department's conclusions as set forth in its November 10, 1994, denial.

From June 13, 1995, through July 17, 1995, Presto and the department exchanged letters which essentially claimed the other was incorrect in its interpretation of Wisconsin tax law. Presto ultimately filed a petition with the Wisconsin Tax Appeals Commission. The department moved to dismiss Presto's petition which was granted. Presto thereafter filed a

petition with the Circuit Court for review of the dismissal.

The Circuit Court, after a complete review of the file, concluded that the Commission's interpretation of secs. 71.75(4) and 71.75(5), Wis. Stats., is plainly incorrect. Presto seeks a refund for the tax year 1985 only. The field audit conducted by the department for that year found Presto underpaid \$33,919.02 and assessed Presto the amount of the underpayment and on top of that assessed Presto \$27,231.86 in interest. The plain language of sec. 71.75(4), Wis. Stats., states that no refund shall be allowed if, after a field audit, there is no change in the tax owed or if a refund is issued. The field audit for 1985 imposed a significant change in Presto's tax liability for that year.

The fact that the department elected to conduct a field audit for three years and issue a net check after concluding that Presto substantially overpaid its taxes for 1987 does not alter the fact that for the year 1985 Presto was assessed more tax and interest.

The Circuit Court reversed the Commission's decision granting the department's motion to dismiss and remanded the case back to the Commission for a decision on its merits.

The State has appealed this decision to the Court of Appeals. □

Transition rules — federalization. *Lincoln Savings Bank, S.A., f/k/a Lincoln Savings and Loan Association vs. Wisconsin Department of Revenue* (Court of Appeals, District I, December 10, 1996). The department appealed from the Circuit Court's reversing an order by the Wisconsin Tax Appeals Commission that assessed additional franchise taxes against the

taxpayer for the years 1987-1990. For summaries of the prior decisions, see *Wisconsin Tax Bulletins* 91 (April 1995), page 13, and 95 (January 1996), page 27.

The only dispute between the parties is whether Lincoln Savings Bank (Lincoln) may subtract its pre-1962 balance of bad debt reserves for federal tax purposes, which accumulated *before* it was subject to the Wisconsin franchise tax. The Commission held that it could not; the Circuit Court held that it could.

Lincoln was first subjected to franchise tax liability in 1962. Both Wisconsin and federal tax law permit institutions like Lincoln to deduct reserves set aside to cover bad debts from their tax liability. Prior to 1987, Wisconsin tax law established a specific mechanism for this deduction in sec. 71.04(9)(b), Wis. Stats. (1985-86). This section was repealed effective for the "taxable year 1987" as part of the legislature's federalization of Wisconsin's tax law. In its place, the legislature defined corporate "net income" for Wisconsin tax purposes, with provisos not pertinent here, as "gross income, as computed under the internal revenue code."

The federalization of Wisconsin's tax law changed the amount of bad debt reserves that institutions like Lincoln could deduct from their income in order to arrive at their taxable income. For the years 1962 through 1986, Lincoln's federal bad debt reserve balance equaled \$3,375,023; Lincoln's Wisconsin bad debt reserve balance for that period was \$2,608,622.

Federalization of the corporate tax liability in Wisconsin resulted in changes in the tax treatment of myriad items for all corporations, and the legislature enacted a transition mechanism to equalize the

differences and made it applicable to corporations generally. This nonstatutory provision, 1987 Wisconsin Act 27, sec. 3047(1)(a), directs that calculations reflecting necessary adjustments are to be made "as of the close of [the corporate taxpayer's] taxable year 1986" and are to account for past differences between the federal and state treatment of the same items.

Section 3047(1)(a) permits the taxpayer to recoup (or "avoid omission" of) the excess of the federal deduction for a bad debt reserve over the Wisconsin deduction for the years prior to federalization of the Wisconsin tax law.

Lincoln first became subject to Wisconsin's franchise tax in 1962. Prior to 1962, it could not have taken *any* deduction from its franchise tax liability for additions to its bad debt reserve because it did not owe *any* franchise tax.

Therefore, the Court of Appeals concluded that Lincoln's pre-1962 federal bad debt reserves are not "required to be subtracted" from Lincoln's income "in order to avoid omission" of that pre-1962 bad debt loss reserve deduction. The Commission correctly applied the non-statutory transition provision, 1987 Wisconsin Act 27, sec. 3047(1)(a), to Lincoln Savings Bank.

