



Wisconsin TAX BULLETIN



Recycling Surcharge
Rates Reduced

See article on this page

Tax Bills Pending in Legislature

Several bills containing provisions that affect Wisconsin taxes have been introduced in the Wisconsin Legislature, including the budget adjustment bill (1997 Senate Bill 436). None of these bills have been enacted into law as of the date this *Wisconsin Tax Bulletin* went to press.

The Wisconsin Legislature was scheduled to conclude its current session by the end of March. Later sessions may also be scheduled. New laws which affect Wisconsin taxes will be explained in a special issue of the *Wisconsin Tax Bulletin*. □

Tax Amnesty Program Planned

The Department of Revenue has presented a plan for a tax amnesty program to the Joint Committee on Finance, as required by 1997

Wisconsin Act 27. The proposed amnesty period, **subject to change**, is from June 15, 1998 to August 14, 1998. The final legislative authorization is contained in the budget adjustment bill, which was expected to be passed by the end of March (see the previous article). The amnesty program had not been enacted into law as of the date this Bulletin went to press.

The department will provide a detailed explanation about the tax amnesty program in a special issue of the *Wisconsin Tax Bulletin*, to be published shortly after the amnesty law is enacted. Information will also be available on the department's internet website at <http://www.dor.state.wi.us>. In addition, the department plans to mail an amnesty kit, including information and forms, to tax practitioners prior to the start of the amnesty application period. □

Recycling Surcharge Rates Reduced For 1998

The rates for the temporary recycling surcharge have been reduced for taxable years beginning on and after January 1, 1998. The new rates are indicated below. Only the rate used to compute the surcharge has been changed. The \$25 minimum and \$9,800 maximum limitations have not changed.

The flat \$25 surcharge which applies to individuals, partnerships, estates, and trusts engaged in farming also remains the same as in 1997.

Rates for Taxable Years
Beginning On and After
January 1, 1998:

1. Corporations (except tax-option (S) corporations), insurance companies, and exempt organizations taxable as corporations: The greater of \$25 or 2.75% of gross tax liability, but not more than \$9,800.
2. Tax-option (S) corporations: The greater of \$25 or 0.2173% of Wisconsin net income, but not more than \$9,800.
3. Partnerships, except partnerships engaged only in farming: The greater of \$25 or 0.2173% of net business income as allocated or apportioned to Wisconsin, but not more than \$9,800.
4. Individuals, estates, trusts, and exempt trusts, except those entities engaged only in farming: The greater of \$25 or 0.2173% of Wisconsin net income, but not more than \$9,800.

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At the time this Bulletin went to press, the Legislature was expected to amend or repeal the adult entertainment tax law. Information about any changes to the adult entertainment tax law will be provided in a future issue of the *Wisconsin Tax Bulletin*. □

Premier Resort Area Tax Begins April 1, 1998

The Wisconsin Legislature has enacted a law which authorizes a county or municipality to impose a 0.5% premier resort area tax. A municipality or county may impose the premier resort area tax if it meets certain conditions and adopts an ordinance. The following municipalities have adopted an ordinance to impose the 0.5% premier resort area tax:

- Village of Lake Delton
Effective April 1, 1998
- City of Wisconsin Dells
Effective July 1, 1998

NOTE: The City of Bayfield is **not** imposing the 0.5% premier resort area tax as reported in *Wisconsin Tax Bulletin* 106 (January 1998), page 4.

A new publication, titled *Premier Resort Area Tax* (Publication 403), provides information about who is subject to the premier resort area tax, what's taxable and exempt, filing returns, etc. To obtain a free copy of this or other publications, see the article titled "Tax Publications Available" on page 10 of this Bulletin. In addition, the March 1998 *Sales and Use Tax Report* (a copy of which appears on pages 39 to 42

5. Partnerships, individuals, estates, trusts, and exempt trusts engaged in farming: \$25.

Note: The changes in the temporary recycling surcharge rates may affect (reduce) estimated tax payments required for taxable years beginning on and after January 1, 1998. □

Adult Entertainment Tax Delayed

The Wisconsin Legislature enacted a law which imposes a 5% tax on the retail sale of adult entertainment products and services. The adult entertainment tax was supposed to be effective for sales made on or after April 1, 1998; however, the effective date of the tax has been delayed.

Wisconsin Tax Bulletin

Published quarterly by
Wisconsin Department of Revenue
Income, Sales and Excise
Tax Division

P.O. Box 8933
Madison, WI 53708-8933

Subscriptions available from
Wisconsin Department of
Administration

Document Sales
P.O. Box 7840
Madison, WI 53707-7840

Annual cost \$7.00

of this Bulletin) gives additional information about the new premier resort area tax. □

Information or Inquiries?

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

Three Charged With Tax Crimes

Accountant and tax preparer Steven H. Kremer, 45, of Ladysmith, was charged in February 1998 by the Rusk County District Attorney's office with three counts of failure to file timely Wisconsin income tax returns.

The criminal complaint alleges that Kremer failed to timely file Wisconsin income tax returns for the years 1994, 1995, and 1996. According to the criminal complaint, he had gross receipts from his accounting business of \$89,120 in 1994, \$93,412 in 1995, and \$107,544 in 1996. If convicted on all three counts, Kremer faces a maximum penalty of up to 27 months in jail and up to \$30,000 in fines.

Failure to file a Wisconsin income tax return when due is a crime punishable by up to nine months imprisonment and up to \$10,000 in fines. In addition to the criminal penalties, 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.

In December 1997, William J. Foley, 55, founder of the original Suburpia Submarine Sandwich Shoppes, was charged in Milwaukee County Circuit Court with seven counts of felony theft of state sales taxes.

According to the criminal complaint, Foley failed to remit to the state \$13,237.59 in sales taxes that he collected from November 1991 through May 1992. He operated several Suburpia locations throughout the Milwaukee area and did not file sales tax returns related to the unpaid tax dollars or corporate tax returns for the business. If convicted on all counts, Foley could face up to 14 years in prison and fines totaling \$70,000.

Also in December, Toni G. Moldenhauer, of Merrill, was charged by the Marathon County District Attorney's Office with one count of filing a false sales tax return with intent to evade sales tax.

According to the criminal complaint, Moldenhauer filed a false Wisconsin Application for Title/Registration which reported the purchase of a 1993 Chevrolet S10 for a full purchase price of \$6,000. The complaint alleges that Moldenhauer actually paid \$17,000 for the vehicle. As a result, he evaded paying sales tax of \$605. If convicted, Molden-

hauer faces up to 30 days in jail and a fine of up to \$500. □

Sales Tax Workshops Being Presented

Do you want a better understanding of Wisconsin sales and use taxes? Are you interested in practical tips on managing sales and use taxes and avoiding audit problems? Do differences in Wisconsin, Iowa, and Minnesota tax laws affect you?

You are invited to attend any of the following workshops presented by the Wisconsin, Iowa, and Minnesota Departments of Revenue. All workshops are from 9:00 a.m. to 12:30 p.m. and will be presented at the locations indicated.

Wisconsin/Minnesota Workshops

April 21, 1998 - Onalaska, WI
(General Businesses)

Onalaska Omni Center
255 Rider Club Street

* * * * *

May 5, 1998 - Duluth, MN
(General Businesses)

Minnesota Department of
Revenue Office
2711 West Superior Street

* * * * *

May 5, 1998 - Winona, MN
(Contractors)

St. Mary's University
700 Terrace Heights Drive

* * * * *

To register, call 1-800-888-6231.

Wisconsin/Iowa Workshop

May 13, 1998 - Dubuque, IA
(*General Businesses*)

Northeast Iowa Community
College
U.S. Highway 20
Peosta, Iowa (7 miles west of
Dubuque)

* * * * *

To register, call 1-800-728-7367. □

Sales and Use Tax Report Mailed

The March 1998 *Sales and Use Tax Report* (1-98), contains a number of articles regarding sales and use tax issues, as well as information on new fees and taxes that took effect on April 1, 1998. This Report was sent in late March and mid-April to all persons registered for Wisconsin sales and use tax purposes. A copy of the Report appears on pages 39 to 42 of this Bulletin. □



Focus on Publications: Bakeries

What sales by a bakery are subject to Wisconsin sales tax? What items may a bakery purchase without paying Wisconsin sales and use tax?

Answers to these and other questions relating to bakeries can be found in a new publication titled *Bakeries - How Do Wisconsin Sales and Use Taxes Affect Your Operations?* (Publication 223). This publication also includes examples of taxable and exempt sales and purchases made by

bakeries, and other helpful information.

To obtain a free copy of this or other publications, see the article titled "Tax Publications Available" on page 10 of this Bulletin. □

Many "Summer Services" Are Subject to Sales Tax

Many seasonal services are subject to Wisconsin sales tax. Taxable seasonal services include:

- landscaping and lawn maintenance services, such as landscape planning and counseling;
- lawn and garden services, such as planting, mowing, spraying, and fertilizing;
- shrub and tree services, such as tree trimming and removal;
- swimming pool cleaning and maintenance; and
- repair services to boats, motorcycles, and bicycles.

Persons in the business (or part-time business) of providing these services must hold a Wisconsin seller's permit. If you know of someone who provides these services but does not hold a seller's permit, contact any Department of Revenue office so registration information can be sent to that person. □

Sale of Home May Affect Homestead Credit

The federal Taxpayer Relief Act of 1997 ("the Act"), enacted August 5, 1997, results in changes to the treatment of a gain from the sale of a personal residence. These provisions were also adopted for Wisconsin income tax purposes (effective at the same time as for federal purposes), by 1997 Wisconsin Act 37.

