



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). □