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

SALES AND USE TAXES

Penalties — negligence — incorrect return. *Dolphin Swimming Pool Co., Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, October 3, 1996). The issue is whether the department properly

imposed the negligence penalty pursuant to sec. 77.60(3), Wis. Stats., and is entitled to summary judgment.

As a result of a field audit, the department issued a sales and use tax assessment against the taxpayer for the period of December 1, 1988 through November 30, 1992. The assessment mainly involved sales and use tax on the taxpayer's purchases of tangible personal property used in its construction of new in-ground swimming pools and spas.

The department's reasons for assessing the 25% negligence penalty against the taxpayer include the following:

- a. For the years 1989-90 and subsequent years of the audit period, the taxpayer's franchise tax returns incorrectly stated that taxpayer had purchased no tangible personal property without payment of state sales or use tax.
- b. The amount of additional use tax that was found in the field audit was approximately three times the use tax the taxpayer had previously reported.
- c. Although the taxpayer had routinely self-assessed and paid use tax to the department prior to June 1990, it ceased self-assessing use tax in June 1990.
- d. The taxpayer hired professional accountants to prepare its sales and use tax returns for the period of June 1990 through December 1990 and to advise its bookkeeper on filing sales and use tax returns for the audit period subsequent to that.
- e. According to information obtained in the audit, the material the taxpayer purchased from vendors for its in-ground pool construction remained constant

throughout the audit period, and the vendors remained the same.

- f. During the period under review, the taxpayer made sales of tangible personal property to its customers without collecting sales tax.
- g. A previous audit of the taxpayer resulted in a significant amount of tax owing, including both use tax on purchases made without payment of sales or use tax and the 25% negligence penalty.

The taxpayer has held a Wisconsin seller's permit since 1972. The current management was not involved until 1987.

From November 1986 until June 1990, the taxpayer's accountant and office manager, Bob Wing, reported use tax on the taxpayer's behalf. Mr. Wing's employment was terminated in June 1990. For the first six months after Mr. Wing's departure, the taxpayer hired a CPA firm to prepare its sales and use tax returns.

The taxpayer relied on the CPA firm for the accurate reporting of use tax and for properly training the taxpayer's bookkeeper. Unknown to the taxpayer's personnel, and for reasons not explained to the taxpayer by the CPA firm, the CPA firm was no longer including in its use tax measure purchases for in-ground swimming pools.

The taxpayer disputes the 25% penalty assessment on several grounds, including that the taxpayer relied on the advice and counsel of a CPA firm in preparing the flawed tax returns, that the taxpayer "did its absolute best in attempting to comply with its sales and use tax obligations," and that the case of *William Pagel vs. Department of Revenue* (Wisconsin Tax Appeals Commission, 1992) supports its position.

(See *Wisconsin Tax Bulletin* 79, page 12, for a summary of this decision.)

The Commission concluded that the department properly imposed the negligence penalty pursuant to sec. 77.60(3), Wis. Stats., and has shown it is entitled to summary judgment as a matter of law.

The law places the filing and reporting obligation on the taxpayer, and any arrangement between the taxpayer and a third party for assistance in fulfilling that obligation must necessarily remain between them. Reliance on third parties was rejected as a defense to the negligence penalty.

As to the applicability of *William Pagel vs. Department of Revenue*, the Commission agreed with the department that the case may be distinguished because it involved withholding taxes and the "willful neglect" language of sec. 71.83(1)(a)4, Wis. Stats., which is not present here, together with an embezzlement which was clearly outside the scope of the bookkeeper's employment.

The Commission disagreed with the taxpayer's argument that its record prior to the 1987 management change should not be considered in determining whether the negligence penalty should apply.

The taxpayer has appealed this decision to the Circuit Court. □

— Service enterprises — bathtub refinishing. *Thaddeus J. Hartlaub, d/b/a Worldwide Refinishing Systems vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, November 6, 1996). The issue is whether the department properly determined the taxpayer's bathtub and other refinishing services to be taxable services.

The taxpayer is in the business of bathtub refinishing, and he also refinishes ceramic tile, sinks, and tub surrounds. A typical job involves replacing the worn surface of a bathtub with a new polyurethane finish. The refinished surface is acid and scratch resistant, and is warranted by the taxpayer for five years, with a longer life expectancy as long as abrasive cleaners are not applied to it. This life expectancy is comparable to that of a new bathtub, but the cost of the taxpayer's refinishing is usually \$300 or less, compared with \$1,000 or more for a new bathtub.