The 1997 federal Taxpayer Relief Act and Wisconsin Act 37 provide that for sales after May 6, 1997, up to \$250,000 of gain on the sale of a personal residence (up to \$500,000 for married persons filing jointly) may be excluded from both federal and Wisconsin taxable income if certain conditions are met. These provisions, which are in sec. 121 of the Internal Revenue Code (IRC), replace the following IRC provisions:

- The once-in-a-lifetime exclusion of up to \$125,000 of gain on the sale of a personal residence by persons age 55 or older (IRC sec. 121).
- The deferral of gain on the sale of a personal residence when a replacement residence was purchased (IRC sec. 1034). IRC sec. 1034 was repealed by the Act.

Note: For a sale of a personal residence during the period May 7, 1997 through August 4, 1997, a person who qualifies for IRC sec. 1034 treatment may elect to

apply those “deferral” provisions rather than the new \$250,000/\$500,000 “exclusion” provisions. This election may be made for homestead credit purposes even if the election is not made for federal or Wisconsin income tax purposes.

For homestead credit purposes, gains which are deferred under IRC sec. 1034 are not includable in household income. However, gains which are excluded under IRC sec. 121 (both the \$125,000 once-in-a-lifetime exclusion and the new \$250,000/\$500,000 exclusion) must be included in household income. □

Don't Forget Wisconsin Use Tax

Under the Wisconsin sales and use tax law, home builders making real property improvements are subject to Wisconsin sales or use tax on their purchases of materials used in making those improvements. If the seller of the materials does not charge Wisconsin sales tax on the sale of the materials, the contractor is subject to use tax.

The use tax is the same rate as the sales tax (5% state, 0.5% county, and 0.1% stadium). Exemptions that apply to the sales tax also apply to the use tax.

What are some examples of real property improvements?

The following property when installed by home builders in new home construction or home remodeling projects are real property improvements:

Bathroom fixtures
Burglar alarm systems
Cabinets
Ceiling fans
Central air conditioning
Communications wiring
Dishwashers (built-in)
Doors
Electrical wiring
Fencing
Fire alarm fixtures
Fireplaces (built-in)
Flooring
Furnaces and duct work
Garage doors
Insulation
Light fixtures
Roofs
Sinks
Walls
Water heaters
Water lines
Water softeners
Windows

A contractor's purchases of the above property it installs in making a real property improvement are subject to Wisconsin use tax if the seller did not charge sales tax. More information about real property improvements can be found in Wisconsin Publication 207, *Sales and Use Tax Information for Contractors*.

Why wouldn't a seller charge tax?

There are primarily two reasons why a seller would not charge tax on sales to contractors:

1. The seller is located outside the state and is not required to collect Wisconsin tax.

Example: Contractor A purchases light fixtures from

Company B, an out-of-state mail order company. Company B did not charge Wisconsin sales tax. Contractor A installs the light fixtures in a new home being constructed. Contractor A owes Wisconsin use tax on his purchase of the light fixtures.

2. The seller has on file from the contractor a resale or exemption certificate.

Example: Contractor A purchases materials from Company B on a regular basis. Most of these materials are resold by Contractor A without installation. Contractor A gave Company B a resale certificate so that Company B would not charge sales tax on the sale of materials to Contractor A. Contractor A checked the box on the resale certificate indicating the certificate was continuous (i.e., applies to all purchases by Contractor A until revoked). Rather than reselling all of the materials, Contractor A uses some of them in making real property improvements. Contractor A owes Wisconsin use tax on its purchase of the materials it used in real property construction and did not resell as tangible personal property.

How does a contractor report use tax to the Department of Revenue?

There are several ways of reporting use tax:

1. If the contractor holds a seller's permit or use tax number issued by the Department of Revenue, use tax is reported on the sales and use tax return the contractor files (Form ST-12, lines 16 - 21).
2. If the contractor does not regularly make purchases subject to use tax that would require the contractor to have a seller's permit or use tax number, use tax can be reported on the:
 - a) Form UT-5, Consumer Use Tax Return.
 - b) Individual income tax return, if the contractor is a sole proprietor.

Important: Failure to report use tax is the most common error made by taxpayers and one of the main reasons why a penalty may be imposed if a taxpayer is audited. Don't forget the use tax!

If you have any questions, you may contact your local Department of Revenue office or call (608) 266-2776 for assistance. □



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, non-profit organizations, or businesses in general.
- Amnesty.
- What to expect in an audit.
- Common errors discovered in audits.
- Manufacturing property assessment.
- Homestead credit.

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

Payments Which Replace AFDC Are Income for Homestead Credit

Several new programs have been implemented to replace Wisconsin's Aid to Families with Dependent Children (AFDC) program. These programs include Wisconsin Works, Kinship Care, and Caretaker Supplement. The treatment of payments under these programs for homestead credit purposes is explained below.

Wisconsin Works

Wisconsin Works, or "W-2," is an assistance program for families with dependent children. It provides payments to needy

persons who work, participate in rehabilitation, education, or training activities, or have an infant. Several types of payments are available through the Wisconsin Works program. These payments affect homestead credit as follows:

- Household Income —
 - "Trial jobs" payments must be included as wages for both income tax and homestead credit purposes, reportable just like any other wages.
 - "Community service job" and "transitional placement" payments must be included as "other household income" on line 11h of Schedule H. (Note: Also report the payments on line 1 of Schedule 4 on the back of Schedule H.)
 - "Custodial parent of infant" payments must be included as "other household income" on line 11h of Schedule H. (Note: Also report the payments on line 2 of Schedule 4 on the back of Schedule H.)
 - Payments for "job access loans," "health care coverage," "child care subsidies," and "transportation assistance" are not includable in household income.
- Property Taxes or Rent —
 - Property taxes or rent must be reduced by one-twelfth for each month payments are received for a community

service job or a transitional placement. The one-twelfth reduction is not required for any other Wisconsin Works payment.

Kinship Care

Relatives who care for children who are not their legal responsibility, such as a grandchild, cousin, niece/ nephew, etc., may be eligible to receive monthly benefits under the Kinship Care program. This program replaced AFDC benefits for non-legally responsible relatives (NLRR AFDC). The Kinship Care program is not part of the Wisconsin Works program, and there is no work requirement for receiving Kinship Care payments. The treatment of Kinship Care payments for homestead credit purposes is the same as the treatment of NLRR AFDC payments, as follows:

- Household Income – Kinship Care payments must be included as “other household income” on line 11h of Schedule H. (Note: Also report the payments on line 4 of Schedule 4 on the back of Schedule H.)
- Property Taxes or Rent – The one-twelfth reduction of property taxes or rent, which is required for each month certain Wisconsin Works payments are received, is NOT required for Kinship Care payments.

Caretaker Supplement

The Caretaker Supplement replaces AFDC benefits for

certain persons. State Supplemental Security Income (State SSI) recipients who are parents of a child in their care at home formerly received AFDC benefits if the child was eligible for Medical Assistance. To replace the AFDC, a Caretaker Supplement increases the recipient's State SSI benefit by \$77 per month for each qualifying child. Caretaker Supplement payments affect homestead credit as follows:

- Household Income – Caretaker Supplement payments must be included in household income. They are a part of SSI benefits, which must be reported on line 11c of Schedule H.
- Property Taxes or Rent – The one-twelfth reduction of property taxes or rent is not required, since the payments are SSI benefits. (Note: Recipients who received AFDC benefits prior to the implementation of Caretaker Supplement payments were required to make the one-twelfth reduction and were ineligible for homestead credit if they received the benefits all year.) □

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 “Topical Index” portion 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 “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 71 of this Bulletin. □

Wisconsin Tax Bulletin Annual Index Included



This issue of the *Wisconsin Tax Bulletin* includes (on pages 43 to 69) the annual index of articles, tax releases, court case summaries, private letter rulings, and other materials that have appeared in past Bulletins. The index includes information for issues 1 to 102 (July 1997), except the court case section, which lists all cases summarized in issues 1 to 107 – this Bulletin. □

1998 Estimated Tax Requirements for Individuals, Estates, and Trusts

Taxpayers who expect to owe \$200 or more of tax and temporary recycling surcharge on a 1998 Wisconsin income tax return are required to pay 1998 Wisconsin estimated tax. There are exceptions for certain estates and trusts, as explained below. A 1998 Form 1-ES, Wisconsin Estimated Tax Voucher, is filed with each estimated tax payment.

For calendar year taxpayers, the first estimated tax payment is due on April 15, 1998. Installment payments are also due on June 15, 1998, September 15, 1998, and January 15, 1999. For fiscal year taxpayers, installment payments are due on the 15th day of the 4th, 6th, and 9th months of the fiscal year and the 1st month of the following fiscal year.

Estates and grantor trusts which are funded on account of a decedent's death are only required to make estimated tax payments for taxable years which end two or more years after the decedent's death. For example, an individual died on March 25, 1997. A grantor trust which was funded on account of the individual's death is not required to make estimated tax payments for any taxable year ending before March 25, 1999.

A trust which is subject to tax on unrelated business income is generally required to pay 1998 Wisconsin estimated tax if it expects to owe \$500 or more on a

1998 Wisconsin franchise or income tax return (Form 4T). A 1998 Form 4-ES, Wisconsin Corporation Estimated Tax Voucher, is filed with each estimated tax payment. Installment payments for such trusts are due on the 15th day of the 3rd, 6th, 9th, and 12th months of the taxable year.

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

Filing Wisconsin Fiduciary and Estate Tax Returns

Wisconsin Fiduciary Returns

Who Must File

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

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

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

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

Trusts must file on a calendar-year basis, and the due date is the following April 15. (Exception: a limited number of charitable trusts may file on a fiscal-year basis.) Estates may choose any fiscal year, but the first return may not cover more than a 12-month period, and the taxable year must end on the last day of a month. The due date for fiduciary returns for estates is 3 1/2 months after the close of the fiscal year.

