



# Wisconsin TAX BULLETIN



## New Sales Tax Publication – Farmers

See article on this page and  
publication on pages 25 to 40.

## New Tax Laws Pending

The Governor's Budget Bill and other bills affecting Wisconsin taxes were still pending at the time this Bulletin went to press. If any of these bills become law, a special issue of the *Wisconsin Tax Bulletin* will be published later this summer, to provide information about the tax law changes. ☐

## Make Your Research Easier

Are you looking for an easy way to locate reference material to research a Wisconsin tax question? The *Wisconsin Topical and Court Case Index* may be just what you need.

This two-part index will help you find reference material relating to income, franchise, withholding, sales/use, estate, and excise taxes.

The first part of the index, the "Topical Index," lists by tax type, alphabetically by subject, references

to Wisconsin statutes, administrative rules, tax releases, private letter rulings, publications, *Sales and Use Tax Reports*, Attorney General opinions, and *Wisconsin Tax Bulletin* articles.

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

The *Wisconsin Topical and Court Case Index* is available by subscription for \$18 per year, plus sales tax. This includes a volume published in January and an addendum published in June. To order your copy, complete the order blank on page 41 of this Bulletin. ☐

## Filing A Power of Attorney

Effective immediately, the Department of Revenue will accept an original, photocopy, or facsimile transmission (fax) of a power of attorney. Previously, it was the department's policy to accept only the original copy of a power of attorney.

Administrative rule Tax 1.13 (titled "Power of Attorney") and the department's Form A-222 titled "Power of Attorney" (which can be used by a taxpayer to grant power of

attorney) are being revised to reflect the new policy regarding acceptance of photocopies and faxed copies. ☐

## Focus on Publications: Sales to Farmers

Which sales to farmers qualify for exemption from Wisconsin sales and use taxes?

The Wisconsin Department of Revenue's new Publication 221, *Farm Suppliers and Farmers – How Do Wisconsin Sales and Use Taxes Affect Sales to Farmers?*, answers this question and many others. The publication includes examples of taxable and exempt sales to farmers and other helpful information for suppliers and farmers.

A copy of Publication 221 appears on pages 25 to 40 of this Bulletin. For information about how to obtain additional copies of this and other department publications, see the article titled "Tax Publications Available" on page 6 of this Bulletin. ☐

## Conviction for Alcohol Beverage Law Violation

The Best Western Midway Hotel, Appleton, Wisconsin, was convicted in March 1997, in Outagamie County Circuit Court, of selling liquor and beer without a license.

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## 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. □

## Wanted! Wisconsin Tax Cheats

### Level the Playing Field

You pay your fair share of state taxes, why shouldn't everyone?

Individuals and businesses who do not voluntarily comply with Wisconsin's tax filing and registration requirements have an unfair advantage over Wisconsin's law-abiding citizens. Ultimately these nonfilers add to the tax burden of those who pay their fair share of Wisconsin taxes.

In June 1996, department Alcohol & Tobacco Enforcement section agents made undercover purchases of alcohol beverages from the hotel, which did not hold a liquor or beer license. They subsequently seized several hundred cans of beer and nearly a hundred bottles of liquor.

The company pled no contest to the charges and was fined \$25,000 plus \$5,000 court costs. In addition, the company was ordered to donate \$20,000 to a local domestic abuse shelter.

Edward W. Koziel, Merrimac, Wisconsin, was charged in May 1997 with one count of filing a false return with the intent to evade sales tax.

According to the criminal complaint, Koziel filed a false Wisconsin Boat Registration and Titling Application that listed a 23 foot boat with a full purchase price of \$12,000, less a \$8,500 trade-in allowance, resulting in sales tax due on \$3,500. The complaint alleges that Koziel actually

paid \$20,900 for the boat and that no trade-in was involved. As a result, Koziel evaded paying sales tax of \$957.

If convicted, Koziel faces up to 30 days in jail and up to \$500 in fines. In addition to the criminal penalties, Wisconsin law provides for substantial civil penalties on the civil tax liability. Assessment and collection of the taxes, penalties, and interest due follows a conviction for criminal violations. □

### Wisconsin Tax Bulletin

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To help level the playing field, voluntary tax compliance is promoted by the Department of Revenue, through various tax enforcement and compliance programs, some of which are described below.

### Nonfiler Programs

The department conducts various programs to identify individuals and businesses who have not filed Wisconsin tax returns or registered to collect and remit Wisconsin sales, use, or withholding taxes, as required. Information received from the public regarding nonfilers is investigated.

### Registration for Nonresidents

The department investigates nonresident individuals and businesses whose activity in Wisconsin may result in a Wisconsin tax filing or registration requirement. Businesses located outside Wisconsin, who have representatives or employees in Wisconsin for business-related activities, may be responsible for collecting and remitting Wisconsin sales, use, and withholding taxes, and filing Wisconsin income or franchise tax returns if they have nexus in Wisconsin.

### Voluntary Disclosure

The department also has a "voluntary disclosure" policy for nonfilers, to encourage compliance with state registration and filing requirements. Under voluntary disclosure, penalties may be waived, and the number of prior returns required may be reduced.

The voluntary disclosure policy for nonfilers and copies of sample agreements appear in *Wisconsin Tax Bulletin* 101 (April 1997), pages 28 to 34.

**Note:** The department also has a voluntary disclosure policy relating to additional taxes due or excessive credits claimed on previously filed Wisconsin tax returns or credit claims. That policy appears on pages 25 to 27 of *Wisconsin Tax Bulletin* 101.

### To Catch a Tax Cheat

Citizens who wish to report suspected tax violators may contact any Department of Revenue office, or call (608) 266-3969 (informants may remain anonymous, if they wish). Cases involving potential criminal violations are referred to the department's Fraud Unit, for investigation and possible prosecution.

### Any Questions?

For more information, you may write to Nexus Unit, Wisconsin Department of Revenue, P.O. Box 8910, Madison, WI 53708-8910, or you may call (608) 266-3969. □



### Any Suggestions for 1997 Tax Forms?

Do you have suggestions for improving Wisconsin's tax forms or instructions? Can you think of ways the forms or instructions could be made easier to understand? If so, the department would like to hear from you.

Please take a few moments to put your ideas in writing, and mail them to Wisconsin Department of Revenue, Administration Technical Services, P.O. Box 8933, Madison, WI 53708-8933, or fax them to (608) 261-6240. Your suggestions could help make "tax time" easier for taxpayers and practitioners. □

### Wisconsin Electronic Filing

#### The Future of Tax Filing

The Wisconsin Electronic Filing (ELF) Program is expanding each tax season. The number of ELF returns has increased 84% since 1995, and ELF returns accounted for nearly 9% of 1996 returns filed. Wisconsin was second in the nation in the percentage of 1996 state returns accompanying federal ELF returns.

One reason for this success is that Wisconsin has one of the fastest electronic refunds in the nation. ELF refunds average just 3 business days from receipt of the return until direct-deposit in the taxpayer's bank account.

In addition, Wisconsin allows electronic filing of balance due returns early, with tax payments not due until April 15. Over 20% of Wisconsin ELF returns are no-tax or balance due returns. Wisconsin also allows electronic filing through October 15, for returns with extensions.

Electronic filing has many benefits for preparers. The adjustment rate on electronic returns is much lower than on paper returns, resulting in less follow-up work for preparers. Other benefits include acknowledgment of receipt of all ELF returns, increased efficiency, and reduced cost of doing business.

To participate in the Wisconsin ELF Program, all you need to do is:

- **Sole Proprietors Located in Wisconsin** — If you are authorized by the IRS to file electronically, you will automatically be included in the Wisconsin ELF Program. No further action is necessary.

- **All Others** — Provide the Wisconsin Electronic Filing Office with your latest copy of federal Form 8633 (Application to Participate in Electronic Filing) showing your IRS-assigned Electronic Filing Identification Number (EFIN). Alternatively, provide your firm's name, your EFIN, and a listing of your officers'/partners' names, addresses, and social security numbers.

This information may be faxed to (608) 264-6884 or mailed to Wisconsin Electronic Filing Office, P.O. Box 8977, Madison, WI 53708-8977.

Additional information about the Wisconsin ELF program is available in Wisconsin Publication 115, "*Wisconsin Federal/State Electronic Filing Handbook*." For information about how to obtain this publication, see the article titled "Tax Publications Available" on page 6 of this Bulletin.

If you prefer, you may call the department's Electronic Filing Help Line at (608) 264-9959. ☐



### Automatic 4-Month Extension Expires August 15

If your 1996 Wisconsin and federal individual income tax returns were due April 15, 1997, but you filed an application for an automatic 4-month extension for filing your federal return with the Internal Revenue Service (IRS), both your federal and Wisconsin returns are due August 15, 1997. When you file your Wisconsin return, be sure to attach to it a copy of the federal extension application, Form 4868.

Any filing extension available under federal law may be used for Wisconsin purposes, even if you are not using that extension to file your federal return. If you did not file a

federal extension application but needed a 4-month extension for Wisconsin only, your 1996 Wisconsin return, ordinarily due April 15, 1997, must be filed by August 15, 1997.

If you are extending the time to file your Wisconsin return only, attach one of the following items to the 1996 Wisconsin return you file:

- A statement indicating that you are filing under the federal automatic 4-month extension provision; or
- A copy of federal Form 4868 with only the name, address, and social security number completed.