The Commission concluded that the department properly determined the taxpayer's refinishing services to be taxable. The taxpayer's services are not "capital improvements" within the exception language in sec. 77.52(2)(a)10, Wis. Stats.

Because the taxpayer claims his services fall within the exemption of the imposition language of the statute, he must clearly show that his services constitute a capital improvement to the underlying real property. He has not done so. The taxpayer did not show that his refinishing services result in any increase in real estate value.

The taxpayer appealed this decision to the Circuit Court but subsequently withdrew his appeal.

The department has not appealed this decision but has adopted a position of nonacquiescence in regard to the portion of the decision which provides that the capital improvement exception in sec. 77.52(2)(a)10, Wis. Stats., applies to the repair, service, alteration, fitting, cleaning, painting, coating, towing, inspection, and maintenance of property deemed to have retained its character as tangible personal property. □

— Time-share property. *Telemark Development, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, October 28, 1996). The issue is whether the taxpayer's sales of time-share condominium units for flexible use are subject to sales tax.

The taxpayer is a Wisconsin corporation in the business of developing and selling time-share condominium units at the Telemark Resort complex near Cable, Wisconsin. Telemark Resort is a 1,600-acre resort complex consisting of a hotel, convention facilities, the taxpayer's time-share condominium development, and numerous recreational facilities.

Telemark Interval Owners Association ("TIOA") is a Wisconsin nonstock corporation and is a membership organization of the owners of the taxpayer's time-share units. Purchasers of the taxpayer's time-share units automatically become members of TIOA. TIOA is responsible for the management of the taxpayer's time-share development.

During the period under review (October 1, 1988 through September 30, 1992), the taxpayer sold its time-share units to the public.

Purchasers of the taxpayer's time-shares receive a fee simple interest in furnished residential units that can be occupied by the purchaser or the purchaser's transferee for certain weeks each year. The year is divided into 52 "unit weeks." The first unit week of each year begins on the first Sunday of the calendar year and ends on the succeeding Sunday. Remaining unit weeks are defined in the same manner.

Telemark rules provide, in part, that the unit weeks in every condominium unit are segregated into guaran-

teed use periods and flexible use periods.

A real estate transfer fee was paid to the Bayfield County Register of Deeds on each of the deeds filed with respect to the sale of time-share units at issue. No sales tax was paid on the sale of time-share units at issue, and the taxpayer did not hold a Wisconsin seller's permit during the period under review.

In order for the department to impose the sales tax on the transactions at issue, it must demonstrate that (1) the use of the time-share units was not fixed as to unit or starting time at the time of sale, and (2) the sales were to transients.

The Commission concluded that the sales at issue are properly subject to the sales tax imposed by sec. 77.52(2)(a)1, Wis. Stats. Under this statute, the sales tax is imposed upon the furnishing of lodging to transients through the sale of time-share property if the use of the rooms or lodging is not set at the time of sale as to starting day or lodging unit.

The Telemark rules explicitly provide that purchasers of time-share units during flexible use periods are not guaranteed a specific unit during a specific week at the time of purchase. Flexible use purchasers must reserve units with the TIOA for their desired particular units and weeks on a first come-first serve basis. Such purchasers are simply guaranteed the right to use an unspecified unit for one or more weeks during the 47 unit weeks within the flexible use period. Purchasers of time-share units during the flexible use periods do not receive the right to use a particular unit at a particular time at the time of the sale. Therefore, the first element of the statute is met.

Section 77.52(2)(a)1, Wis. Stats., defines "transient" as any person

residing for a continuous period of less than one month in a motel, hotel or other furnished accommodations available to the public. The time-share units are sold only in one-week intervals (as opposed to month-long intervals), and even if someone purchased four consecutive unit-weeks, there is no guarantee that the purchaser would be able to use the four unit-weeks continuously. Therefore, the only inference that can be drawn is that all of the sales have been to persons that will reside for a continuous period of less than one month. Therefore, the second element of the imposition statute is met.

The taxpayer has appealed this decision to the Circuit Court. □

FUEL TAXES

— Assessments — authority; Assessments — statute of limitations. *Jones Oil Company, Inc. vs. Wisconsin Department of Revenue* (Circuit Court for Dane County, October 8, 1996). The taxpayer seeks judicial review of a decision of the Wisconsin Tax Appeals Commission (Commission) dated December 12, 1995, and the January 24, 1996 denial of the taxpayer's petition for rehearing. See *Wisconsin Tax Bulletin* 96 (April 1996), page 21, for a summary of the Commission's decision.