Closing Certificates

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

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

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

1. Complete the top third of page 1 of Form 2.
2. Insert the appropriate statement at line 1:
 - a. "Gross income is less than \$600 and no 1041 is required." or
 - b. "A first and final return will be filed upon closing the estate."
3. Complete the "Information Required" section of page 2 of Form 2.
4. Sign and date the Form 2.
5. Attach copies of the inventory and will.

The department shall determine that all income, withholding, sales, use, gift, and delinquent taxes are paid. A Closing Certificate for Fiduciaries will then be issued.

Receipt of the Closing Certificate for Fiduciaries does not relieve the executor, administrator, personal representative, or trustee from filing the final fiduciary income tax return. If a probate final account is filed with the court, a copy must be attached to the final return.

For the fiscal year ending June 30, 1997, the department issued

nearly 14,000 Closing Certificates for Fiduciaries.

Wisconsin Estate Tax Returns

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

Filing Requirement

A Wisconsin estate is required to file a Wisconsin estate tax return (Form W706) if it is required to file a federal estate tax return. An estate is required to file a federal estate tax return (Form 706) if the gross estate at date of death plus gifts in excess of \$10,000 made to each donee per calendar year since December 31, 1976, exceeds:

\$ 600,000	1987 through 1997
625,000	1998
650,000	1999
675,000	2000 and 2001
700,000	2002 and 2003
850,000	2004
950,000	2005
1,000,000	2006

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

Due Date

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

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

Payment of Tax

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

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

Examples:

1. The decedent died February 15, 1997. An extension of time to file the federal estate tax return was obtained from the IRS. The Wisconsin estate tax return and payment of the tax were submitted on December 31, 1997, which was within the extension period. Tax of \$1,200 was due. The total amount due is \$1,326, computed as follows:

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

2. The decedent died February 15, 1997 and did not obtain an

extension to file from the IRS. The Wisconsin estate tax return was filed December 31, 1997, and showed no tax due. This estate owes the minimum penalty of \$25.

Installment Payments

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

Interest is computed at the rate of 12 percent per year from date of death. Distributees of real estate must provide to the department a certified copy of a lien for unpaid taxes and interest on the property to secure payment, and record the lien in the office of the register of deeds of the county in which the property is located. Distributees of personal property must provide either a lien or a financial guarantee bond equal to the estimated tax and interest, if the tax has not been

determined. Upon determination of the tax, distributees of personal property must either provide a lien or a financial guarantee bond sufficient to secure payment of the tax and interest, or pay the excess over the amount of tax and interest secured by the bond.

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

Certificate Determining Estate Tax

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

Tax Publications Available

Listed below are nearly 60 publications which are available, free of charge, from the Department of Revenue. Copies are available at any department office, or by mail, fax, or (in many cases) the internet.

By Mail

Write to Wisconsin Department of Revenue, Forms Request Office, P.O. Box 8903, Madison, WI 53708-8903; call (608) 266-1961; or fax a request to (608) 261-6239.

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.

Via the Internet

Access the department's World Wide Web site at <http://www.dor.state.wi.us>, and click on "Forms and Publications."

Income and Franchise Taxes

- 102 Wisconsin Tax Treatment of Tax-Option (S) Corporations and Their Shareholders (12/97)
- 103 Reporting Capital Gains and Losses for Wisconsin by Individuals, Estates, Trusts (10/97)
- 104 Wisconsin Taxation of Military Personnel (10/97)
- 106 Wisconsin Tax Information For Retirees (10/97)
- 109 Tax Information for Married Persons Filing Separate Returns and Persons Divorced in 1997 (10/97)
- 112 Wisconsin Estimated Tax and Estimated Surcharge for Individual, Estates, Trusts, Corporations, Partnerships (11/97)
- 113 Federal and Wisconsin Income Tax Reporting Under the Marital Property Act (10/97)
- 115 Handbook for Federal/State Electronic Filing (12/97)

- 116 Income Tax Payments Are Due Throughout the Year (12/95)
- 119 Limited Liability Companies (LLCs) (12/97)
- 120 Net Operating Losses for Individuals, Estates, and Trusts (11/97)
- 121 Reciprocity (12/97)
- 122 Tax Information for Part-Year Residents and Nonresidents of Wisconsin for 1997 (11/97)
- 123 Business Tax Credits for 1997 (12/97)
- 125 Credit for Tax Paid to Another State (11/97)
- 600 Wisconsin Taxation of Lottery Winnings (10/97)
- 601 Wisconsin Taxation of Pari-Mutuel Wager Winnings (10/97)

Sales and Use Taxes

- 200 Electrical Contractors - How Do Wisconsin Sales and Use Taxes Affect Your Business? (3/98)
- 201 Wisconsin Sales and Use Tax Information (12/97)
- 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 Nonprofit Organizations (9/90)

- 207 Sales and Use Tax Information for Contractors (3/98)
- 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)
- 223 Bakeries – How Do Wisconsin Sales and Use Taxes Affect Your Business? (2/98)

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 (10/97)

Other Topics

- 111 How to Get a Private Letter Ruling From the Wisconsin Department of Revenue (10/97)
- 114 Wisconsin Taxpayer Bill of Rights (11/97)
- 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 (9/97)
- 400 Wisconsin's Temporary Recycling Surcharge (12/97)
- 401 Extensions of Time to File (11/97)
- 403 Premier Resort Area Tax (2/98)
- 410 Local Exposition Taxes (11/94)
- 500 Tax Guide for Wisconsin Political Organizations and Candidates (1/97)
- 502 Do You Have Wisconsin Tax Questions? (2/97)
- 503 Wisconsin Farmland Preservation Credit (12/97)
- 504 Directory for Wisconsin Department of Revenue (10/97)

- 508 Wisconsin Tax Requirements Relating to Nonresident Entertainers (8/94)
- 509 Filing Wage Statements and Information Returns on Magnetic Media (3/94)
- 700 Speakers Bureau presenting . . . (2/93)
- W-166 Wisconsin Employer's Withholding Tax Guide (3/96) ☐



Farmers Receive \$35 Million in Farmland Credits

Tax relief totaling \$35 million was distributed to Wisconsin farmers in 1997 through the farmland preservation and farmland tax relief credit programs. About 22,500 farm owners received farmland preservation credits totaling \$22.5 million, and 59,000 farm owners received farmland tax relief credits totaling \$12.8 million.

Farmland Preservation Credit

Benefits averaging \$1,000 per claimant (29% of their 1996 property tax liabilities) were distributed through the farmland preservation credit program. The goals of this program are to preserve Wisconsin farmland, encourage local land use planning and soil conservation practices, and ease the property tax burden of Wisconsin farmers. About 38% of farm owners with 35 or more acres claimed farmland preservation credits in 1997.

To qualify for relief under this program, farmland must be zoned for exclusive agricultural use or be subject to a preservation agreement between the farmland owner and the state. About 82% of the claims are for land under zoning and 18% are for land covered by agreements. Participants must also comply with soil and water conservation standards developed by the county land conservation committee.

Farmland Tax Relief Credit

Farmland tax relief credits averaging \$217 were paid in 1997. These credits equal 10% of the first \$10,000 of property taxes on qualifying farmland. This program, which is in addition to the farmland preservation credit program, provides direct benefits to virtually all Wisconsin farmland owners with 35 or more acres.

Proceeds from the Wisconsin Lottery are used to fund the farmland tax relief credit program. ☐

repealed and recreated (R&R), or a new rule (NR).

Scope Statement Published (2-15-98)

11.99 Audit entertainment – NR

Rules Being Reviewed Following Publication of Various Notices

1.13 Power of attorney-A

11.03 Elementary and secondary schools and related organizations-A

11.11 Industrial or governmental waste treatment facilities-A

11.12 Farming, agriculture, horticulture and floriculture-A

11.33 Occasional sales-A ☐

Administrative Rules in Process

Listed below are proposed new administrative rules and changes to existing rules that are currently in the rule adoption process. The rules are shown at their stage in the process as of April 1, 1998, or at the stage in which action occurred during the period from January 2 to April 1, 1998.

Each affected rule lists the rule number and name, and whether it is amended (A), repealed (R),



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:

See *Wisconsin Tax Bulletins* 98 (July 1996), pages 21 and 23, and 102 (July 1997), page 14, for summaries of the previous decisions.

Corporation Franchise and Income Taxes

Insurance companies – interest from United States government obligations
American Family Mutual Insurance Company and American Standard Insurance Company (p. 13)

Loss deductions (prior law)
Interest on assessments and refunds
Madison Gas and Electric Company (p. 14)

Homestead Credit

Household income – social security benefits
Computation of credit
John and Kathy Lizan (p. 15)

Sales and Use Taxes

Containers, packaging and shipping materials – delivery of newspapers
Madison Newspapers, Inc. (p. 16)

Estoppel
Spickler Enterprises, Ltd. (p. 17)

Motor vehicles and trailers – sold to nonresidents
Mrotek, Inc. (p. 18)

Transportation charges
Rhineland Paper Co., Inc. (p. 18)

Transportation charges
Trierweiler Construction and Supply Co., Inc. (p. 19)

Sales Taxes and Withholding Taxes

Officer liability
Michael A. Pharo (p. 20)

Withholding Taxes

Employers required to withhold
Robar International, Inc. (p. 21)

CORPORATION FRANCHISE AND INCOME TAXES

Insurance companies – interest from United States government obligations. *American Family Mutual Insurance Company and American Standard Insurance Company vs. Wisconsin Department of Revenue* (Court of Appeals, District IV, October 30, 1997). The taxpayers appeal from an order affirming decisions of the Tax

Appeals Commission assessing taxes on income generated from U.S. government obligations for the period 1984-1991. The sole issue on appeal is whether the statute imposing the tax, sec. 71.43(2), Wis. Stats., is a nondiscriminatory franchise tax within the meaning of 31 U.S.C. sec. 3124(a)(1), which exempts U.S. government obligations from all state and local taxation *except* such as may be imposed by “a nondiscriminatory franchise tax.”