**Note:** You were not required to pay your 1996 taxes by April 15, 1997, as a condition for receiving an extension of time to file your Wisconsin tax return. ☐

## Question and Answer

**Q** I recently purchased two meals at a local restaurant. The price of one meal was \$10 and the other meal was \$8. I had a coupon issued by a national chain of which the local restaurant was a franchise. The coupon allowed me to purchase one meal at the regular price (\$10) and the second meal of lesser value (\$8) was "free." The local restaurant was reimbursed by the national chain for the value of the coupon (i.e., the \$8 selling price of the free meal). How much Wisconsin sales tax may the restaurant charge me for the two meals?

**A** The Wisconsin sales tax that may be charged by the restaurant to you is 90¢, computed as follows:

Selling price of the meals (\$10 + \$8)	\$ 18.00
Sales tax rate (5%)	<u>x .05</u>
Sales tax	<u>\$ .90</u>

**Q** I recently purchased two meals at a restaurant. The price of one meal was \$10 and the other meal was \$8. I had a coupon issued by a local restaurant that allowed me to purchase one meal at the regular price (\$10) and the second meal of lesser value (\$8) was "free." The restaurant was not reimbursed by a third party for the value of the coupon I redeemed (i.e., the \$8 selling price of the free meal). How much Wisconsin sales tax may the restaurant charge me for the two meals?

**A** The Wisconsin sales tax that may be charged by the restaurant to you is 50¢, computed as follows:

Selling price of the meals (\$10 + \$8)	\$ 18.00
Less amount of coupon	<u>8.00*</u>
Amount subject to sales tax	\$ 10.00
Sales tax rate (5%)	<u>x .05</u>
Sales tax	<u>\$ .50</u>

\* If a seller is **not** reimbursed by a third party for the value of a coupon redeemed by the consumer, the amount of the coupon is subtracted from the selling price prior to computation of the sales tax. ☐

## Flow-Through of Tax-Exempt Interest Issue is Resolved

In the case of *Leonard H. and Ardis Erickson vs. Wisconsin Department of Revenue*, the Wisconsin Tax Appeals Commission ruled as follows:

- Tax-exempt interest does not retain its character when it passes through a qualified retirement plan; and
- Tax-exempt interest loses its tax exempt status when distributed from a pension plan.

The *Erickson* case is summarized in *Wisconsin Tax Bulletin* 100 (January 1997), page 20. Since the taxpayers did not appeal this decision, it is considered the final determination on this matter.

**Note:** The *Erickson* decision does not affect the department's position with regard to the flow-through of tax-exempt interest in benefits from IRA, Keogh, and certain other plans. This is explained in a tax release published in *Wisconsin Tax Bulletin* 80 (January 1993), page 21.

The department had previously received either claims for refund (from taxpayers who had specific information from their retirement fund on the amounts of tax-exempt interest from U.S. obligations) or Agreements Extending Time To File Claim For Refund (I-830).

The department has sent letters to all individuals who filed claims for refund, denying those claims. The department has also sent letters to those individuals who filed Agreements Extending Time To File Claim For Refund, informing them of the final determination and notifying them that their agreement is considered withdrawn. ☐

## Information or Inquiries?

Listed below are telephone numbers to call if you wish to contact the Department of Revenue about any of the taxes administered by the Income, Sales, and Excise Tax Division. A comprehensive listing of telephone numbers and addresses appears in *Wisconsin Tax Bulletin* 101 (April 1997), pages 35 to 38.

### Madison — Main Office

Area Code (608)

Appeals . . . . .	266-0185
Audit of Returns: Corporation, Individual, Homestead . . . . .	266-2772
Beverage . . . . .	266-6702
Cigarette, Tobacco Products . . . . .	266-8970
Copies of Returns . . . . .	267-1266
Corporation Franchise and Income . . . . .	266-1143
Delinquent Taxes . . . . .	266-7879
Electronic Filing . . . . .	264-9959
Estimated Taxes . . . . .	266-9940
Fiduciary, Estate . . . . .	266-2772
Forms Request:	
Taxpayers . . . . .	266-1961
Practitioners . . . . .	267-2025
Fax-A-Form . . . . .	261-6229
Homestead Credit . . . . .	266-8641
Individual Income . . . . .	266-2486
Motor Vehicle Fuel . . . . .	266-3223
Refunds . . . . .	266-8100
Sales, Use, Withholding . . . . .	266-2776
TDD . . . . .	267-1049

### District Offices

Appleton . . . . .	(920)* 832-2727
* (414) until July 25, 1997	
Eau Claire . . . . .	(715) 836-2811
Milwaukee:	
General . . . . .	(414) 227-4000
Refunds . . . . .	(414) 227-4907
TDD . . . . .	(414) 227-4147

averaged more than 1,000 each week, accessing general information about taxes, along with 139 forms and 30 publications that can be downloaded to personal computers.

A survey on the web page indicates it is easy to navigate and a worthwhile use of taxpayer dollars.

The department's web page is at: <http://www.dor.state.wi.us>. For further information, contact the department's internet coordinator, Mary Lou Clayton, at (608) 261-2272. ☐

## Wisconsin Tax Bulletin Annual Index Available



Once each year the *Wisconsin Tax Bulletin* includes an index of materials that have appeared in past Bulletins. The latest index available appears in *Wisconsin Tax Bulletin* 101 (April 1997), pages 39 to 66, and includes information for issues 1 (October 1976) to 99 (October 1996). ☐

## Racine Taxpayer Assistance Hours Revised

The department's office at 616 Lake Ave., Racine, Wisconsin, has changed its hours for taxpayer assistance. From April 16 through December, taxpayer assistance will be offered on Monday, Wednesday, and Thursday mornings from 7:45 a.m. to 11:45 a.m. The office was formerly open Monday through Friday during the above hours.

No changes are planned for taxpayer assistance hours at the Racine office during the tax filing season, January through April 15. Taxpayer assistance will be available during the filing season from 7:45 a.m. to 4:30 p.m., Monday through Friday. ☐

## Department's Internet Site is Popular

More than 26,000 visitors toured the Department of Revenue's web page in the first eight months since its debut in October 1996. Visitors have

## 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; use the department's Fax-A-Form system by calling (608) 261-6229 from a fax telephone and entering the retrieval code "10" plus the publication number. 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 Electrical Contractors — How Do Wisconsin Sales and Use Taxes Affect Your Business? (2/97)
- 201 Wisconsin 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 Use Tax Information For 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 Cemetery Monument Dealers — How Do Wisconsin Sales and Use Taxes Affect You? (3/97)
- 212 Businesses: Do You Owe Use Tax on Imported Goods? (2/97)
- 213 Travelers: Don't Forget About Use Tax (2/97)
- 214 Businesses: Do You Owe Use Tax? (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)
- 221 Farm Suppliers and Farmers — How Do Wisconsin Sales and Use Taxes Affect Sales to Farmers? (4/97)

### 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 (5/97)
- 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)
- 124 Petition For Compromise Of Delinquent Taxes (4/97)
- 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)	11.002	Permits, application, department determination-A
503	Wisconsin Farmland Preservation Credit (12/96)	11.01	Sales and use tax return forms-A
504	Directory for Wisconsin Department of Revenue (10/96)	11.05	Governmental units-A
508	Wisconsin Tax Requirements Relating to Nonresident Entrepreneurs (8/94)	11.12	Farming, agriculture, horticulture and floriculture-A
509	Filing Wage Statements and Information Returns on Magnetic Media (3/94)	11.14	Exemption certificates, including resale certificates-A
700	Speakers Bureau presenting ... (2/93)		
W-166	Wisconsin Employer's Withholding Tax Guide (3/96) <input type="checkbox"/>	11.32	"Gross receipts" and "sales price"-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
		11.68	Construction contractors-A
		11.86	Utility transmission and distribution lines-A
		11.97	"Engaged in business" in Wisconsin-A

## Recently Adopted Emergency Rule Summarized

Summarized below is information regarding secs. Tax 11.05 and 11.86, revised as an emergency rule effective May 18, 1997.

In addition to the summary of the changes, the text of the revised rules is reproduced. 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 41 of this Bulletin to obtain the Tax section of the Wisconsin Administrative Code.

**Tax 11.05(2)(s)** is amended and **Tax 11.86(6)** is repealed and recreated, to reflect a Wisconsin Tax Appeals Commission decision (*Straight Arrow Construction Company, Inc. vs. Wisconsin Department of Revenue*, August 28, 1996 and April 4, 1997). The Commission held that there is no statutory basis for the department's distinction that certain services performed in developed areas were taxable landscaping services, while the same services performed in undeveloped areas were not landscaping and therefore not taxable.

The text of Tax 11.05(2)(s) and 11.86(6) is as follows:

11.05(2)(s) The gross receipts from landscaping and lawn maintenance services, including weed cutting in lawn, and garden ~~and other developed areas~~ and along highways, streets and walkways, but not charges for damages described in sub. (3)(c).

## 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 July 1, 1997, or at the stage in which action occurred during the period from April 2, 1997 to July 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).

### Rules at or Reviewed by Legislative Council Rules Clearinghouse

11.05	Governmental units-A
11.86	Utility transmission and distribution lines-A

### Rules Sent to Revisor for Publication of Notice

11.001	Forward and definitions-A
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### Rules Sent for Legislative Committee Review

11.66	Telecommunications and CATV services-A
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### Emergency Rules Adopted (effective May 18, 1997)

11.05	Governmental units-A
11.86	Utility transmission and distribution lines-A <input type="checkbox"/>

11.86(6) LANDSCAPING SERVICES. Gross receipts from landscaping and lawn maintenance services are taxable. Except as provided in sub. (5)(a), landscaping and lawn maintenance services include:

a. Landscape planning and counseling.

b. Lawn and garden services, such as planting, mowing, spraying and fertilizing.

c. Shrub and tree services.

d. Spreading topsoil and installing sod or planting seed where trenches have been dug or sump pump, transmission and distribution lines have

been buried in residential, business, commercial and industrial locations, cemeteries, golf courses, athletic fields, stadiums, parking lots and other areas and along highways, streets and walkways.