The taxpayer seeks reversal of the Commission's order affirming the department's assessments for special fuel tax and for general aviation fuel tax against the taxpayer, or a new trial at which the taxpayer could introduce evidence to support its claim that it is not subject to the tax assessments in question. The record does not reflect the date on which the taxpayer attempted to serve the department by mail.

An affidavit submitted to the Circuit Court by the department in opposition to the taxpayer's petition for judicial review indicated that a copy of a petition for review in this case was forwarded to the department by regular mail, that no copy of the petition was received by the department by either personal delivery or by certified mail, and that the department did not admit service with respect to the petition for review in this case. The department maintains that the taxpayer's failure to strictly comply with the service requirements of sec. 227.53(1)(c), Wis. Stats., deprives the Circuit Court of both subject matter and personal jurisdiction in this matter.

The Circuit Court concluded that it does not have the power to disregard the specific statutory requirements for commencing this judicial review proceeding, and that the taxpayer has failed to invoke the subject matter and personal jurisdiction to commence the judicial review proceeding. The Circuit Court therefore dismissed the petition for review.

The taxpayer has appealed this decision to the Court of Appeals. □

DRUG TAXES

— Drug tax — constitutionality. *State of Wisconsin vs. Darryl J. Hall* (Wisconsin Supreme Court, January 24, 1997). This is a review of a decision of the Court of Appeals dated September 14, 1995. The taxpayer challenges the constitutionality of the drug tax stamp law ("the stamp law"). The taxpayer was convicted and sentenced to two consecutive three-year sentences under the stamp law, and, concurrently, two consecutive 30-year sentences for delivery of cocaine base convictions. The delivery convictions and their 30-year sentences are not at issue in this case.

This case presents three issues:

- A. Whether sec. 139.89, Wis. Stats., a part of the stamp law, unconstitutionally compels self-incrimination.
- B. If so, whether sec. 139.91, Wis. Stats., the confidentiality provision of the stamp law, on its face, provides the taxpayer with protection as broad as the protection offered by the privilege against self-incrimination.
- C. If not, whether the confidentiality provision may be construed in a manner which provides protection coextensive with the privilege.

The taxpayer contends that two requirements of the stamp law violate his privilege against self-incrimination: (1) the purchase requirement; and (2) the requirement that tax stamps must be affixed to a dealer's drugs. He argues that these requirements violate his privilege in two ways: (1) by requiring a dealer, when purchasing stamps, to provide incriminating information that may be used by prosecutors against him in a criminal proceeding; and (2) by providing vital evidence in a prosecutor's case against a dealer

who complies with the statute and affixes the stamps to illicit drugs, because such acts show both knowledge that the items are controlled substances, and intent to possess controlled substances.

The second issue is whether the confidentiality provision of the stamp law, on its face, provides protection as broad as the protection offered by the privilege against self-incrimination. The privilege against self-incrimination may not properly be asserted if other protection is granted which is so broad as to have the same extent in scope and effect as the privilege itself. The State of Wisconsin ("the State") argues that the stamp law's confidentiality provision provides such coextensive protection against self-incrimination.

The third issue is whether the confidentiality provision may be construed in a manner which provides protection coextensive with the privilege against self-incrimination. The State argues that the language of the stamp law should be construed to provide direct immunity, and that it should also be construed to provide taxpayers with protection against derivative use of incriminating information.

The Wisconsin Supreme Court concluded as follows:

- A. The drug tax stamp law unconstitutionally compels self-incrimination, absent some preexisting statutory confidentiality or immunity provision providing protection equivalent to that of the Fifth Amendment.
- B. While providing some protection, the stamp law, on its face, fails to provide the taxpayer with protection coextensive with the privilege against self-incrimination.
- C. Section 139.91, Wis. Stats., plainly and unambiguously provides direct, but not derivative use immunity. Consequently, the statute may not be construed to provide the taxpayer with protection coextensive with the privilege against self-incrimination.

At this time it is not known whether the State will appeal this decision to the United States Supreme Court. □



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:

Income, Franchise, Withholding, and Excise Taxes; Homestead and Farmland Preservation Credits

1. Interest on Unpaid Taxes: Regular vs. Delinquent Rates (p. 20)

Sales and Use Taxes

2. Use of Automobiles Provided "Free" by Dealers to Customers (p. 23)

INCOME, FRANCHISE, WITHHOLDING, AND EXCISE TAXES; HOMESTEAD AND FARMLAND PRESERVATION CREDITS

1 Interest on Unpaid Taxes: Regular vs. Delinquent Rates

Statutes: Sections 71.67(2), 71.74(15), 71.82(1) and (2), and 71.91(1), Wis. Stats. (1995-96)

Note: This tax release applies to Wisconsin income, franchise, withholding, and excise taxes and for farmland preservation and homestead credits.