The facts are not in dispute. The taxpayers are subject to sec. 71.43(2), Wis. Stats., which imposes a franchise tax on the net income of Wisconsin-based insurance companies. The term “net income” is defined as “federal taxable income as determined in accordance with the provisions of the internal revenue code.” Section 71.45(2)(a), Wis. Stats. The effect of incorporating the federal statutes is to bring income from federal obligations within net income and make it taxable.

The taxpayers did not report income derived from federal obligations on their returns for the years in question. After conducting a field audit, the department assessed additional taxes on the companies based, in part, on their income from federal government obligations. After the department denied their requests for redeterminations, the taxpayers appealed to the Tax Appeals Commission, arguing, among other things, that because Wisconsin law does not tax income on state and municipal obligations, its taxation of income from federal obligations renders the tax discriminatory and thus impermissible under 31 U.S.C. sec. 3124(a)(1). In support of

their argument, the taxpayers referred the Commission to several statutes expressly exempting various state and municipal obligations from “all taxation.”

The Commission upheld the assessments. The Commission ruled that the existence of the other exemption statutes was not enough to render the tax discriminatory. According to the Commission, the taxpayers must show not only that sec. 71.43(2), Wis. Stats., when considered in light of related exemptions from the tax, is discriminatory on its face but also that the department actually applied it in a discriminatory manner to defeat the tax. On the department’s assertions that it does not, in practice, exempt state and local obligations from the tax, the Commission concluded that, as applied, the tax was not discriminatory and dismissed the taxpayers’ appeals. The taxpayers sought judicial review of the Commission’s decisions, and the Circuit Court affirmed.

The Court of Appeals concluded that because its terms plainly direct the taxation of federal obligations in the face of statutes which, equally plainly, exempt various state and municipal obligations from the tax, sec. 71.43(2), Wis. Stats., is discriminatory within the meaning of 31 U.S.C. sec. 3124(1)(a) and thus violates the ban of the federal statute.

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

Loss deductions (prior law); Interest on assessments and refunds. *Madison Gas and Electric Company vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, December 15, 1997). This matter is before the Commission on the taxpayer’s motion for summary judgment. The first issue is whether the department properly disallowed the taxpayer’s deductions claimed in 1975, 1976, and 1977 concerning the line collapse in 1975. The second issue is whether the department erred when it failed to credit or offset the taxpayer’s overpayment of 1978 taxes against amounts owed to the department as of the date of the overpayment.

At all times relevant to this matter, the taxpayer was a Wisconsin corporation doing business in Wisconsin as an electric and gas utility.

On January 11, 1975, the 63-mile transmission line between the taxpayer’s North Madison substation and the South Fond du Lac substation collapsed and was totally destroyed. As a result of the collapse, the taxpayer’s use of the line was totally extinguished.

In February 1975, the taxpayer filed suit against 4 defendants seeking compensation for damages caused by the collapse. The 4 defendants were (1) a consulting engineering firm, (2) the manufacturer of the line’s tower structures, (3) the builder of the tower structures and the transmission line, and (4) a railroad that allegedly cut a conductor

causing the remainder of the line to collapse after the initial, partial collapse.

The taxpayer had no insurance that covered the loss related to the line collapse and did not receive any compensation from any of its insurers. The taxpayer claimed losses related to the line collapse on its 1975 through 1977 Wisconsin franchise tax returns.

In June 1978, the taxpayer reached a settlement with the defendants, the terms of which paid the taxpayer \$3.5 million. This was the only compensation the taxpayer received with regard to the line collapse. The taxpayer reported the amount from the June 1978 settlement as income on its 1978 Wisconsin franchise tax return.

In January 1983, the department assessed the taxpayer additional franchise taxes and interest for the years 1972 through 1979. The assessment dealt with a plethora of issues, one of which was the treatment of losses related to the line collapse. In March 1983, the taxpayer filed a petition for redetermination objecting to the assessment. In December 1996, the department issued a notice of action granting in part and denying in part the petition for redetermination.

The delay in issuing the notice of action was primarily caused by an agreement between the department and the taxpayer to wait until the completion of a federal audit of the taxpayer covering the same years at issue in the department’s audit. Although the

federal audit was apparently completed in June 1989, the taxpayer did not forward the federal audit workpapers to the department until May 1995.

In the notice of action, the department denied 85% of the losses related to the line collapse claimed by the taxpayer for 1975, 1976, and 1977. The remaining 15% was allowed for each year as a then-current deduction for cost to remove the line, consistent with the results of the federal audit.

In the notice of action, the department allowed the taxpayer to deduct \$2,537,648 for losses related to the line collapse in 1978, the year the taxpayer had reported the \$3.5 million settlement as income.

As a result of the department's notice of action, the taxpayer was determined to have underpaid its franchise tax liability for 1976, 1977, and 1979 and overpaid its franchise tax liability for 1978. The department charged interest at the rate of 12% on amounts underpaid and credited the taxpayer with interest at the rate of 9% on amounts overpaid. The department did not credit or offset any portion of the taxpayer's overpayment of tax for 1978 against the principal amounts owing to the department for the other years covered by the audit.

The Commission concluded:

1. There is no genuine issue of material fact, and this matter

is appropriate for summary judgment as a matter of law.

2. The department properly disallowed the deductions relative to the line collapse claimed by the taxpayer for 1975, 1976, and 1977 because these losses were later compensated.
3. The department properly calculated interest on the amounts owing to the department and amounts overpaid by the taxpayer because the department has the discretion whether to issue a refund or credit amounts overpaid by the taxpayer against amounts owed by the taxpayer.

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

HOMESTEAD CREDIT

Household income - social security benefits; Computation of credit. *John and Kathy Lizan vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, October 30, 1997). The issues in this case are:

- A. Whether the department properly adjusted the claimants' 1992 through 1994 homestead credit claims to include social security benefits each year and aid to families with dependent children (AFDC) in 1994.
- B. Whether the adjusted amount of homestead credit each year was properly calculated.

During the period under review, calendar years 1992 through 1994, the claimants were married and had a minor child.

John Lizan has been diagnosed with a medical condition which has prevented him from maintaining employment. As a result of his condition, Mr. Lizan received social security benefits of \$8,196 in 1992, \$8,436 in 1993, and \$8,562 in 1994. During 1994 only, Mrs. Lizan received \$2,160 of social security benefits and \$208 of AFDC. Their son also received social security benefits during those years as a result of Mr. Lizan's condition, but they are not involved in this proceeding.

The claimants filed homestead credit claims for 1992, 1993, and 1994 but failed to include the social security benefits received in these years, or the AFDC benefits received in 1994. In each year under review, the instruction booklet issued by the department stated that claimants were required to include in household income payments received in the form of social security benefits.

In September 1996, the department issued an assessment against the claimants, denying all of the homestead credit allowed for 1992 and 1994, and \$144 of the \$196 homestead credit allowed for 1993. The assessment was for the purpose of including in household income the social security and AFDC benefits received during the years at issue.

The claimants argued on appeal that the social security benefits they received during 1992 through 1994 should not be included in household income for purposes of the homestead credit, and that even if the law requires this, the homestead credit instructions did not state this, and thus they should be able to keep all of the homestead credit claimed. They further argued that because their income, even with the social security benefits added, is well below the maximum allowable, they should be entitled to some credit for 1992 and 1994. The claimants also argued without any relevant rationale, that the department should not have considered AFDC benefits Mrs. Lizan received in 1994.

The Commission concluded as follows:

- A. The department's adjustments to the claimants' homestead credit claims are correct because the department properly included in household income the amounts received in social security benefits.
- B. The department properly calculated the adjustment to the claimants' homestead credit as a result of the inclusion of social security benefits in household income.

Income, as defined by sec. 71.52(6), Wis. Stats., clearly includes the social security benefits paid to the claimants. Furthermore, the instructions for each year made it clear the social security benefits had to be in-

cluded in income for purposes of the homestead credit calculation.

Under sec. 71.54(1)(d)2, Wis. Stats., in order to receive any credit the real estate taxes claimed must be greater than 13% of household income above \$8,000. In 1992 and 1994, the claimants' property taxes did not exceed 13% of their household income in excess of \$8,000; thus, the department properly reduced their homestead credit to zero for 1992 and 1994.

AFDC benefits are clearly cash public assistance and properly considered by the department. However, there is no need to consider this issue since it would not have affected the claimants' entitlement to a credit for 1994.

The claimants 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. □

SALES AND USE TAXES

Containers, packaging and shipping materials - delivery of newspapers. *Madison Newspapers, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, January 28, 1998). The issue is whether the taxpayer's carriers or its subscribers are its "customers" for purposes of the exemption from sales tax for packaging materials in sec. 77.54(6)(b), Wis. Stats.

Section 77.54(6)(b), Wis. Stats., provides an exemption for the gross receipts from the sale of and the storage, use or consumption of "Containers, labels, sacks, cans, boxes, drums, bags or other packaging and shipping materials for use in packing, packaging or shipping tangible personal property, if such items are used by the purchaser to transfer merchandise to customers..." (Emphasis added.) Section 77.54(6r), Wis. Stats., states that "The exemption under sub. (6) shall be strictly construed."

The primary business of the taxpayer is the production and distribution of newspapers. When the taxpayer distributed its newspapers to carriers, it bundled them with packaging materials. After the carriers took possession of the newspaper bundles, the carriers removed the packaging materials and discarded them. The packaging materials were not on the newspapers when they were delivered to subscribers.