(Note: In addition, the example that followed sub. (6) is deleted.) □



## 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

Bad debts — nonbusiness

*Randy S. and Shirley S. Albee*  
(p. 9)

Refunds, claims for — statute of limitations

*Kurt H. Van Engel* (p. 9)

### Corporation Franchise and Income Taxes

Apportionable income

Unitary business

Dividends — deductible dividends  
*Albany International Corp.*  
(p. 10)

Apportionment — apportionable income defined

*Hercules Incorporated* (p. 10)

Insurance companies — addback of exempt or excluded interest and dividends received deduction

*Heritage Mutual Insurance Company* (p. 13)

Insurance companies — addback of exempt or excluded interest and dividends received deduction

Insurance companies — interest from United States government obligations

Insurance companies — loss carryovers

*American Standard Ins. Co. of Wisconsin*  
*American Family Mutual Ins. Co.* (p. 14)

Manufacturer's sales tax credit  
*Wausau Paper Mills Company*  
(p. 15)

### Sales and Use Taxes

Estoppel

*Spickler Enterprises, Ltd.*  
(p. 16)

Landscaping

*Straight Arrow Construction Co., Inc.* (p. 16)

Transportation charges

*Rhineland Paper Company, Inc.* (p. 17)

Transportation charges

*Trierweiler Construction and Supply Co. Inc.* (p. 18)

### Drug Taxes

Drug tax — constitutionality

*Darryl J. Hall* (p. 19)



## INDIVIDUAL INCOME TAXES

### ✚ **Bad debts — nonbusiness.**

*Randy S. and Shirley S. Albee vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, February 11, 1997). The issue in this case is whether the taxpayers' deductions for unpaid wages and commissions, unreimbursed business expenses, and interest qualify as nonbusiness bad debts.

In August 1989, Randy S. Albee ("the taxpayer") began working for Bayshore Technologies, Inc. ("BTI"), a company located in Clearwater, Florida. Shortly after he began working for BTI, BTI stopped paying wages to its employees. An official of BTI asked its employees to continue to work for BTI and promised them they would be paid when the company was able to pay them. The taxpayer was paid a weekly wage through early November 1989. The taxpayer agreed to continue working for BTI in exchange for BTI's promise to pay him for his services once BTI had the ability to make these payments.

In January 1990, BTI sent a letter to the taxpayer indicating that it had become insolvent and that it was terminating the employment of all employees who had worked for BTI without pay. The taxpayer wrote to BTI to demand \$21,187.51 which he believed was due to him under his employment arrangement with BTI. This sum consisted of wages and guaranteed commissions (\$10,142.82), up-front living expenses, relocation expenses, and employe business related expenses (\$10,932.93), and interest on past due expenses (\$111.76). The wages and guaranteed commissions represented employe compensation and were not reported as his income for any year. The up-front living ex-

penses, relocation expenses, and employe business related expenses represented amounts the taxpayer expended during 1989 and for which he believed BTI was obligated to reimburse him.

The taxpayers listed \$3,500 of the amounts claimed against BTI as capital losses on their 1990 income tax return and another \$500 on their 1991 return. The department disallowed these capital losses for both 1990 and 1991.

The Commission concluded that the taxpayers' claimed deductions for unpaid wages and commissions are not deductible because these amounts were not reported in gross income, that the deductions for unreimbursed business expenses are not deductible because they were not deducted in the year in which they were incurred, and that the deduction for interest is not deductible because the underlying deductions upon which they are based are not deductible.

The taxpayers have not appealed this decision.

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

### ✚ **Refunds, claims for — statute of limitations.**

*Kurt H. Van Engel vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, April 24, 1997). The issue in this case is whether refunds claimed by the taxpayer on his late-filed 1988 and 1989 income tax returns should be allowed as an offset against an assessment covering his late-filed 1990, 1991, and 1992 returns. The

1988 and 1989 returns were filed after the statutory deadline for claiming refunds.

The taxpayer is a Milwaukee businessman. In 1988 he was notified that he was the target of a federal criminal investigation, and in 1991 he was indicted by the United States for federal tax crimes. These charges were subsequently resolved through the federal legal system.

When the taxpayer was notified that he was the target of a federal investigation, he believed he was confronted with a real hazard of self-incrimination if he timely filed additional income tax returns. Consequently, on the advice of counsel, he declined to file returns for a number of years, including Wisconsin returns for 1988 through 1992. During this time he made payments to the State of Wisconsin, which he estimated would cover his annual tax liability.

In March 1995, after the federal criminal proceedings had concluded, the taxpayer filed state income tax returns for 1988 through 1992, more than four years after the unextended due dates of his 1988 and 1989 tax returns. On his tax returns for 1988 through 1991, the taxpayer claimed refunds which he asked to be applied to his next year's tax; for 1992, he claimed a refund. The refunds have since been reduced in accordance with adjustments allowed by the department to the taxpayer's 1987 return.

In August 1995, the department notified the taxpayer that the claims for refund covering the years 1988 and 1989 were rejected, because the returns were filed more than four years after the original due date. There is nothing in the record indicating that the department conveyed to the taxpayer any notice that he

had some right to ask for a redetermination of its decision or to appeal to the Commission. The taxpayer did not file a petition for redetermination of the decision of August 1995.

Because it had disallowed the taxpayer's claims for refund for 1988 and 1989, the department made adjustments to his other returns. It subtracted the refund from 1989 from the taxpayer's tax payment for 1990. The department assessed additional taxes for 1990, 1991, and 1992 in a notice dated September 11, 1995. The department denied the taxpayer's petition for redetermination, and in July 1996 the taxpayer sent to the Commission a petition for review covering tax years 1988, 1989, 1990, 1991, and 1992. He asserted in the petition that "overpayment credits from 1988 and 1989 are in excess of the total tax, interest and penalty balance due.... We are requesting that these credits offset the balance due."

This matter presents questions arising out of the taxpayer's substantial overpayment of estimated taxes but serious delinquency in filing returns. He filed a petition for review of his returns for 1988, 1989, 1990, 1991, and 1992 before the Commission in July 1996. The department moved to dismiss, asserting that (1) the taxpayer failed to state a claim upon which relief could be granted, (2) the statute of limitations on refunds had expired, and (3) the determination on the 1988 and 1989 returns was final and conclusive because the taxpayer failed to timely appeal the determination to the Commission.

The Commission concluded that the taxpayer's refunds from 1988 and 1989, otherwise barred by the statute of limitations, may be applied as an offset against the additional assessment of income taxes for the period 1990 through 1992 under the doc-

trine of "equitable recoupment." The petition for review asks that "overpayment credits for 1988 and 1989 ... offset the balance due" on the assessment for the later period. This request fairly pleads the issue of "equitable recoupment."

The doctrine of equitable recoupment in tax cases is an exception to the legislative policy of barring claims for and against the government in tax matters by statutes of limitations. It is a defense which permits the taxpayer to offset the department's money claim on grounds of equity and justice. The Commission held that the taxpayer will get nothing back, but the department will get nothing more.

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

## CORPORATION FRANCHISE AND INCOME TAXES

**— Apportionable income; Unitary business; Dividends — deductible dividends.** *Wisconsin Department of Revenue vs. Albany International Corp.* (Circuit Court for Dane County, March 25, 1997). Both the department and the taxpayer filed a petition for review of the May 23, 1994, decision by the Wisconsin Tax Appeals Commission. See *Wisconsin Tax Bulletin* 88 (July 1994), page 11, for a summary of the decision.

The department and the taxpayer reached a settlement of all claims relating to this case. They agreed to settle the remaining issues in this case based on the settlement involving the department and NCR Corporation.

Based on this information, the Circuit Court dismissed the case with

prejudice and without costs on March 25, 1997. □

**— Apportionment — apportionable income defined.** *Hercules Incorporated vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, February 26, 1997). The issues presented in this case are as follows:

- A. Did the department properly include in the taxpayer's apportionable income, pursuant to sec. 71.25(5)(a), Wis. Stats., the gain realized by the taxpayer on the sale of its 38.7% interest in Himont, Inc., in 1987?
- B. Did the department properly include in the taxpayer's apportionable income, pursuant to sec. 71.25(5)(a), Wis. Stats., the interest received by the taxpayer from Himont, Inc., in 1986 and 1987 on the \$70 million working capital note?
- C. Did the department properly include in the taxpayer's apportionable income, pursuant to sec. 71.25(5)(a), Wis. Stats., the gain realized by the taxpayer on the sale of its 13% interest in Erbmont, N.V. in 1986?
- D. Did the department's inclusion of these amounts of gain and interest in the taxpayer's apportionable income violate the Due Process and/or Commerce Clauses of the United States Constitution?

Hercules Incorporated, a Delaware corporation, had its corporate headquarters and principal place of business in Wilmington, Delaware. The taxpayer's operations, including management of its investment port-

folio, were managed from its offices in Delaware.

Prior to November 1, 1983, the taxpayer was in the business, among other businesses, of manufacturing and marketing polypropylene. The polypropylene manufacturing business was not a part of the taxpayer's operations conducted in Wisconsin.