Background: The Wisconsin Statutes provide that unpaid taxes shall bear interest at 12% per annum from the date on which such taxes if originally assessed would have become delinquent if unpaid, to the date on which such taxes when subsequently assessed will become delinquent if unpaid.

The Wisconsin Statutes also provide that delinquent taxes are subject to interest at a rate of 18% per annum.

In the June 9, 1993, decision in *William Wrigley, Jr. Co. vs. Wisconsin Department of Revenue*, Wisconsin Supreme Court No. 88-2265, Wis. Tax Report, CCH ¶ 400-005, the Wisconsin Supreme Court ruled that the corporation franchise tax assessment for the years that Wrigley did not file Wisconsin corporation franchise tax returns, was an "additional" assessment subject to sec. 71.13(2), Wis. Stats. (1985-86), that did not become delinquent, and therefore, not subject to delinquent interest, until 30 days following the United States Supreme Court's final determination that the assessment was correct.

The Wisconsin Supreme Court decision provided that "delinquent interest is a penalty that is meant to punish taxpayers who do not pay their taxes on time. Wrigley should not be punished. Wrigley was acting in good faith and on the advice of counsel when it determined that it

did not need to file a tax return in Wisconsin."

The court also provided that "the delinquency provisions at issue here are not intended to punish non-filers. Rather, they are intended to encourage prompt payment of admitted tax liability. Tax acknowledged by the taxpayers to be due is delinquent from the due date of the return whether a return is filed or not. Tax assessed by the DOR upon audit does not become delinquent ... until 30 days after the taxpayer's liability has finally been determined."

In the February 26, 1996, decision in *Aqua Finance, Inc. vs. Wisconsin Department of Revenue*, the Wisconsin Tax Appeals Commission ruled the sales tax law provides that the delinquency occurs, and 18% delinquent interest begins to accrue, on the date the sales tax return would have been due. This decision is based on section 77.60(2)(b), Wis. Stats. (1993-94), which provides that delinquent fees and interest at 1.5% per month are imposed when no return is filed by the due date of the return.

Therefore the *Wrigley* case applies only to income, franchise, withholding, and excise taxes and farmland preservation and homestead credits, but not to sales and use taxes.

Policy:

1. Delinquent interest at a rate of 18% per annum applies to an "admitted" tax liability (tax acknowledged by the taxpayer to be due) not paid by the due date if the liability is the result of:

- a) Tax due on a timely filed return which is not paid by the due date of the return;
 - b) Tax due on a late return voluntarily filed by a taxpayer;
 - c) Tax due on a late return filed as a result of action by the Department of Revenue; or
 - d) Tax due on an assessment issued by the Department of Revenue for failure to file a return. (See Item 2.d. below for the treatment of tax due as determined by an assessment which is not an admitted liability.)
2. Interest at a rate of 12% per annum applies to an "additional" tax liability if the liability is the result of:
- a) An amended return filed by a taxpayer showing additional tax;
 - b) An assessment made by the Department of Revenue for adjustments to a timely filed return;
 - c) An assessment made by the Department of Revenue for adjustments to a late filed return; or
 - d) An assessment made by the Department of Revenue upon audit for a taxpayer's failure to file a return in those situations where the taxpayer does not admit to the tax liability and the taxpayer has good faith reason for the position taken.

Facts and Questions:

Voluntarily Filed Timely Returns

Facts and Question 1: Taxpayer A files a Wisconsin income tax return

on April 15, the original due date of the return, reporting a tax due of \$1,000 and does not remit the \$1,000 payment. Is the unpaid balance of \$1,000 subject to 18% delinquent interest?

Answer 1: Yes. The tax, which is considered admitted to be due by the taxpayer, is subject to delinquent interest at 18% per annum from the original due date of the return to the date paid (sec. 71.82(2), Wis. Stats. (1995-96)).

Facts and Question 2: Taxpayer B files a Wisconsin income tax return on April 15, the original due date of the return, and pays the tax due shown on the return of \$5,000. The department determines that Taxpayer B owes \$360 of interest for underpayment of estimated taxes. Is the \$360 subject to 18% delinquent interest?