The taxpayer contends that its customers were the carriers, rather than the subscribers. It asserts the following testimony (list not all-inclusive):

1. The taxpayer entered into an agreement with the carriers which provided that the carriers sell and distribute the newspapers as independent contractors;
2. Within certain limits, carriers were free to deliver newspapers to subscribers on their route in any manner that they chose;

3. Each carrier could arrange to have other persons assist on the route and was expected to find a substitute when the carrier was unable to complete the route; and
4. The billing statement that the taxpayer gave the carriers had language such as "Total Charges For Papers You Bought" and "Money Received From Your Customers Who Paid At The Office."
5. When office pay subscribers failed to renew their subscriptions on time, the taxpayer would continue to pay carriers the retail rate for 10 days;
6. When a carrier commenced a carrier collect subscription, the taxpayer would demand the name of the subscriber;
7. When carriers solicited new subscriptions, they were instructed by the taxpayer to have new subscribers make their checks payable to the taxpayer;
8. The taxpayer paid for worker's compensation insurance for its carriers and obtained a street trades permit for every carrier under the age of 18 as required by state law; and
9. In general, a carrier received credit for each newspaper delivered by a missed delivery system as if the carrier had delivered the newspaper.

The department argues that the taxpayer's customers were the subscribers. The department presents the following evidence (list not all-inclusive):

1. Between 92 and 93 percent of the taxpayer's subscribers remitted their subscription payments directly to the taxpayer. The taxpayer maintained a central billing system to bill subscribers, collect subscription payments, and credit each carrier for amounts received from subscribers on that carrier's route;
2. Money paid in advance to the taxpayer for subscriptions was invested in interest-bearing investments, and this interest was retained by the taxpayer. These funds were treated as the taxpayer's funds and not funds held in trust for carriers;
3. The taxpayer paid an additional subsidy to all carriers on routes requiring a motor vehicle;
4. The taxpayer also subsidized certain low-profit routes;

5. When office pay subscribers failed to renew their subscriptions on time, the taxpayer would continue to pay carriers the retail rate for 10 days;
6. When a carrier commenced a carrier collect subscription, the taxpayer would demand the name of the subscriber;
7. When carriers solicited new subscriptions, they were instructed by the taxpayer to have new subscribers make their checks payable to the taxpayer;
8. The taxpayer paid for worker's compensation insurance for its carriers and obtained a street trades permit for every carrier under the age of 18 as required by state law; and
9. In general, a carrier received credit for each newspaper delivered by a missed delivery system as if the carrier had delivered the newspaper.

The Commission concluded that the taxpayer's purchase of packaging materials was not exempt from the use tax because the bundles of newspapers on which the packaging material was used were transferred to carriers who were not the taxpayer's "customers" within the meaning of sec. 77.54(6)(b), Wis. Stats.

The taxpayer's contracts and documents show a general, but inconsistent, intent to treat carriers as its customers and subscribers as the customers of the carriers. Although the taxpayer argued that the carriers

were independent contractors, the taxpayer's policies insulated the carriers from most risks of loss and absorbed the majority of the carrier's expenses. The taxpayer exercised much more control over carriers than would be expected if the carriers were the taxpayer's customers.

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

Estoppel. *Spickler Enterprises, Ltd. vs. Wisconsin Department of Revenue* (Court of Appeals, District IV, November 20, 1997). This is an appeal from the Circuit Court's January 22, 1997, decision. See *Wisconsin Tax Bulletin* 102 (July 1997), page 16, for a summary of the January 22, 1997 decision. *Wisconsin Tax Bulletin* 99 (October 1996), page 21, provides a summary of the December 21, 1995, decision of the Wisconsin Tax Appeals Commission that the taxpayer appealed to the Circuit Court.

The issue in this case is whether the Circuit Court was correct in upholding the Commission's decision that the taxpayer was not entitled to estoppel against the department to defeat the department's sales tax assessment. The Commission determined that the elements of estoppel were not clearly present in this case.

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.

The taxpayer is a registered motor vehicle dealer which sells motorized recreational vehicles, non-motorized trailers and campers, pickup truck toppers, and associated accessories. It has held a state sales tax permit since 1976. The department assessed sales tax on the taxpayer's sales in Wisconsin of motor vehicles and non-motorized trailers and pickup toppers to out-of-state residents. The taxpayer did not dispute the amount of tax; however, it claimed the department should be estopped from assessing a tax on the sales of non-motorized trailers and related items of tangible personal property and services. The taxpayer claimed that it relied on oral statements by clerical employees of the Department of Transportation (DOT) that sales tax on the items in question should be paid to the purchaser's state of residence.

The Circuit Court held that the Commission had properly denied the imposition of estoppel. The Commission found that the taxpayer failed to provide clear and convincing evidence that the elements of estoppel were met.

The Court of Appeals affirmed the Commission, deciding that it was not reasonable for the taxpayer to rely upon oral statements of DOT clerical employees in failing to pay sales tax on its sales of motorized trailers to out-of-state residents. The Court of

Appeals concluded that the taxpayer has not met its burden to establish the elements of estoppel against the department.

The taxpayer appealed the decision to the Wisconsin Supreme Court, which denied the petition for review. The decision is final. □

Motor vehicles and trailers - sold to nonresidents.

Mrotek, Inc. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, September 9, 1997). The issues in this case are:

- A. Whether the taxpayer's sales of snowmobiles and ancillary items are exempt under sec. 77.54(5)(a), Wis. Stats., because they were sold to Minnesota residents.
- B. Whether the effect of the department's assessment will lead to unconstitutional double taxation.

The taxpayer is a retailer located in Hayward, Wisconsin, and is engaged in the sale of snowmobiles, all-terrain vehicles, trailers, and accessories. The department issued a sales tax assessment for the period January 1, 1990, through December 31, 1993, for additional sales tax and interest. The department's assessment was for uncollected sales tax on certain sales of snowmobiles, all-terrain vehicles, trailers, and accessories, as well as unpaid sales tax on certain manufacturer's rebates, customer down

payments, and allegedly exempt sales for which there was no valid exemption certificate.

The Commission concluded as follows:

- A. Snowmobiles, all-terrain vehicles, trailers, and accessories do not qualify for the exemption from sales tax in sec. 77.54(5)(a), Wis. Stats., which provides that sales of motor vehicles to nonresidents who will not use the motor vehicles in Wisconsin are exempt from the sales tax. Section 340.01(35), Wis. Stats., defines the term "motor vehicle." Two of the aspects of this definition are: 1) that the vehicle must be "self-propelled"; and 2) that snowmobiles and all-terrain vehicles are not motor vehicles.
- B. The taxpayer provided no evidentiary facts to show that any of the items purchased by Minnesota residents will be subject to any Minnesota tax.

The taxpayer has not appealed this decision. □

Transportation charges.

Rhineland Paper Co., Inc. vs. Wisconsin Department of Revenue (Circuit Court for Dane County, December 18, 1997). This is an appeal from the December 19, 1996 decision of the Wisconsin Tax Appeals Commission. For a summary of that decision, see *Wisconsin Tax Bulletin* 102 (July 1997), page 17.

The issue in this case is whether the Commission properly reversed the department's use tax assessment of amounts paid by the taxpayer to transport coal to its facility by rail after it was loaded onto rail cars. The Commission held that "sales price" as defined in sec. 77.51(15)(a)3, Wis. Stats. (1995-96), does not include transportation charges paid to persons other than the coal vendors.

The taxpayer is a Wisconsin corporation primarily engaged in the business of manufacturing paper. During the period under review, the taxpayer bought coal from three coal vendors for use in its facility in Rhinelander, Wisconsin. Except for a portion of the coal not at issue, the purchase price paid by the taxpayer to the coal vendors included shipment of the coal F.O.B. the vendor's dock. The coal was loaded onto railroad cars and was shipped by various railroad companies to the taxpayer's facility. The amount that the taxpayer paid for the coal did not include the cost of transporting the coal to its facility once it had been loaded onto the railroad cars.

All coal was transported by rail under separate arrangements between the taxpayer and the respective railroad companies. The taxpayer paid all of the cost of transporting the coal after it was loaded onto the rail cars. The railroad companies billed the taxpayer directly for the rail freight charges, and the taxpayer paid the railroads directly for the delivery. The taxpayer paid Wisconsin sales and/or use tax on the coal but did not pay any sales

or use tax on the freight charges for shipping the coal by rail to its facility.

The measure of the "use tax" is defined to be the "sales price" of the coal or the tangible personal property. Section 77.51(15)(a)3, Wis. Stats., provides that "'Sales price' means the total amount for which tangible personal property is sold, leased or rented, valued in money, whether paid in money or otherwise, without any deduction on account of any of the following: . . . 3. The cost of transportation of the property prior to its purchase."

Section 77.51(15)(b)3, Wis. Stats., further states that "'Sales price' shall not include any of the following: . . . 3. Transportation charges separately stated, if the transportation occurs after the purchase of the property is made."

The Circuit Court concluded that the Commission was correct that, as a matter of law, transportation costs, when separately paid by the purchaser of tangible personal property to a third party (other than the vendor of said personal property), and which are not reflected in the actual price paid to the vendor of said personal property, are not included in the statutory definition of "sales price" permitting the imposition of use tax. The Court also noted that if the statutes regarding this issue are ambiguous, they are construed in favor of the taxpayer.

The department has not appealed this decision. □

■ Transportation charges.

Trierweiler Construction and Supply Co., Inc. vs. Wisconsin Department of Revenue (Circuit Court for Dane County, December 12, 1997). This is an appeal from the April 30, 1997, decision of the Wisconsin Tax Appeals Commission. For a summary of that decision, see *Wisconsin Tax Bulletin* 102 (July 1997), page 18.

The issue is whether transportation charges that the taxpayer paid to its carriers are included in the "sales price" of the property purchased and subject to use tax. Section 77.51(15)(a)3, Wis. Stats., provides that "'Sales price' means the total amount for which tangible personal property is sold, leased or rented, valued in money, whether paid in money or otherwise, without any deduction on account of any of the following: . . . 3. The cost of transportation of the property prior to its purchase."