Polypropylene is a thermoplastic that is used to manufacture a wide variety of products, including appliance parts, automobile components, fibers, housewares, and other consumer products, packaging, and textiles.

Prior to July 1984, the taxpayer's domestic operations were divided into 5 separate and distinct lines of business: (1) organics, (2) plastics, (3) aerospace and explosives, (4) water soluble products, and (5) other products. The polypropylene manufacturing business was part of the Plastics business until November 1, 1983.

After July 1984, the taxpayer was reorganized into 3 business segments:

- (1) Hercules Specialty Chemicals Company,
- (2) Hercules Aerospace Company, and
- (3) Hercules Engineered Polymers Company.

The polypropylene manufacturing business was not included in any of these business segments.

The taxpayer's operations in Wisconsin consisted of one paper chemicals manufacturing plant in Milwaukee. That plant's 4 main products were Kymene, used in wet-strengthened tissues and toweling, and

Aqualpel, Pexol, and Scripset, all used as sizing agents in chemicals for the paper industry. No polypropylene was used or manufactured at this plant. The taxpayer's operations in Wisconsin also include a sales office in Green Bay for the sale of paper industry chemicals.

On June 28, 1983, the taxpayer entered into a joint venture agreement with Montedison S.p.A., an Italian company and a major worldwide producer of polypropylene. Pursuant to this agreement, Himont was formed on November 1, 1983, to acquire the polypropylene businesses formerly owned by the taxpayer and Montedison. After the taxpayer divested itself in 1983 of its polypropylene business, it no longer had any facilities, personnel, or technology to engage in, nor did it engage in, the business of manufacturing or marketing polypropylene.

### *Himont*

Himont is a Delaware corporation, with its principal place of business in Wilmington, Delaware. At all times it was a separate legal entity, with its own management and its own board of directors.

The taxpayer and Montedison each received 50% of the stock in Himont in return for the transfer of their respective polypropylene assets and technology. In addition to the Himont stock received by the taxpayer, Himont provided to the taxpayer a promissory note in the original principal amount of \$70 million. This note was designed to equalize the relative value of the assets acquired by Himont from the taxpayer and Montedison, due to the fact that the value of the assets acquired from the taxpayer exceeded the value of the assets acquired from Montedison. The note was payable in 5 years at variable interest rates.

In 1986, the taxpayer received interest from Himont in accordance with the terms of the \$70 million note. The interest received was deposited in the taxpayer's general corporate account.

When Himont was created, it contracted for certain administrative services from the taxpayer and from Montedison pursuant to a series of written agreements. The services the taxpayer provided to Himont included accounting, contracting, payroll, finance, and insurance services, among others. Services were performed from 1983 through 1991.

The taxpayer leased 33,000 square feet of office space to Himont at the taxpayer's headquarters in Wilmington, Delaware, beginning in 1983 through April 1988.

Himont and the taxpayer entered into a polypropylene supply agreement. For the fiscal years ending October 31, 1985, through October 31, 1988, the total dollar amounts of polypropylene the taxpayer purchased from Himont were less than 13% of Himont's total sales.

The taxpayer's and Himont's personnel did not participate in common profit-sharing or pension plans, nor did the taxpayer provide employee benefit programs for Himont. To the extent former employees of the taxpayer had accrued or vested benefits at the time Himont was created, those accrued assets, and the associated liabilities, were acquired by Himont from the taxpayer.

The employees of the taxpayer who were hired by Himont initially received the same salaries, including bonuses and incentives, benefits, seniority, and pension plan, from Himont that they had received from the taxpayer.

In February 1987, Himont sold approximately 22.6% of its stock at \$28 per share in a public offering. Upon completion of the sale, the taxpayer and Montedison each owned approximately 38.7% of Himont's issued and outstanding stock.

Negotiations between the taxpayer and Montedison resulted in the sale to Montedison, in September 1987, of the taxpayer's 38.7% interest in Himont for \$59.50 per share. The taxpayer realized a 1987 net capital gain from the sale of \$1,338,501,966. The taxpayer used the proceeds from the sale as follows:

- 30.6% to construct a plant for the aerospace business,
- 35.6% to repurchase the taxpayer's own common stock, and
- 33.7% to pay the taxpayer's taxes.

The taxpayer and Himont were functionally integrated. They engaged in transactions which were not at arm's-length, including the sale by Himont of polypropylene to the taxpayer at a discount from market, the sale by the taxpayer to Himont at cost of a wide range of administrative services, and the rental of substantial space by the taxpayer to Himont, also at cost.

There was centralized management between the taxpayer and Himont. The taxpayer had a management role grounded in the taxpayer's operational expertise in the polypropylene business. The taxpayer had the authority to select, and dismiss if appropriate — in each case with the concurrence of Himont's board — Himont's president, who in turn selected other key Himont officials.

The taxpayer also nominated Himont's vice presidents for financial accounting and administration and the head of Himont's North American operations. The taxpayer selected as Himont's first president the manager of the taxpayer's polypropylene business, who left the taxpayer to assume the position. The taxpayer selected 3 of the 6 members of Himont's board of directors until 1987, when it selected 3 of 11 members. The taxpayer also had the authority to select the chairman of Himont's board of directors, who was Himont's chief executive officer (CEO). In 1987, the taxpayer's just-retired CEO became CEO of Himont. At that same time, 3 new "outside" director positions were added to the board along with 2 new "inside" director positions. Himont's new CEO and Himont's president became the new "inside" directors. Thus, the taxpayer effectively controlled 5 of 11 members of Himont's board in 1987.

Montedison selected the vice chairman of Himont's board of directors and nominated Himont's vice presidents for business management and technology and the head of Himont's European operations as well as a key employee in the financial area.

There were economies of scale between the taxpayer and Himont, reflected in the taxpayer's agreement to purchase most of its polypropylene needs from Himont, which were substantial, and in the taxpayer's providing to Himont a variety of services and space, at cost, throughout the period under review.

The taxpayer's investment in Himont served an operational purpose by reducing the taxpayer's exposure to commodity petrochemicals "without sacrificing our commitment to the

polypropylene market" and by giving the taxpayer "immediate entry into the European staple fibers market."

After Himont was formed, the taxpayer did not provide it with financing or guarantees to assist in obtaining financing, nor was there joint ownership or use of any trademarks, service marks, trade names, logos, or product designs.

On its 1985, 1986, and 1987 Wisconsin corporate tax returns, the taxpayer reported dividends received from Himont as apportionable to Wisconsin.

### *Erbamont*

On June 30, 1983, in exchange for a 50% interest in Adria Labs, Incorporated, the taxpayer acquired from Montedison 8% of the stock of Erbamont N.V., a New York Stock Exchange listed company engaged in the international pharmaceutical and health care business.

In connection with the creation of Himont, the taxpayer acquired an additional 5% of Erbamont's stock from Montedison, resulting in the taxpayer's ownership of 13% of Erbamont's stock.

In March 1986, the taxpayer sold its 13% interest in Erbamont and realized a net capital gain of \$70,892,163. The proceeds from the sale were deposited in the taxpayer's general corporate account.

The taxpayer's board of directors monitored its Erbamont stock holdings for performance. No functional integration, centralized management, or economies of scale existed between the taxpayer and Erbamont. Except for electing 1 or 2 of the 12 members of Erbamont's board of

directors, the taxpayer never participated in or controlled Erbamont's management. Erbamont had its own management team, none of whom were former employees of the taxpayer, and there were no business transactions or contracts between the taxpayer and Erbamont.

The taxpayer's ownership of Erbamont stock served an investment rather than an operational purpose.

The taxpayer did not include the capital gains from the sales of its interests in Erbamont and Himont in apportionable income in its 1986 and 1987 Wisconsin corporation tax returns, nor did it include the interest received from Himont in its 1986 return, but treated these items as nonapportionable, nonunitary non-business income.

### Conclusions of Law

The Commission reached the following conclusions:

- A. Yes, the department properly included in the taxpayer's apportionable income, pursuant to sec. 71.25(5)(a), Wis. Stats., the gain realized by the taxpayer on the sale of its 38.7% interest in Himont, Inc., in 1987.
- B. Yes, the department properly included in the taxpayer's apportionable income, pursuant to sec. 71.25(5)(a), Wis. Stats., the interest received by the taxpayer from Himont, Inc., in 1986 and 1987 on the \$70 million working capital note.
- C. No, the department did not properly include in the taxpayer's apportionable income, pursuant to sec. 71.25(5)(a),

Wis. Stats., the gain realized by the taxpayer on the sale of its 13% interest in Erbamont, N.V. in 1986.

- D. No, the department's inclusion of these amounts of gain and interest in the taxpayer's apportionable income did not violate the Due Process and/or Commerce Clauses of the United States Constitution.

The taxpayer has appealed this decision to the Circuit Court. The department has not appealed. □

**Insurance companies — addback of exempt or excluded interest and dividends received deduction.** *Wisconsin Department of Revenue vs. Heritage Mutual Insurance Company* (Court of Appeals, District II, February 12, 1997). The department appealed from a Circuit Court order affirming a decision of the Wisconsin Tax Appeals Commission granting the taxpayer's claims for a partial refund of taxes previously paid for the years 1987 and 1988. For summaries of the prior decisions, see *Wisconsin Tax Bulletins* 92 (July 1995), page 16, and 96 (April 1996), page 16.