Answer 2: Yes. All nondelinquent payments (\$5,000) of additional amounts owed are applied first to any penalties, then to interest and finally to the tax (sec. 71.74(15), Wis. Stats. (1995-96)). Therefore, the \$360, which is still owed by Taxpayer B, is *tax* which is subject to 18% delinquent interest from the original due date of the return to the date paid (sec. 71.82(2), Wis. Stats. (1995-96)).

Voluntarily Filed Late Returns

Facts and Question 3: Taxpayer C voluntarily files a late Wisconsin income tax return and pays the tax due when filing the return. Is the tax due shown on the return subject to delinquent interest?

Answer 3: Yes. The tax, which was admitted to be due by the taxpayer, is subject to delinquent interest from the original due date of the return to the date paid (sec. 71.82(2), Wis. Stats. (1995-96)).

Facts and Question 4: Taxpayer D voluntarily files a late Wisconsin income tax return but does not pay the tax due when filing the return. The department bills Taxpayer D for the tax shown on the return. Is the tax due subject to 18% delinquent interest?

Answer 4: Yes. The tax, which was admitted to be due by the taxpayer, is subject to delinquent interest at 18% per annum from the original due date of the return to the date paid (sec. 71.82(2), Wis. Stats. (1995-96)).

Facts and Question 5: Taxpayer E voluntarily files a late Wisconsin income tax return but does not pay the \$500 tax due when filing the return. The department bills Taxpayer E for \$600, the \$500 tax shown on the return, and an additional \$100 of tax resulting from an adjustment to the return made by the department. Is the \$600 tax due subject to delinquent interest?

Answer 5: The \$500 of tax, which was admitted to be due by the taxpayer, on the return as filed is subject to 18% delinquent interest from the original due date of the return to the date paid (sec. 71.82(2), Wis. Stats. (1995-96)). The additional \$100 of tax determined to be due by the department is subject to 12% interest from the original due date of the return to the due date of the assessment (sec. 71.82(1), Wis. Stats. (1995-96)).

Facts and Question 6: Corporation F, an Illinois corporation, determines that it should have been filing Wisconsin corporation franchise tax returns as a result of the activities of its employees in Wisconsin. Corporation F voluntarily files late 1991, 1992, 1993, and 1994 Wisconsin corporation franchise tax returns in December 1995. The returns all show Wisconsin franchise tax due. Is

the tax due on the 1991 through 1994 returns subject to delinquent interest?

Answer 6: Yes. The tax on each return, which was admitted to be due by Corporation F, is subject to 18% delinquent interest from the original due date of the return to the date paid (sec. 71.82(2), Wis. Stats. (1995-96)).

Late Returns Filed as a Result of Department Action

Facts and Question 7: The department investigates the Wisconsin activities of employees of Corporation G, a Minnesota corporation. As a result of this investigation, Corporation G files late Wisconsin corporation franchise tax returns for 1991, 1992, 1993, and 1994. All the returns show Wisconsin franchise tax due. Is the tax due on the 1991 through 1994 returns subject to 18% delinquent interest?

Answer 7: Yes. The tax on each return, which was admitted to be due by Corporation G, is subject to 18% delinquent interest from the original due date of the return to the date paid (sec. 71.82(2), Wis. Stats. (1995-96)).

Facts and Question 8: The department investigates the Wisconsin activities of employees of Corporation H, an Iowa corporation. Corporation H does not respond to the department's inquiries. After the department issues an estimated assessment for Corporation H's failure to respond to the inquiries, Corporation H files late Wisconsin corporation franchise tax returns for 1991, 1992, 1993, and 1994. All returns show Wisconsin franchise tax due. The department cancels the estimated franchise tax assessment against Corporation H. Is the tax due as shown on the late filed returns subject to delinquent interest?

Answer 8: Yes. The tax on each return, which was admitted to be due by Corporation H, is subject to 18% delinquent interest from the original due date of the return to the date paid (sec. 71.82(2), Wis. Stats. (1995-96)).

Facts and Question 9: The department investigates the Wisconsin activities of employees of Corporation I, a Michigan corporation. Based on this investigation the department determines that the activities of the employees of Corporation I in Wisconsin are sufficient to create franchise tax nexus in Wisconsin. Corporation I, in good faith and with a reasonable basis, feels that the Wisconsin activities of its employees are protected by Public Law 86-272 and refuses to file Wisconsin corporation franchise tax returns for 1991, 1992, 1993, and 1994. The department issues an estimated franchise tax assessment against Corporation I.