The taxpayer is a Wisconsin corporation engaged in the business of highway construction. The taxpayer manufactured ready-mix concrete, some of which it used for its own projects, most of which was sold to other parties. During the period under review, the taxpayer purchased cement from various suppliers in Wisconsin for use at either its road construction sites or its concrete manufacturing plant. These suppliers were retailers of the cement. The suppliers added sales tax to the amount they charged for the cement. The

supplier's charge for the cement to the taxpayer did not include transportation costs for shipment from the supplier to the taxpayer.

The carriers were hired by the taxpayer and were completely independent of the suppliers. These carriers were not engaged in the sale of the cement but merely in the business of hauling it for others. The taxpayer was billed directly by the carriers for their transportation services, and the taxpayer paid the carriers directly. The carriers did not charge sales tax for the transportation.

The taxpayer did not pay sales tax on the transportation charges. The taxpayer stored, used, or consumed the cement in Wisconsin and did not pay use tax on the transportation charges incurred in the shipping of the cement.

The Circuit Court 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 not appealed this decision. □

SALES TAXES AND WITHHOLDING TAXES

■ Officer liability. *Michael A. Pharo vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, December 11, 1997). The issue in this case is whether the taxpayer is a responsible person under secs. 71.83(1)(b)2 and 77.60(9), Wis. Stats.

The taxpayer converted his sole proprietorship into a corporation, Town & Country Communications ("the corporation"). The taxpayer assumed the title of General Manager and effectively controlled the corporation. He hired and assigned duties to all employees and determined their compensation. The taxpayer opened all mail, controlled the corporate checkbooks, made bank deposits, and had signature authority on the corporation's checking accounts, including the payroll account. He also did the corporation's bookkeeping, sometimes with the help of others.

The taxpayer signed and filed most of the corporation's sales tax returns with the department during the period under review, without remitting the taxes due thereon. He signed and filed the corporation's withholding tax deposit report with the department for the first quarter of 1991, without remitting the taxes due. The taxpayer also signed checks to the department for payroll taxes at various times during the period under review, as well as a payroll check to an employee in January 1991.

The Commission concluded that the taxpayer was a responsible person under sec. 71.83(1)(b)2, Wis. Stats. and sec. 77.60(9), Wis. Stats., and was personally liable for the unpaid withholding and sales and use taxes. The taxpayer had the **authority** and the **duty** to pay the corporation's withholding and sales and use taxes, and the taxpayer **intentionally breached that duty**.

The taxpayer had virtually total control over the financial affairs of the corporation. With the exception of his own testimony, the taxpayer presented no evidence showing that anyone else had *authority* over the corporation's financial decision-making, including which creditors were paid and when, at any time during the periods under review.

With no one else controlling the corporation's checkbook or opening the mail, the Commission concluded that the taxpayer had constructive knowledge and most likely actual knowledge that both sales and withholding taxes were unpaid and subsequently delinquent. The taxpayer was shown to be the corporation's primary - if not its only - owner, its only manager, and the only one who exercised financial and management control during the periods under review. His knowledge of and control over the corporation and its employees throughout the periods was such that he was *duty-bound* to see to it that the sales and withholding taxes were paid as they became due.

Intentional breach of duty is established by the taxpayer's failure to direct payment of taxes while allowing other creditors to be paid. The evidence shows that the corporation continued to do business and meet its payroll during the periods under review (and beyond) while taxes went unpaid. This *breach of duty* is attributable to the taxpayer because he controlled and directed corporate finances as owner and general manager.

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

WITHHOLDING TAXES

Employers required to withhold. *Robar International, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, October 30, 1997). The issues in this case are:

A. Whether the payments made by the taxpayer to its president and sole shareholder are wages subject to withholding under sec. 71.64, Wis. Stats.

B. Whether the department properly imposed the negligence penalty provided in sec. 71.83(1)(a)3, Wis. Stats., for the taxpayer's failure to withhold.

The taxpayer is a corporation which manufactures trash compactors. Robert J. Hoelzl began the business in 1973 as a sole proprietor, and converted it to a corporation in 1989. Hoelzl owned all of the taxpayer's stock and was employed as its president and chief operating officer, devoting 100% of his time to these duties. Hoelzl did not offer his management services to any other company.

Hoelzl signed the taxpayer's corporate franchise or income tax returns for the fiscal years 1989 through 1992, which is the period under review. The returns were prepared by an accountant and showed deductions for "management fees" which were paid to Hoelzl. The taxpayer withheld no taxes on these management fees, although it did withhold taxes on wages paid to its other employees.

Hoelzl paid himself "draws" from the taxpayer monthly, or more frequently, during the period under review. The draws were recorded on the taxpayer's books as "notes receivable - officers," although there were no signs of actual signed notes. No interest was charged by the taxpayer nor did the notes have any due date. At the end of each fiscal year, Hoelzl reclassified the notes receivable as "management fees."

The Commission concluded that:

A. The payments made by the taxpayer to Hoelzl are wages subject to withholding. Hoelzl was an employee of the taxpayer.

B. The department properly imposed the negligence penalty. Hoelzl clearly was not an independent contractor, and it was neglect for the taxpayer to treat him as such.

The taxpayer has not appealed this 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 releases are included:

Individual Income Taxes

1. Trustee's Administrative Fees (p. 22)

Sales and Use Taxes

2. Cranes Rented to Repair Manufacturing Machinery (p. 23)
3. Effect of Motor Vehicle Fuel Tax Refund on Computation of Gross Receipts and Sales price (p. 24)
4. Transportation Charges (p. 26)

Rental Vehicle Fee

5. Rental Vehicle Fee – Effect on Gross Receipts and Sales Price (p. 29)

INDIVIDUAL INCOME TAXES

1 Trustee's Administrative Fees

Statutes: Sections 71.05(6)(a)1 and (b)1 and 71.07(5), Wis. Stats. (1995-96)

Background:

Federal tax treatment: An individual may claim an itemized deduction on federal Schedule A for amounts paid for trustee's administrative fees to the extent the fees are incurred to produce or collect taxable income or to manage property. No deduction is allowed for any expense allocable to the earning of tax-exempt interest.

If it cannot be determined what part of the trustee's administrative fees is for tax-exempt interest and what part is for taxable income, the fees must be allocated using reasonable proportions based on facts and circumstances. Further information on allocating trustee's administrative fees is available in federal Publication 550, *Investment Income and Expenses*, which is available from the Internal Revenue Service.

The itemized deduction for amounts paid for trustee's administrative fees is combined with certain other miscellaneous itemized deductions, and the total

is subject to the 2% of federal adjusted gross income limitation.

Wisconsin tax treatment: Section 71.05(6)(a)1, Wis. Stats. (1995-96), provides that the amount of interest income, less related expenses, which is not included in federal adjusted gross income is added to federal adjusted gross income when computing Wisconsin adjusted gross income.

Section 71.05(6)(b)1, Wis. Stats. (1995-96), provides that, to the extent included in federal adjusted gross income, the amount of interest or dividend income which is by federal law exempt from taxation by Wisconsin is subtracted from federal adjusted gross income when computing Wisconsin adjusted gross income.

Section 71.07(5), Wis. Stats. (1995-96), provides for the Wisconsin itemized deduction credit. Certain amounts which are allowable as federal itemized deductions on federal Schedule A are used in the computation of the Wisconsin itemized deduction credit.

Section 71.07(5)(a), Wis. Stats. (1995-96), lists the various federal itemized deductions which may *not* be used in the computation of the Wisconsin itemized deduction credit. The federal miscellaneous itemized deduction for trustee's administrative fees is not included in this listing. Therefore, the amount of

trustee's administrative fees which is allowable as a federal miscellaneous itemized deduction (subject to the 2% of federal adjusted gross income limitation) is used in the computation of the Wisconsin itemized deduction credit.

Facts: An individual has the following income from a trust for 1997:

Interest from U.S. government bonds	\$20,000
Interest from municipal bonds	\$26,000

Trustee's administrative fees of \$4,500 were paid during 1997. The fees were paid to produce or collect taxable income. It is determined that \$1,957 of the fees is allocable to the U.S. government interest, and \$2,543 is allocable to the municipal bond interest. The U.S. government bond interest is reported on the individual's 1997 federal income tax return, and a miscellaneous itemized deduction is claimed on Schedule A for the trustee's administrative fees of \$1,957 related to the U.S. government bond interest.

The municipal bond interest is exempt from federal tax, and therefore, no deduction is allowed on federal Schedule A for the trustee's administrative fees related to such interest.

Question 1: The municipal bond interest is taxable by Wisconsin. What amount is added to federal adjusted gross income for municipal bond interest when

computing Wisconsin adjusted gross income?

Answer 1: \$23,457. Under sec. 71.05(6)(a)1, Wis. Stats. (1995-96), the addition for municipal bond interest is reduced by related expenses. Therefore, the \$26,000 of municipal bond interest is reduced by the trustee's administrative fees of \$2,543 which are related to such interest income (\$26,000 - \$2,543 = \$23,457).

Question 2: The U.S. government bond interest is not taxable by Wisconsin. What amount is subtracted from federal adjusted gross income for U.S. government interest when computing Wisconsin adjusted gross income?

Answer 2: \$20,000. The entire amount of U.S. government interest may be subtracted. Section 71.05(6)(b)1, Wis. Stats. (1995-96), does not require individuals to reduce the subtraction amount for U.S. government interest by related expenses.

Question 3: Are the federal miscellaneous itemized deductions, which include trustee's administrative fees related to U.S. government interest, adjusted (reduced) when computing the Wisconsin itemized deduction credit?