The question in this case is whether Heritage Mutual Insurance Company (Heritage) took the proper deduction pursuant to sec. 71.45(2), Wis. Stats. (1987-88), when computing its Wisconsin taxable income. This statute requires an insurance company to "add back" certain interest and dividend income allowed as deductions under federal tax law.

The starting point for computing an insurer's net income for purposes of Wisconsin tax law is the insurer's federal taxable income. For federal

purposes, the insurer must include investment income and underwriting income. However, federal law allows an insurer to deduct certain interest and dividend income when determining its federal taxable income. These deductions include the interest earned on any state or local bond and certain dividends received.

In addition, an insurer is allowed to exclude from underwriting income its "losses incurred." These losses included losses actually paid plus increases in the reserve for losses incurred but not yet paid. Prior to the Tax Reform Act of 1986, federal law did not place any limitation on this "losses incurred" deduction. However, the Tax Reform Act scaled back this deduction by 15% of the sum of the exempt interest income and the allowable dividend deductions.

During this time, Wisconsin tax law remained constant. Both before and after the Tax Reform Act, sec. 71.45(2), Wis. Stats. (1987-88), required a Wisconsin insurer to "add back" to its federal taxable income the interest and dividend deductions which it had taken for federal tax purposes.

The department contends that the proper amount of the "add back" was the full amount of the federal deduction as reported by Heritage on its original state returns. Heritage contends that the proper amount is 85% of the federal deduction pursuant to the Tax Reform Act.

The department further contends that allowing insurance companies to add back only 85% of their interest and dividend income will result in a windfall to insurance companies. The department's concern stems from the fact that a portion of the tax-exempt loss reserves is funded

with tax-exempt interest and dividend income. By reducing the loss reserves deduction by 15% of the interest and dividend income, the Tax Reform Act of 1986 prevented insurance companies from receiving a double deduction on that portion of its loss reserves which is funded with tax-exempt income.

The Court of Appeals concluded that when changes in federal law produce a corresponding effect in Wisconsin tax procedures, it is for the legislature, not the courts, to consider whether such change represents good policy. Oftentimes, the legislature has responded to federal law by directing the taxpayer to deviate from the federal law. However, in this instance it has not. Unless and until it does, the Court properly follows the clear and unambiguous language of sec. 71.45(2), Wis. Stats. (1987-88). Therefore, the Court of Appeals affirmed the Circuit Court's order upholding the Commission's decision.

The department has not appealed this decision. □

**Insurance companies — addback of exempt or excluded interest and dividends received deduction; Insurance companies — interest from United States government obligations; Insurance companies — loss carryovers.** *American Standard Ins. Co. of Wisconsin and American Family Mutual Ins. Co. vs. Wisconsin Department of Revenue* (Circuit Court for Dane County, February 21, 1997). The taxpayers seek judicial review of two decisions and orders of the Wisconsin Tax Appeals Commission affirming certain franchise tax determinations made by the department against the taxpayers. See *Wisconsin Tax Bulletin* 98 (July 1996), pages 21 and 23, for summaries of the Commission's decisions.

The issues presented are the following:

- A. Was the tax imposed on the taxpayers under chapter 71, Wis. Stats., a "nondiscriminatory franchise tax" within the meaning of 31 U.S.C. §3124(a)(1), permitting calculation of taxes owed based on the taxpayers' interest earned from U.S. government obligations?
- B. Did the department properly and constitutionally adjust American Family's loss carryforward for 1986 under sec. 71.06(1), Wis. Stats. (1985-86), and for 1991 under sec. 71.45(4), Wis. Stats. (1989-90), by not allowing the taxpayer to include in its loss carryforward the amount of its dividend received deduction in each loss year?

### *Treatment of U.S. Government Interest*

The "franchise tax" in question was imposed by the department pursuant to sec. 71.01(2), Wis. Stats. (1985-86), and sec. 71.43(2), Wis. Stats. (1987-88). The substance of these successor statutes is the same and has been in existence since first enacted as sec. 71.01(2), Wis. Stats. (1965-66).

The Wisconsin franchise tax has remained essentially the same until amended by sec. 1 of 1985 Wisconsin Act 261, effective for tax year 1986 and thereafter, to subject a corporation that ceases doing business in Wisconsin to a "special franchise tax" according to or measured by its entire Wisconsin net income for the taxable year during which the corporation ceases doing business in the state.

The constitutionality of the franchise tax as created and maintained between 1965 and 1986 was upheld in *Savings League v. Revenue Dept.*, 141 Wis. 2d 918 (Ct. App. 1987), *review denied*, 144 Wis. 2d 956, *appeal dismissed*, 488 U.S. 806 (1988) adopting the test for determining what is a true franchise tax set forth in *Educational Films Corporation v. Ward*, 282 U.S. 379 (1931).

The department maintains that the "special franchise tax" was not applied to the taxpayers, and that even if it were invalid, it is severable under sec. 990.001(11), Wis. Stats. However, the taxpayers maintain that the character of the franchise tax was irrevocably altered into a tax on income by the addition of the "special franchise tax" in 1986 because the so-called franchise tax could apply to a taxpayer ceasing to exercise its franchise of doing business in the state and permitting the tax to be measured by the current income (including interest earned on U.S. obligations) of the withdrawing corporation.

The taxpayers' brief purports to set forth a list of Wisconsin state and local securities whose interest is exempt from the Wisconsin franchise tax. Since the listed local securities are not listed as franchise tax adjustments to federal taxable income under sec. 71.44(2)(a)1-13, Wis. Stats., the listed securities are not excluded from the statutory calculation of Wisconsin net income for franchise tax purposes.

### *Loss Carryforward*

In 1985 and 1991 when American Family claimed business losses, the department required the taxpayer to add back its Wisconsin dividends deductions under sec. 71.01(4)(a)7, Wis. Stats. (1985-86), and under

sec. 71.45(2)(a)8, Wis. Stats. (1991-92), respectively. The denial of the "dividend received" deduction effectively reduced the amount of business loss available to be carried forward. The authority relied on by the department and Commission for removing the "dividend received" deduction from the calculation of business losses available for the carryforward provisions is sec. 71.06(3), Wis. Stats. (1985-86), and sec. 71.45(4), Wis. Stats. (1991-92). American Family argues that the department has improperly interpreted the statutory provisions, and that the interpretation denies the taxpayer equal protection of the law.

The Circuit Court reached the following conclusions:

- A. The "special franchise tax" enacted by 1985 Wisconsin Act 261 is invalid, because it imposes an income tax on the "entire Wisconsin net income" from which the interest income from U.S. government obligations is not excluded in violation of 31 U.S.C. §3124(a) and the Supremacy Clause of the U.S. Constitution. The "special franchise tax" is severable, and the remaining statutory framework is workable and enforceable. As severed, the tax imposed on the taxpayers under chapter 71, Wis. Stats., by the department is a "nondiscriminatory franchise tax" within the meaning of 31 U.S.C. §3124(a)(1), permitting calculation of taxes owed based on the taxpayers' interest earned from U.S. government obligations.
- B. The department properly and constitutionally adjusted American Family's loss carryforward for 1986 under sec. 71.06(1), Wis. Stats. (1985-86), and for 1991 under sec. 71.45(4), Wis.

Stats. (1989-90), by not allowing the taxpayer to include in its loss carryforward calculation the amount of its dividend received deduction for the loss year.

The taxpayers have appealed this decision to the Court of Appeals.

**Note:** The department and the taxpayer agreed to a dismissal of the appeal of the remaining issues that had been heard by the Wisconsin Tax Appeals Commission. These issues related to add modifications for federally nontaxable interest and dividends and the Wisconsin dividends received deduction. They were settled based on the Court of Appeals' decision in the *Heritage Mutual Insurance Company* case and the settlement between the department and NCR Corporation, respectively. The Circuit Court dismissed the case involving these two issues with prejudice on March 11, 1997. □

**— Manufacturer's sales tax credit.** *Wausau Paper Mills Company vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, April 23, 1997). The issue in this case is whether the sales and use tax paid by the taxpayer on the electricity consumed in the operation of its wastewater treatment plant is eligible for the manufacturing sales tax credit against the Wisconsin franchise tax, pursuant to sec. 71.28(3), Wis. Stats. (1989-90) [formerly sec. 71.043, Wis. Stats. (1985-86)], and sec. Tax 2.11, Wis. Adm. Code.

The taxpayer is a Wisconsin corporation engaged in the business of the manufacture of fine printing and writing papers in Wisconsin.

The taxpayer manufactures pulp and paper in its mill. Water is added to

and mixed with other raw materials (pulpwood, wood pulp, chemicals, mineral fillers) and extracted and collected at various stages throughout the manufacturing process. Large quantities of water are used in the manufacturing process as a transportation medium, as raw material, and for various other manufacturing uses.

The water that is extracted throughout the paper manufacturing process is "collected" by a series of U-drain and closed sewers, which convey the wastewater from the taxpayer's pulp mill, paper machines, stock preparation area, starch kitchen, and finishing areas to a sump at the head end of the wastewater treatment plant, which is adjacent to the rest of the taxpayer's facility.

Federal and Wisconsin laws require the taxpayer to satisfy certain environmental standards before discharging water into the Wisconsin River. The taxpayer satisfies these requirements by processing the water in its wastewater treatment plant. The wastewater treatment plant itself is a standalone, separate and distinct set of buildings and equipment from the rest of the taxpayer's facility.

Over 98% of the water processed in the taxpayer's wastewater treatment plant is water that has been used by the taxpayer in its paper manufacturing process.

The use of water is essential to the taxpayer's continuance of its paper making business. Its subsequent treatment in the wastewater treatment plant is essential to the taxpayer's continuance of its paper making business in order to comply with the environmental standards.