Corporation I appeals the assessment to the department's Office of Appeals. As a result of conferences with the Office of Appeals, Corporation I agrees that it has franchise tax nexus in Wisconsin and files Wisconsin franchise tax returns for 1991, 1992, 1993, and 1994. The Office of Appeals, by closing agreement, reduces the estimated assessment to the amount of tax, interest and late filing fees, which result from the late filed returns. Is the tax due on the 1991 through 1994 returns subject to 18% delinquent interest?

Answer 9: No. Since Corporation I was acting in good faith and had a reasonable basis determining that it did not have a Wisconsin corporation franchise tax filing liability, the tax due as a result of the additional assessment by the department is subject to 12% interest from the original due date of the return to the due date established by the closing

agreement or the date paid, whichever occurs first, (sec. 71.82(1), Wis. Stats. (1995-96)). The taxpayer has met all conditions of Item 2.d. under the **Policy** section of this tax release.

Facts and Question 10: Taxpayer J, an individual, filed Wisconsin resident income tax returns for 1993 and prior years. Taxpayer J did not file a 1994 Wisconsin individual income tax return.

In response to a department inquiry as to why a return for 1994 was not filed, Taxpayer J indicated that he was a resident of the State of Florida for 1994. After further investigation, the department determined that Taxpayer J had not abandoned his Wisconsin domicile during 1994 and should have filed a Wisconsin resident individual income tax return for 1994. An assessment for 1994 tax due was issued by the department.

Taxpayer J disagrees with this determination and appeals the assessment to the Office of Appeals who denied the appeal. The taxpayer then filed a petition for review with the Wisconsin Tax Appeals Commission (TAC). The Wisconsin Tax Appeals Commission rules that although Taxpayer J had taken certain steps to establish his domicile in Florida, he did not abandon his Wisconsin domicile during 1994. Therefore, he was a Wisconsin resident for 1994 and was liable for the tax due as determined by the department's assessment. Taxpayer J did not appeal this decision.

Is the tax due subject to 18% delinquent interest?

Answer 10: No. Since Taxpayer J was acting in good faith and had a reasonable basis when he determined that he did not have a Wisconsin individual income tax filing liability, the tax due as a result of the additional assessment by the department

is subject to 12% interest from the original due date of the return to 30 days following the date on which the TAC order representing the final determination becomes final or the date paid, whichever occurs first (secs. 71.82(1) and 71.91(1)(c), Wis. Stats. (1995-96)). The taxpayer has met all the conditions of Item 2.d. under the **Policy** section of this tax release.

SALES AND USE TAXES

Note: The following tax release interprets the Wisconsin sales and use tax law as it applies to the 5% state sales and use tax. The 0.5% county and 0.1% stadium sales and use taxes may also apply. For information on sales or purchases that are subject to the county or stadium sales and use tax, refer to Wisconsin Publication 201, *Wisconsin State and County Sales and Use Tax Information*.

2 Use of Automobiles Provided "Free" by Dealers to Customers

Statutes: Sections 77.51(14)(intro.) and (j) and 77.53(1) and (1m), Wis. Stats. (1995-96)

Wis. Adm. Code: Sections Tax 11.28(3)(c)1.a. (December 1996 Register) and Tax 11.83(1) (February 1997 Register)

Background: Under sec. 77.53(1), Wis. Stats. (1995-96), Wisconsin use tax is imposed on a motor vehicle dealer's use of a motor vehicle purchased without sales or use tax for a purpose in addition to retention, demonstration, or display, while holding it for sale in the regular course of business. The amount subject to tax is determined under sec. 77.53(1m), Wis. Stats. (1995-96).

Section Tax 11.83(1), Wis. Adm. Code (February 1997 Register), defines "motor vehicle" to mean a self-propelled vehicle, such as an automobile, truck, truck-tractor, or motorcycle, designed for and capable of transporting persons or property on a highway.

Section Tax 11.28(3)(c)1.a., Wis. Adm. Code (December 1996 Register), interpreting sec. 77.51(14), Wis. Stats. (1995-96), provides that a retailer may use a resale certificate when purchasing taxable tangible personal property which will be given by the retailer as a premium to the retailer's customer when that customer purchases other property. This transaction is deemed a sale of both the premium and the other property.

Section 77.51(14)(j), Wis. Stats. (1995-96), provides, in part, that a lease is a continuing sale.

Facts and Question 1: Company A is a licensed Wisconsin motor vehicle dealer. Company A purchases automobiles without Wisconsin sales or use tax to resell to others. Company A also services and repairs automobiles for customers.