Answer 3: No. Although U.S. government interest is not taxable by Wisconsin, the federal miscellaneous itemized deductions, which include trustee's administrative fees related to the U.S.

government interest, are not adjusted when computing the Wisconsin itemized deduction credit. The amount of miscellaneous itemized deductions which is allowable for federal tax purposes is used when computing the Wisconsin itemized deduction credit. □

SALES AND USE TAXES

Note: The following tax releases interpret 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*.

2 Cranes Rented to Repair Manufacturing Machinery

Statutes: Section 77.54(6)(a), Wis. Stats. (1995-96)

Wis. Adm. Code: Sections Tax 11.39(2)(b) (October 1997 Register) and Tax 11.40(3)(a) (April 1994 Register)

Background: Section 77.54(6)(a), Wis. Stats. (1995-96), provides an exemption from Wisconsin sales and use tax for "Machines and specific processing equipment and repair parts or replacements thereof, exclusively and directly used by a manufacturer in manufacturing tangible personal property and safety attachments for those machines and equipment."

Section Tax 11.39(2)(b), Wis. Adm. Code (October 1997 Register), provides that “Manufacturing does not include storage, delivery to or from the plant, repairing or maintaining facilities or research and development.”

Section Tax 11.40(3)(a), Wis. Adm. Code (April 1994 Register), which provides an exemption for certain tools used in manufacturing, also provides in part that “...if the items are also used for machine repair or general maintenance, they are **not** exempt.” (Emphasis added.)

Facts:

- Company A is in the business of renting cranes.
- Company A rents cranes to manufacturers.
- Manufacturers use the cranes for:
 - a) loading or unloading manufacturing machines,
 - b) repairing manufacturing machines, or
 - c) setting manufacturing machines.

Question: Is the rental of the crane by Company A to a manufacturer who uses the crane to load, unload, repair, or set manufacturing machines subject to Wisconsin sales and use tax?

Answer: Yes. Since the crane is not directly used in manufacturing tangible personal property, it does not qualify for the exemption in sec. 77.54(6)(a), Wis. Stats. (1995-96). □

3 Effect of Motor Vehicle Fuel Tax Refund on Computation of Gross Receipts and Sales Price

Note: This tax release applies only to refunds of motor vehicle fuel tax where the refund check is dated on or after December 1, 1997. For refunds dated prior to December 1, 1997, the tax release titled “Effect of Motor Fuel Tax Refund on Computation of Gross Receipts and Sales Price,” which appeared in *Wisconsin Tax Bulletin* 85 (January 1994), applies.

Statutes: Sections 77.51(4)(a)4 and (15)(a)4, Wis. Stats. (1995-96), as amended by 1997 Wisconsin Act 27, and 77.54(11), Wis. Stats. (1995-96)

Background: Section 77.54(11), Wis. Stats. (1995-96), provides an exemption from Wisconsin sales or use tax for gross receipts from sales of and the storage, use, or other consumption in Wisconsin of motor vehicle fuel, general aviation fuel, or alternate fuel subject to taxation under ch. 78, Wis. Stats. However, if the motor vehicle fuel tax or alternate fuel tax is refunded under sec. 78.75, Wis. Stats., because the buyer does not use the fuel in operating a motor vehicle upon the public highways, the exemption from Wisconsin sales or use tax no longer applies.

Therefore, if a retailer sells motor vehicle fuel that is not subject to the Wisconsin motor vehicle fuel tax, the retailer should charge Wisconsin sales tax on the sale of the fuel, unless some other sales and use tax exemption applies (e.g., fuel sold for residential

use). Similarly, if a person purchases motor vehicle fuel subject to motor vehicle fuel tax and later is issued a refund of the motor vehicle fuel taxes, the purchase is subject to Wisconsin use tax, unless some other sales and use tax exemption applies (e.g., farming).

The following Facts and Questions address the question of what amount is subject to Wisconsin sales or use tax based on the definitions of gross receipts and sales price under sec. 77.51(4)(a)4 and (15)(a)4, Wis. Stats. (1995-96), as amended by 1997 Wisconsin Act 27.

Facts and Question 1: Company A sells motor vehicle fuel to Company B. The amount of the sale of the motor vehicle fuel includes \$2,000 of federal motor vehicle fuel tax. Company A charges Company B Wisconsin sales tax on the total amount of the sale of the motor vehicle fuel, including the federal motor vehicle fuel tax.

Company B, subsequent to the sale of the motor vehicle fuel, files a claim for refund with the Internal Revenue Service (IRS) for the \$2,000 of federal motor vehicle fuel tax it paid to Company A. The claim for refund is made using federal Form 843.

May Company B file a claim for refund of the sales tax it paid on the \$2,000 of federal motor vehicle fuel tax that was refunded by the IRS to Company B?

Answer 1: Yes. The \$2,000 refund of federal motor vehicle

fuel tax to Company B reduces by \$2,000 the gross receipts subject to Wisconsin sales tax on the sale of the motor vehicle fuel by Company A to Company B.

The definition of gross receipts in sec. 77.51(4)(a)4, Wis. Stats. (1995-96), as amended by 1997 Wisconsin Act 27, provides that gross receipts subject to sales tax do not include federal motor vehicle fuel taxes that have been refunded.

Facts and Question 2: Assume the same facts as in Facts and Question 1, except that Company B claims a credit on its federal corporate income tax return using federal Form 4136 for the \$2,000 of federal motor vehicle fuel tax it paid to Company A on the purchase of motor vehicle fuel.

May Company B file a claim for refund of the sales tax it paid on the \$2,000 of federal motor vehicle fuel tax allowed as a credit to Company B?

Answer 2: Yes. The same answer as given to Facts and Question 1 applies.

Facts and Question 3: Company C sells motor vehicle fuel to Company D. The amount of the sale of the motor vehicle fuel includes the federal and Wisconsin motor vehicle fuel taxes of \$2,000. Company C does not charge Company D Wisconsin sales tax on the sale of the motor vehicle fuel. Company D reports Wisconsin use tax on its Wisconsin sales and use tax return for the purchase of the motor

vehicle fuel. Company D includes the \$2,000 of federal and Wisconsin motor vehicle fuel taxes in the amount on which use tax is computed.

Company D, subsequent to reporting Wisconsin use tax on the motor vehicle fuel purchased, files claims for refund with the IRS and the Wisconsin Department of Revenue for the \$2,000 of federal and Wisconsin motor vehicle fuel taxes it paid to Company C.

May Company D file a claim for refund of the use tax it paid to the department on the \$2,000 of federal and Wisconsin motor vehicle fuel taxes refunded by the IRS and the Wisconsin Department of Revenue to Company D?

Answer 3: Yes. The \$2,000 refund of federal and Wisconsin motor vehicle fuel taxes to Company D reduces by \$2,000 the sales price subject to Wisconsin use tax on the sale by Company C of the motor vehicle fuel which is stored, used, or consumed in Wisconsin by Company D.

The definition of sales price in sec. 77.51(15)(a)4, Wis. Stats. (1995-96), as amended by 1997 Wisconsin Act 27, allows the purchaser to reduce the sales price subject to use tax by refunds from the IRS and the Wisconsin Department of Revenue of the motor vehicle fuel taxes paid on the sale.

Facts and Question 4: Assume the same facts as in Facts and

Question 3, except that Company D claims a credit on its federal corporate income tax return using federal Form 4136 for the federal motor vehicle fuel tax it paid to Company C on the purchase of motor vehicle fuel.

May Company D file a claim for refund of the use tax it paid to the department on the federal motor vehicle fuel tax allowed as a credit by the IRS on Company D's federal corporate income tax return and the Wisconsin motor vehicle fuel tax refunded by the Wisconsin Department of Revenue?

Answer 4: Yes. The same answer as given to Facts and Question 3 applies.

Facts and Question 5: Company E sells motor vehicle fuel to Company F for \$6,000. The \$6,000 selling price includes \$2,000 of federal and Wisconsin motor vehicle fuel taxes. Company E does not charge Company F Wisconsin sales tax on the sale of the motor vehicle fuel.

After buying the motor vehicle fuel, Company F files claims for refund with the IRS and the Wisconsin Department of Revenue for the \$2,000 of federal and Wisconsin motor vehicle fuel taxes it paid on the motor vehicle fuel purchased from Company E. Company F does not report Wisconsin use tax on its Wisconsin sales and use tax return for the purchase of the motor vehicle fuel.

Company F is audited by the department. It is determined that Company F should have reported Wisconsin use tax on its purchase of motor vehicle fuel from Company E.

What is the sales price used in determining the amount of use tax due?

Answer 5: The sales price subject to use tax is \$4,000 (\$6,000 selling price less \$2,000 of federal and Wisconsin motor vehicle fuel taxes refunded by the IRS and the Wisconsin Department of Revenue).

The definition of sales price in sec. 77.51(15)(a)4, Wis. Stats. (1995-96), as amended by 1997 Wisconsin Act 27, provides a reduction in the computation of sales price for refunds of motor vehicle fuel taxes.

Caution: For refunds of motor vehicle fuel tax where the refund check is dated prior to December 1, 1997, refunds of motor vehicle fuel taxes by the IRS and the Wisconsin Department of Revenue to the purchaser do not reduce gross receipts or sales price subject to sales or use tax from the sale of or the storage, use, or consumption of the motor vehicle fuel.

Note: Information regarding filing claims for refund of Wisconsin sales or use tax is available in Wisconsin Publication 216, *Filing Claims for Refund of Sales or Use Tax*. □

4 Transportation Charges

Statutes: Sections 77.51(4)(a)3, (14r), and (15)(a)3 and 77.52(2)(a), Wis. Stats. (1995-96)

Wis. Adm. Code: Section Tax 11.94 (June 1991 Register)

Background:

Law

Section 77.51(4)(a)3 and (15)(a)3, Wis. Stats. (1995-96), provides that gross receipts and sales price, for purposes of imposing Wisconsin sales or use tax, include the total amount of the sale, valued in money, whether received in money or otherwise, without any deduction for the cost of transportation of the property prior to its sale to the purchaser.