The department has accepted the taxpayer's wastewater treatment plant as an industrial waste treatment

facility eligible for property tax exemption under sec. 70.11(21), Wis. Stats., and for sales and use tax exemption under sec. 77.54(26), Wis. Stats.

The taxpayer consumes electricity in the operation of its wastewater treatment plant. The taxpayer pays sales and use tax on such electricity under ch. 77, Wis. Stats.

The Commission concluded that the sales and use tax paid by the taxpayer on the electricity consumed in the operation of the taxpayer's wastewater treatment plant is not eligible for the manufacturing sales tax credit against the Wisconsin franchise tax pursuant to sec. 71.28(3), Wis. Stats. (1989-90) [formerly sec. 71.043, Wis. Stats. (1985-86)].

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

## SALES AND USE TAXES

**— Estoppel.** *Spickler Enterprises, Ltd., vs. Wisconsin Department of Revenue* (Circuit Court for Dane County, January 22, 1997). This is an appeal from the December 21, 1995 decision of the Wisconsin Tax Appeals Commission ("Commission"). For a summary of that decision, see *Wisconsin Tax Bulletin* 99 (October 1996), page 21.

The issue is whether the Commission properly denied the imposition of the doctrine of estoppel against the Department of Revenue ("DOR"). The Commission determined that the elements of estoppel were not clearly present in this case.

The taxpayer argues that the Commission's decision should be afforded "due weight" rather than

"great weight" since the application of estoppel is a legal doctrine and does not require any specialized, technical or superior knowledge by the Commission. The DOR argues that the Commission's interpretation is entitled to "great weight" because it has accumulated substantial expertise in the application of tax laws from which it can assess whether the taxpayer was reasonable in relying on the Department of Transportation's ("DOT") advice regarding a substantial tax liability, and those findings must stand because they are supported by substantial evidence in the record.

The elements of estoppel are (1) action or non-action, (2) on the part of one against whom estoppel is asserted, (3) which induces reasonable reliance thereon by the other, and (4) which is to his detriment. The party asserting estoppel must prove all four elements by clear and convincing evidence.

### A. Action or Non-action.

The Circuit Court concluded that the Commission properly denied the imposition of estoppel. The Commission properly found that the taxpayer failed to provide clear and convincing evidence that applicable action was taken.

### B. Action by DOR.

The Commission properly determined that the evidence in the record does not support the taxpayer's claim that the agency relationship between the DOR and the DOT gave the DOT the "apparent authority" to act on behalf of the DOR. Rather, the evidence shows that if the alleged tax advice was in fact furnished by clerical employees at the DOT, they were acting

outside the scope of their internal authority and in the absence of any authority from the DOR.

The Commission properly found that the DOT was not an agent of the DOR.

### C. Reasonable Reliance.

The Commission was justified in determining that it was unreasonable for the taxpayer to rely for its tax advice upon undocumented oral statements to its clerical workers by clerical workers of the DOT, when tens of thousands of dollars in sales tax liability was at issue.

### D. Detriment to Spickler.

Because the taxpayer fails to show the first three elements of estoppel by clear and convincing evidence, the fact that the taxpayer may have suffered a financial detriment as a result of DOR's assessment is irrelevant to the outcome of the case.

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

**— Landscaping.** *Straight Arrow Construction Co., Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, August 28, 1996 and April 4, 1997). The issue in this case is whether the distinction drawn by the department, i.e., that the sales taxation status of certain services rendered by the taxpayer depends upon whether those services were performed in "developed" or "undeveloped" settings, is a valid interpretation of sec. 77.52(2)(a)20, Wis. Stats.

The taxpayer is a Wisconsin business corporation, with its principal



office in Cottage Grove, Wisconsin. The taxpayer is primarily a construction and landscaping contractor doing work in the private and government sectors. In recent years, the taxpayer's main focus has been government work on federal, state, and local highway projects. The taxpayer typically is a subcontractor to general contractors who have prime contracts with the land owners.

Depending on the topography, a typical contract will include the following items: fine grading; conditioning the soil by shredding, disking, and harrowing the soil, by the use of chain drags, rock rakes, box scrapers, and by hand raking; spreading specialized fertilizers and mulch; planting specialized seed mixtures (grasses and/or wild flowers), specialized sod, sod netting and reinforcement, specialized trees, specialized vines, and specialized bushes; and installing retaining walls, riprap (and grouting for riprap), erosion mats, bales and staples, topsoil, right-of-way fencing (woven wire or chain link), silt fences, guardrail posts and guardrail (rigid steel and cable), delineator posts, wooden and steel sign posts, portable crash barriers and related carts, landmark reference monuments, storm sewers, culverts, drains and associated inlets and covers, concrete block retaining walls, concrete aprons, concrete collars, curb, gutter and end walls, and rock retaining walls (decorative walls composed of specially placed rock, not riprap).

On any particular Department of Transportation (DOT) job, the project's typical work area generally included areas within "the right-of-way" in various townships, cities, and rural residential areas. The "right-of-way" (including rest areas and weigh stations) is the primary

work area on any particular section of state, county, interstate, or local roadway. In addition, the taxpayer's services were also performed on real property adjacent to right-of-ways, including farm homesteads, rural homes, and other places such as these on any particular project.

The taxpayer's services, to varying degrees and in no particular order of importance, are performed 1) to beautify the area wherein its services are performed, and 2) to reduce and/or prevent the possibility of soil erosion.

The Commission concluded that the distinction drawn by the department in issuing its assessment, that the sales taxation status of certain services rendered by the taxpayer depends upon whether those services were performed in "developed" or "undeveloped" settings, is not a valid interpretation of sec. 77.52(2)(a)20, Wis. Stats., because such an interpretation is not supported by the plain meaning of the statute and impermissibly restricts the scope of the statute.

The department has not appealed this decision. □

### **Transportation charges.**

*Rhineland Paper Company, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, December 19, 1996, and March 21, 1997). The issue in this case is whether amounts paid by the taxpayer to transport coal to its facility by rail after it was loaded onto rail cars is subject to use tax.

The taxpayer is a Wisconsin corporation primarily engaged in the business of manufacturing paper. During the period under review, September 1, 1988 through August 31, 1992, the taxpayer bought coal

from three coal vendors for use in its facility in Rhineland, Wisconsin.

Except for certain purchases of coal from River Trading Co., the purchase price paid by the taxpayer to the coal vendors included shipment of the coal to the coal vendor's dock and loading onto rail cars but did not include the cost to transport the coal after it had been loaded onto rail cars. With regard to those purchases of coal from River Trading Co., it is not clear whether the purchase price reflected the cost to transport the coal after it had been loaded onto rail cars, because there was no written contract between that company and the taxpayer.

Except for the coal purchased from River Trading Co. as described above, all coal purchased during the period under review was transported by rail under arrangements between the taxpayer and railroad companies. The taxpayer paid all of the cost of transporting the coal after it was loaded onto the rail cars. Details of the arrangements between the taxpayer and the railroad companies were confidential and not disclosed to the coal vendors.

Resolution of this matter hinges largely on whether sec. 77.51(15)(a)3, Wis. Stats., in conjunction with sec. 77.53(1), Wis. Stats., requires that the sales price, on which the use tax is imposed, include transportation charges paid separately by the purchaser of tangible personal property to a person other than the vendor of the personal property and which are not reflected in the actual price paid to the vendor of the personal property.

The Commission concluded that except for certain purchases of coal from River Trading Co., amounts paid by the taxpayer to transport

coal by rail after it was loaded onto rail cars are not subject to use tax because sec. 77.51(15)(a), Wis. Stats., does not subject to use tax transportation charges paid to persons other than the coal vendors. The plain language of the statutes involved makes it clear that the sales price does not include such separately paid transportation charges.

With regard to certain purchases of coal from River Trading Co., the taxpayer has not sufficiently shown that amounts incurred to transport this coal were incurred entirely by the taxpayer after the coal was placed in rail cars and was not reflected in the price paid to that company.

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

### **— Transportation charges.**

*Trierweiler Construction and Supply Co. Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, April 30, 1997). The issue in this case is whether the transportation charges paid by the taxpayer to carriers for transporting cement from suppliers' facilities to the taxpayer's construction sites and manufacturing plant are part of the "sales price" of the cement and subject to use tax, and if so, whether the imposition of use tax on such charges violates the equal protection clauses of the United States and Wisconsin Constitutions.

During the years 1989 through 1992 ("the audit period"), the taxpayer was a corporation organized and existing under the laws of Wisconsin. It was engaged primarily in the business of constructing roads, highways, and other improvements. Beginning in 1990 and throughout the balance of the audit period, the taxpayer also manufactured ready-

mix concrete at a plant in Marshfield, Wisconsin. Some of the concrete manufactured at the Marshfield plant was used by the taxpayer in its construction activities; the majority of the concrete the taxpayer manufactured at its plant was sold to other parties.

During the audit period, the taxpayer purchased cement from various suppliers located in Wisconsin. The cement was hauled by various trucking companies ("carriers") to the taxpayer's road construction sites located throughout Wisconsin or to the taxpayer's Marshfield manufacturing plant to be incorporated into concrete for later use at the taxpayer's construction sites. The taxpayer paid sales/use tax on its purchase and/or use of the cement.