While a customer's automobile is being serviced or repaired by Company A, Company A allows the customer to use, without additional charge, an automobile Company A purchased for resale. Company A charges the customer for labor and materials to repair the customer's automobile.

Company A makes no use of the automobile other than providing it to a customer when the customer's automobile is being serviced or repaired.

Is Company A subject to Wisconsin use tax on the use of the automobile

provided without charge to its customer?

Answer 1: No. Company A has made no use of the automobile in addition to retention, demonstration, or display, while holding it for sale and lease to its customers (resale).

Under sec. Tax 11.28(3)(c)1.a., Wis. Adm. Code (December 1996 Register), Company A is considered to be both selling the repair services and parts and leasing the automobile to its customer. Since Company A has made no use of the automobile in addition to retention, demonstration, or display, while holding it for sale or lease, there is no basis for imposition of use tax on the use of the automobile under sec. 77.53(1), Wis. Stats. (1995-96).

Facts and Question 2: Assume the same facts as in Facts and Question 1, except that Company A, in addition to providing use of the automobile to a customer whose automobile is being repaired or serviced by Company A, uses the automobile to pick up repair parts from local vendors, pick up mail at the post office, and go to the bank.

Is Company A subject to Wisconsin use tax on the use of the automobile provided without charge to its customer?

Answer 2: Yes. Company A owes use tax on its use of the automobile to pick up repair parts from local vendors, pick up mail at the post office, and go to the bank. The amount subject to tax is determined under sec. 77.53(1m), Wis. Stats. (1995-96).

Company A, when it picks up repair parts from local vendors, picks up mail at the post office, and goes to the bank, is using the automobile for a purpose in addition to retention, demonstration, or display, while

holding it for sale or lease. Therefore, Company A is subject to Wisconsin use tax on such use under sec. 77.53(1), Wis. Stats. (1995-96), measured by the lease value as provided in sec. 77.53(1m)(b), Wis. Stats. (1995-96).

Facts and Question 3: Company A is a licensed Wisconsin motor vehicle dealer. Company A purchases automobiles without Wisconsin sales or use tax to resell to others. Company A also services and repairs automobiles for customers.

Common Carrier B's truck is serviced or repaired by Company A. Common Carrier B's truck is used exclusively in hauling property for others for hire and therefore, any repair parts and service for the vehicle are exempt from Wisconsin sales or use tax under secs. 77.52(2)(a)10. and 77.54(5)(b), Wis. Stats. (1995-96). While Common Carrier B's truck is being serviced or repaired, Company A allows Common Carrier B to use, without additional charge, an automobile Company A purchased for resale. Common Carrier B uses the auto-

mobile to drive to its headquarters and return to Company A to pick up its repaired truck. The fair market value of such use of the automobile is \$30.

Common Carrier B provides Company A with an exemption certificate that claims exemption under secs. 77.52(2)(a)10. and 77.54(5)(b), Wis. Stats. (1995-96) for the labor and materials relating to the repair of the truck. The charge by Company A to Common Carrier B for the repair of the truck and the lease of the automobile is \$300.

Company A makes no use of the automobile other than providing it to a customer when a Common Carrier B's truck is being serviced or repaired.

Is Company A subject to Wisconsin use tax on the use of the automobile provided without charge to Common Carrier B?

Answer 3: No. Company A has made no use of the automobile in addition to retention, demonstration, or display, while holding it for sale or lease to its customers (resale).

Under sec. Tax 11.28(3)(c)1.a., Wis. Adm. Code (December 1996 Register), Company A is considered to be both selling the repair services and parts **and** leasing the automobile to Common Carrier B. Since Company A has made no use of the automobile in addition to retention, demonstration, or display, while holding it for sale or lease, there is no basis for imposition of use tax on the use of the automobile under sec. 77.53(1), Wis. Stats. (1995-96).

Caution: Although the sale of labor and materials for the repair of Common Carrier B's truck is exempt from Wisconsin sales or use tax under secs. 77.52(2)(a)10. and 77.54(5)(b), Wis. Stats. (1995-96), there is no exemption that applies to the lease of the automobile by Company A to Common Carrier B. Company A is subject to Wisconsin sales or use tax on that portion of the \$300 charge to Common Carrier B that is attributable to the lease of the automobile to Common Carrier B (i.e., Company A is subject to sales tax on the \$30 charge for the lease of the automobile to Common Carrier B). □