The taxpayer's suppliers had no obligation to deliver the cement to the taxpayer's construction sites or to its manufacturing plant. The taxpayer did not hire the suppliers to provide such transportation. The cement was not transported to the taxpayer's construction sites or manufacturing plant by vehicles owned or leased by the suppliers, and the suppliers did not retain the carriers to transport the cement to such locations. The suppliers made the cement available for pickup at and loaded the cement into the carriers' vehicles at the suppliers' terminals and silos.

The amount that the suppliers charged the taxpayer and that the taxpayer paid to its suppliers for the cement did not include transportation charges from the suppliers' facilities to the taxpayer's construction sites or to its manufacturing plant. The suppliers added Wisconsin sales tax to the amount they charged the taxpayer for the cement.

The taxpayer arranged for the carriers to provide the service of trans-

porting the cement from the suppliers' facilities to the taxpayer's construction sites and manufacturing plant. The taxpayer was free to select, and did select, the carriers to be used for these transportation services. The carriers hired by the taxpayer were not engaged in the sale of cement, but were only engaged in the business of hauling property for others.

The carriers invoiced the taxpayer directly for their transportation services, and the taxpayer paid the carriers for their services by checks drawn on the taxpayer's account and remitted directly to the carrier. The carriers did not charge the taxpayer — and the taxpayer did not pay the carriers — the Wisconsin sales tax on the charges for transportation services on the hauling of taxpayer's cement from the suppliers' facilities to taxpayer's construction sites and manufacturing plant.

Almost all of the construction projects performed by the taxpayer during the audit period lasted for a full construction season, approximately May to December. If the cost of transportation of the cement to the taxpayer's construction sites and manufacturing plant increased after the taxpayer purchased the cement, this increased cost would be borne by the taxpayer or absorbed by the carriers; the cement suppliers never bore the expense of such a rate increase.

Similarly, if the cost of transportation of the cement to the taxpayer's construction sites and manufacturing plant decreased after the time the taxpayer purchased the cement, the benefit of this reduced cost would be enjoyed by the taxpayer (through a reduction in the rates charged by the carriers) or by the carriers; no direct savings from reduced transportation

costs for the cement inured to the cement suppliers.

During the audit period, the taxpayer stored, used, and consumed in Wisconsin the cement it purchased from its suppliers. The suppliers were retailers of the cement they sold to the taxpayer. Neither the suppliers nor the carriers have given to the taxpayer receipts for the payment of the transportation services with the Wisconsin sales tax separately stated and shown to have been paid. Wisconsin sales tax has not been paid to the taxpayer by either the suppliers or the carriers on the subject transportation charges.

All of the suppliers who sold cement to the taxpayer and all of the carriers who hauled the cement for the taxpayer were engaged in business in Wisconsin. The taxpayer has not paid to the department use tax on the transportation charges it paid to the carriers who hauled the cement from

the suppliers to the taxpayer's construction sites and manufacturing plant.

During the audit period, none of the taxpayer's suppliers had any ownership interest in the carriers. The taxpayer, not the taxpayer's suppliers, bore the risk of loss as the cement was transported by carriers and bore the risk of any increase in price charged by the carriers.

The Commission concluded that transportation charges paid separately to common carriers by the taxpayer for hauling cement purchased by the taxpayer from the taxpayer's suppliers are not included in or added to the cement's "sales price," as that term is defined in sec. 77.51(15)(a), Wis. Stats., and, therefore, not subject to the use tax under sec. 77.53(1), Wis. Stats.

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

## DRUG TAXES

**— Drug tax — constitutionality.** *State of Wisconsin vs. Darryl J. Hall* (Wisconsin Supreme Court, January 24, 1997). The Wisconsin Supreme Court held that the Wisconsin drug tax stamp law is in part unconstitutional (see *Wisconsin Tax Bulletin* 101, April 1997, page 18, for a summary of that decision).

The summary in *Wisconsin Tax Bulletin* 101 stated that it was not known whether the decision would be appealed to the United States Supreme Court. The State did not appeal the decision. □



## 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 release is included:

### Sales and Use Taxes

1. Prepackaged Combinations of Food, Food Products, and Beverages Constitute Meals (p. 20)

## 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 Sales and Use Tax Information*.

# 1 Prepackaged Combinations of Food, Food Products, and Beverages Constitute Meals

**Statutes:** Sections 77.54(20), Wis. Stats. (1995-96)

**Wis. Adm. Code:** Section Tax 11.51(2)(c)5, Wis. Adm. Code, December 1996 Register

**Background:** Section 77.54(20), Wis. Stats. (1995-96), provides an exemption from Wisconsin sales and use tax for the gross receipts from sales of, and the storage, use or other consumption of certain food, food products, and beverages for human consumption.

An exception to this exemption is found in sec. 77.54(20)(c)2.a, Wis. Stats. (1995-96), which provides that sales of meals and sandwiches are subject to Wisconsin sales or use tax.

The Wisconsin Statutes do not define the terms "meal" or "sandwich." However, sec. Tax 11.51(2)(c)5, Wis. Adm. Code, December 1996 Register, provides some guidance as to what constitutes a meal. This section provides in part that "A meal usually consists of a diversified selection of foods which are not susceptible of consumption in the absence of at least some articles of tableware and which are not conveniently consumed while one is standing or walking."

## Facts 1

- ABC Company offers for sale a combination of meat, cheese, and crackers in one package.
- Each packaged combination contains 6-8 crackers, 6-8 slices of cheese, and 6-8 slices of meat.
- The packaged combination is advertised as constituting a meal and is sold for a single price.

## Facts 2

- DEF Company offers for sale a combination of meat, cheese, crackers, a fruit drink, and a small candy bar in one package.
- Each packaged combination contains 6-8 crackers, 6-8 slices of cheese, 6-8 slices of meat, a fruit drink, and a small candy bar.
- The packaged combination is advertised as constituting a meal and is sold for a single price.

## Facts 3

- GHI Company offers for sale a combination of pizza crusts, shredded cheese, sliced pepperoni, a small package of pizza sauce, a fruit drink, and a small candy bar in one package.

- Each packaged combination contains 3-4 mini pizza crusts, shredded cheese, several slices of pepperoni, a small packet of sauce along with a plastic utensil for spreading the sauce, a fruit drink, and a small candy bar.
- The packaged combination may be eaten heated or unheated.
- The packaged combination is advertised as constituting a meal and is sold for a single price.

## Facts 4

- JKL Company offers for sale a combination of a sandwich, a bag of pretzels or potato chips, and cookies in one package.
- The packaged combination is advertised as constituting a meal and is sold for a single price.

**Question:** Are sales of any of the packaged combinations described in Facts 1 through 4 above subject to Wisconsin sales or use tax?

**Answer:** Yes. Sales of all of the above described packaged combinations are subject to Wisconsin sales or use tax under sec. 77.54(20)(c)2.a, Wis. Stats. (1995-96), as meals. □



## Private Letter Rulings

*"Private letter rulings" are written statements issued to a taxpayer by the department that interpret Wisconsin tax laws to the taxpayer's specific set of facts. Any taxpayer may rely upon the ruling to the same extent as the requestor, provided the facts are the same as those set forth in the ruling.*

*The number assigned to each ruling is interpreted as follows: The "W" is for "Wisconsin," the first two digits are the year the ruling becomes available for publication (80 days after the ruling is issued to the taxpayer), the next two digits are the week of the year, and the last three digits are the number in the series of rulings issued that year. The date following the 7-digit number is the date the ruling was mailed to the requestor.*

*Certain information contained in the ruling that could identify the taxpayer requesting the ruling has been deleted. Wisconsin Publication 111, "How to Get a Private Letter Ruling From the Wisconsin Department of Revenue," contains additional information about private letter rulings.*

The following private letter rulings are included:

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### Sales and Use Taxes

Exemptions — manufacturing,  
video production, duplication  
W9714001 (p. 21)

### Fiduciary Taxes

Trusts — residency  
W9722002 (p. 22)

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✱ **W9714001**, January 9, 1997

**Type Tax:** Sales and Use

**Issue:** Exemptions — manufacturing, video production, duplication

**Statutes:** Section 77.54(6)(a) and (6m), Wis. Stats. (1993-94)

**Wis. Adm. Code:** Section Tax 11.39 (October 1995 Register)

This letter responds to your request for a private letter ruling.

### Facts

ABC Corporation (ABC) is in the business of producing video tapes. It records an event with a camera. The video tape created by such recording (source tape) is loaded into a computer. The computer and software are used to edit the source tape, including deleting unwanted material and adding graphics, text, and audio. The resulting product is called a master tape.

From the master tape, duplicates are made. If a customer requests a large quantity of duplicates, the master is sent to a duplication facility.

### Request

You ask whether ABC is subject to Wisconsin sales or use tax on equipment (e.g., computer and software) it purchases and uses in producing video tapes.

### Ruling

Machinery and equipment used **exclusively** and **directly** in editing a source tape to create a master tape and duplicating the master tape to create multiple copies of the master tape, as described in the facts above, are exempt from Wisconsin sales or use tax under sec. 77.54(6)(a), Wis. Stats. (1993-94). Machinery and equipment used in recording the event on video tape (i.e., creating the source tape) are subject to Wisconsin sales or use tax.

### Analysis

Section 77.54(6)(a), Wis. Stats. (1993-94), provides, in part, an exemption from Wisconsin sales or use tax for machines and specific processing equipment exclusively and directly used by a manufacturer in manufacturing tangible personal property.

Section 77.54(6m), Wis. Stats. (1993-94), defines "manufacturing" to mean the production by machinery of a new article with a different form, use, and name from existing materials by a process popularly regarded as manufacturing.

ABC, when it edits a source tape to create a master tape by deleting unwanted material and adding graphics, text, and audio, and when it duplicates the master tape to create multiple copies of the master tape, is using machinery to create a product with a different form, use, and name from the source tape it begins with. This process is popularly regarded as manufacturing.

However, sec. Tax 11.39(4)(r)8, Wis. Adm. Code (October 1995 Register), provides that persons engaged in the business of photography are not considered manufacturers. In addition, the Wisconsin Tax Appeals Commission held in the case of *Associated Wedding Photographers, Inc. v. Wisconsin Department of Revenue* (January 19, 1976, CCH 201-203), that a professional wedding photographer was not engaged in manufacturing tangible personal property. Video taping is a form of photography and is not considered to be manufacturing, as the term is defined in sec. 77.54 (6m), Wis. Stats. (1993-94). □

✱ **W9722002**, March 12, 1997

**Type Tax:** Fiduciary

**Issue:** Trusts — residency

**Statutes:** Sections 71.04 and 71.14, Wis. Stats. (1995-96)

This letter responds to your request for a private letter ruling.

#### Facts

In 1945, Grantor A irrevocably created a number of trusts under a single trust agreement. Article IX of the trust agreement provided for the establishment of five separate trusts, including one for the benefit of Grantor A's then wife, Mrs. A, and one for Grantor A's daughter, Ms. AB.

In 1987, the XYZ County Circuit Court partitioned the Mrs. A Trust into the Ms. AC Partition Trust, the Mr. A, Jr. Partition Trust and the Ms. ABC Partition Trust. Only the Ms. ABC Partition Trust and the Ms. AB Trust (hereinafter referred to collectively as the "ABC Trusts") are the subject of the ruling request.

Article I of the Trust Agreement provides that the ABC Trusts shall each terminate thirty (30) years after the death of the last survivor of the individuals therein listed; provided, however, that if the ABC Trusts do not hold any stock or securities of the DEF Company, the Trustees of the ABC Trusts, in their unfettered discretion, may terminate the ABC Trusts at any time after the death of the person for whose primary benefit the ABC Trusts were made. The person for whose primary benefit the ABC Trusts were made was Ms. ABC, who died a resident of Virginia in 1993. Prior to Ms. ABC's death, the ABC Trusts sold all of the DEF Company stock held by them. Such sale took place in 1985 to GHI Company. Article X of the Trust Agreement provides that the income beneficiaries of the ABC Trusts may receive income in the "unfettered discretion" of the Trustees; otherwise, the income can be accumulated. The ABC Trusts do not permit the invasion of principal for the benefit of their income beneficiaries; and Article XV specifically indicates that the net income of the ABC Trusts does not include profits from the sale, exchange or other disposition of securities or investments. Upon the termination of the ABC Trusts, the then assets of the ABC Trusts are to be distributed to the issue of Ms. ABC.

Article VII of the Trust Agreement allows the Trustees to appoint a trust company or bank having trust company powers to serve as a trustee of the ABC Trusts at such time as the ABC Trusts do not own any stock, securities or other interest in the DEF Company. Article VII of the Trust Agreement also provides with respect to a corporate Trustee:

"Any such corporate Trustee appointed hereunder shall have all the rights, powers and duties

herein conferred upon the individual Trustees in so far as they are applicable to the property remaining in trust. If such corporate Trustee is appointed Trustee as aforesaid with respect to a particular Trust or Trusts, then the custody, collection accounting and distribution of assets and income of the particular Trust or Trusts shall reside with such corporate Trustee."

Article VII also indicates that the Trustees of the ABC Trusts need not be residents of the State of Wisconsin. By the 1988 order of the Honorable JKL in XYZ County Circuit Court Case No. XXXX, the following individuals were named as successor Trustees of the Trusts:

Trustee 1  
Trustee 2  
Trustee 3  
Trustee 4  
Trustee 5

Solely Trustee 1 and Trustee 5 are Wisconsin residents. Trustee 4, pursuant to Article XIV(P) of the Trust Agreement was authorized by the other co-Trustees of the ABC Trusts to be the managing trustee. The records of the ABC Trusts have been maintained at Trustee 4's office in Virginia, with copies of some records maintained at the offices of the DEF Company in Wisconsin. The ABC Trusts also maintained an Investment Agency Agreement with the MNO Trust Company of Wisconsin which acted as a custodian for the ABC Trusts. Trustee meetings of the ABC Trusts have been held in Florida, Virginia and California.

In order to address the Trustees' concerns regarding the effect of the Rule against Perpetuities on the ABC Trusts, and in order to address state income tax concerns, including the

reduction of such taxes, the Trustees have undertaken the following actions:

1. PQR Bank, South Dakota was elected as a co-Trustee in 1996. PQR Bank, as a corporate fiduciary, under Article VII of the Trust Agreement assumed custody of all of the assets of the ABC Trusts.
2. PQR Bank established two separate trust accounts for each of the Trusts comprising the ABC Trusts.
3. Separate checking accounts for each of the ABC Trusts have been opened at PQR Bank and PQR Bank will be writing all checks on behalf of the ABC Trusts.
4. The ABC Trusts, moved their offices to South Dakota and rent such property under a year to year lease which commenced in 1996.
5. All copies of records of the ABC Trusts maintained at the DEF Company have been transferred to the South Dakota office.
6. All of the investment decisions of the ABC Trusts will continue to be made outside of Wisconsin and all of the business of the ABC Trusts will be conducted outside of Wisconsin.
7. The ABC Trusts terminated their Investment Agency Agreement with the MNO Trust Company in Wisconsin and have entered into an Investment Agency Agreement with the MNO Trust Company of Florida to assist the Trustees in a custodial capacity. The Investment Agency Agreement was added in 1996.

### Request

Based on the facts presented, you ask if the ABC Trusts will be subject to Wisconsin income tax for the 1997 calendar year and subsequent years.

### Ruling

Based on the actions taken by the Trustees during 1996 (these actions are described in items 1 through 7 listed above), the ABC Trusts are no longer administered in Wisconsin and, as a result, are considered nonresident trusts. A nonresident trust is subject to Wisconsin income tax only on income derived from Wisconsin sources. Income from Wisconsin sources includes income or gain from:

- a. Real or tangible personal property located within the state,
- b. A business, trade, profession or occupation carried on within the state, including a corporation taxed under Subchapter S of the Internal Revenue Code,
- c. Personal or professional services performed within the state either as an individual or a member of a partnership, and
- d. Income received from the Wisconsin state lottery or a multistate lottery if the winning lottery ticket or lottery share was purchased from a Wisconsin retailer.

Income a nonresident trust derives from land contracts, mortgages, stocks, bonds and securities, or from the sale of similar intangible personal property, follows the residence of the trust and is not subject to Wisconsin income tax.

### Analysis

Section 71.14, Wis. Stats. (1995-96), establishes residency for estates and trusts. Section 71.14(3), Wis. Stats., provides, with exceptions not relevant to this ruling, that trusts created by contract, declaration of trust or implication of law shall be considered resident at the place where the trust is being administered.

In its ruling in *Sally L. Pabst, et al., Trustees v. Wisconsin Department of Taxation*, 19 Wis. 2d 313 (1963), the Wisconsin Supreme Court stated:

“we now conclude that the statutory word “administered” as applied to an *inter vivos* trust of intangibles means simply conducting the business of the trust. The problem of determining whether such a trust is administered in Wisconsin may be made more difficult when the business of the trust is partly conducted in other states as well as in Wisconsin. In such a situation, a proper application of the statute would appear to require the conclusion that the trust is being administered in Wisconsin within the meaning of the statute if the major portion of the trust business is conducted in Wisconsin.” (Pabst at 321).

Based on the facts presented in the request for this ruling, little or no business of the ABC Trusts is conducted in Wisconsin.

Section 71.04, Wis. Stats. (1995-96), establishes income tax situs for income received by trusts. More specifically, sec. 71.04(1), Wis. Stats., provides:

- (1) Income or loss of nonresident trusts from business, not requir-

- ing apportionment under sec. 71.04(4), (10) or (11), shall follow the situs of the business from which derived.
- (2) All items of income, loss and deductions of nonresident trusts derived from a tax-option corporation not requiring apportionment under sec. 71.04(9), Wis. Stats., shall follow the situs of the business of the corporation from which derived.
- (3) Income or loss of nonresident trusts derived from rentals and royalties from real estate or tangible personal property, or from the operation of any farm, mine or quarry, or from the sale of real property or tangible personal property shall follow the situs of the property from which derived.
- (4) A nonresident limited partner's distributive share of partnership income shall follow the situs of the business.
- (5) A nonresident limited liability company member's distributive share of limited liability company income shall follow the situs of the business.
- (6) Income of nonresident trusts from the state lottery under Chapter 565, Wis. Stats., is taxable by Wisconsin.
- (7) Income of nonresident trusts from any multistate lottery under Chapter 565, Wis. Stats., is taxable by Wisconsin, but only if the winning lottery ticket or lottery share was purchased from a retailer, as defined in sec. 565.01(6), Wis. Stats., located in Wisconsin or from the Wisconsin Department of Revenue.
- (8) Income of nonresident trusts from pari-mutuel winnings or purses under Chapter 562, Wis. Stats., is taxable by Wisconsin.
- (9) All other income or loss of nonresident trusts, including income or loss derived from land contracts, mortgages, stocks, bonds and securities or from the sale of similar intangible personal property, shall follow the residence of the trust, except as provided in sec. 71.04(1)(b) and (9), Wis. Stats. □