Section 77.51(14r), Wis. Stats. (1995-96), provides that a sale or purchase involving the transfer of ownership of property shall be deemed to have been completed at the time and place when and where possession is transferred by the seller or the seller's agent to the purchaser or the purchaser's agent. A common carrier or the U. S. Postal Service shall be deemed the agent of the seller, regardless of any f.o.b. point and regardless of the method by which freight or postage is paid.

Section 77.52(2)(a), Wis. Stats. (1995-96), provides that various services are subject to Wisconsin

sales or use tax. Transportation services are not services specifically subject to tax under sec. 77.52(2)(a), Wis. Stats. (1995-96).

Court Decisions

In the cases of *Rhineland Paper Company, Inc. vs. Wisconsin Department of Revenue* (97 CV 1051, December 18, 1997) and *Trierweiler Construction and Supply Co., Inc. vs. Wisconsin Department of Revenue* (97 CV 1444, December 12, 1997), the Circuit Court held that transportation costs separately incurred by the buyer from a carrier independent of the retailer of the taxable property are not part of the sales price of tangible personal property subject to Wisconsin sales or use tax.

The Department of Revenue did not appeal these decisions. The questions and answers below reflect these Circuit Court decisions.

Question 1: When are transportation charges subject to Wisconsin sales or use tax, and who is responsible for paying the tax to the Department of Revenue?

Answer 1:

A. Seller Contracts With Carrier and Buyer Pays Seller for Transportation of Taxable Tangible Personal Property — Delivery by Common Carrier, Contract Carrier, U.S. Postal Service, or Seller's Vehicle

Example: Seller A hires a common carrier to ship its taxable product to Buyer B. The common carrier charges Seller A \$40 for transportation. Seller A charges Buyer B \$1,000 for the product, plus \$50 for transportation.

1. Carrier

The common carrier is not subject to Wisconsin sales or use tax on its \$40 charge to the Seller A for transportation because it is providing a service that is not subject to Wisconsin sales or use tax under sec. 77.52(2)(a), Wis. Stats. (1995-96).

Note: In this example, the carrier is not subject to Wisconsin sales or use tax on its sale of the transportation service, regardless of whether the carrier is a common carrier, a contract carrier, or the U.S. Postal Service.

2. Seller

Seller A's total charge of \$1,050 to Buyer B (including the \$50 transportation charge) is subject to Wisconsin sales or use tax. The sale of the taxable product occurs when Buyer B takes possession of the product from the common carrier. Since the transportation occurs before the sale of the property by Seller A to Buyer B, the \$50 transportation charge is included in gross receipts subject to sales tax.

Note: In this example, Seller A's gross receipts subject to Wisconsin sales or use tax include the \$50 charge for transportation, regardless of whether delivery is made by a common carrier, a contract carrier, the U.S. Postal Service, or the seller's own vehicle.

3. Buyer

If Seller A does not charge Buyer B Wisconsin sales or use tax on the sale of the taxable product, Buyer B is subject to Wisconsin sales or use tax on Seller A's total charge of \$1,050 (including the \$50 transportation charge). The sale of the taxable product occurs when Buyer B takes possession of the product from the common carrier. Since the transportation occurs before the sale of the property by Seller A to Buyer B, the \$50 transportation charge is included in the sales price subject to sales or use tax.

B. Buyer Contracts With Carrier and Buyer Pays Carrier for Transportation of Taxable Tangible Personal Property — Delivery by Common Carrier, Contract Carrier, or U.S. Postal Service

Example: Seller A charges Buyer B \$1,000 for a taxable product. Buyer B hires a common carrier to pick up the product from Seller A and ship it to Buyer B. The

common carrier charges Buyer B \$40 for the transportation.

1. Carrier

The common carrier is not subject to Wisconsin sales or use tax on its \$40 charge to Buyer B for transportation because it is providing a service that is not subject to Wisconsin sales or use tax under sec. 77.52(2)(a), Wis. Stats. (1995-96).

Note: In this example, the carrier is not subject to Wisconsin sales or use tax on its sale of the transportation service, regardless of whether the carrier is a common carrier, a contract carrier, or the U.S. Postal Service.

2. Seller

Seller A is subject to Wisconsin sales or use tax on its \$1,000 charge to Buyer B. Seller A does not include the \$40 charge for transportation in gross receipts subject to Wisconsin sales or use tax because Seller A does not have any gross receipts from transportation.

Note: In this example, Seller A's gross receipts subject to Wisconsin sales or use tax do not include the \$40 charge for transportation, regardless of whether delivery is made by a common carrier, a contract carrier, or the U.S. Postal Service.

3. Buyer

The buyer is not subject to Wisconsin sales or use tax on the \$40 transportation charge as a result of the *Rhineland Paper* and *Trierweiler Construction* cases, because the transportation costs were separately incurred by Buyer B independent of Seller A.

C. Seller Contracts With Carrier but Buyer Pays Carrier for Transportation of Taxable Tangible Personal Property — Delivery by Common Carrier, Contract Carrier, or U.S. Postal Service

Example: Seller A hires a contract carrier to ship its taxable product to Buyer B. Seller A charges Buyer B \$1,000 for the product, plus \$50 for transportation. It is agreed between Seller A and Buyer B that Buyer B will pay the contract carrier directly for transportation. Buyer B will then deduct the amount paid to the carrier (even if less or more than \$50) from the \$1,050 charge by Seller A. Buyer B pays the contract carrier \$40 and deducts the \$40 it paid to the contract carrier from the \$1,050 amount it owes Seller A. Buyer B remits \$1,010 to Seller A.

1. Carrier

The contract carrier is not subject to Wisconsin sales or use tax on its \$40 transporta-

tion charge to Seller A, which was paid by Buyer B, because it is providing a service that is not subject to Wisconsin sales or use tax under sec. 77.52(2)(a), Wis. Stats. (1995-96).

Note: In this example, the carrier is not subject to Wisconsin sales or use tax on the sale of the transportation service, regardless of whether the carrier is a common carrier, a contract carrier, or the U.S. Postal Service.

2. Seller

Seller A is subject to sales or use tax on \$1,050 charged to Buyer B. The sale of the product occurs when Buyer B takes possession of the taxable product from the contract carrier. Because the transportation occurs prior to the sale of the product, the \$50 charge for transportation may not be deducted by Seller A from gross receipts subject to Wisconsin sales or use tax.

Section Tax 11.94(2)(d), Wis. Adm. Code (June 1991 Register), provides that when taxable tangible personal property is sold for a “delivered price,” tax applies to the charge for transporting the property to the purchaser, even though the purchaser may directly pay the transportation charges. Property is sold for a “delivered price” when the price agreed upon includes all costs or charges

for transporting the property directly to the purchaser, and under circumstances such that if there is an increase or decrease in the cost of the transportation, it is borne by the seller.

Note: Seller A’s gross receipts subject to Wisconsin sales or use tax include the \$50 charge for transportation, regardless of whether delivery is made by a common carrier, a contract carrier, or the U.S. Postal Service.

3. Buyer

If Seller A does not charge Wisconsin sales or use tax on the sale of the taxable tangible personal property, Buyer B is subject to Wisconsin sales or use tax on Seller A’s total charge of \$1,050 to Buyer B. Because the transportation occurs before the sale of the property by Seller A to Buyer B, the charge for transportation may not be deducted in arriving at the sales price subject to Wisconsin sales or use tax.

The *Rhineland Paper Company* and *Trierweiler Construction* decisions do not apply because (a) Seller A charged Buyer B for the transportation and (b) the transportation was not incurred separately by Buyer B independent of Seller A.

Question 2: If a seller charges a purchaser for transportation and the transportation is for both

taxable and nontaxable tangible personal property, is the entire charge by the seller for transportation subject to Wisconsin sales or use tax?

Answer 2: No. Only that part of the transportation charge that relates to the sale or purchase of **taxable** tangible personal property is subject to Wisconsin sales or use tax. A reasonable allocation of the total transportation charge is required to determine the taxable and nontaxable transportation charges.

Example: Company J sells office supplies to Company K. Company K will use 20% of the office supplies at its headquarters in Wisconsin. The remaining 80% of office supplies will be resold by Company K. Company K issues a resale certificate to Company J, indicating that 80% of the office supplies are exempt from Wisconsin sales or use tax because they are for resale.

Company J hires a common carrier to transport the office supplies and other tangible personal property to Company K.

Company J bills Company K \$1,000 for the office supplies, plus \$100 for transportation.

Of the \$1,100 that Company J charges to Company K, \$200 of the office supplies plus \$20 of transportation charges are subject to Wisconsin sales or use tax. The \$800 of office supplies that

will be resold and \$80 of the transportation charges are exempt from Wisconsin sales or use tax. The allocation of the \$100 transportation charge is computed as follows:

$\$200 \text{ (charge for taxable office supplies)} \div \$1,000 \text{ (total charge for office supplies)} = 20\%$.

$20\% \times \$100 \text{ total transportation charge} = \$20 \text{ taxable transportation charge.}$ □

RENTAL VEHICLE FEE

5 Rental Vehicle Fee — Effect on Gross Receipts and Sales Price

Statutes: Section 77.51(4)(a)4 and (15)(a)4, Wis. Stats. (1995-96), and sec. 77.995, Wis. Stats., as created by 1997 Wisconsin Act 27

Wis. Adm. Code: Section Tax 11.26(3)(b) (December 1992 Register)

Background: Effective April 1, 1998, a 3% state rental vehicle fee is imposed on the rental of certain vehicles for periods of less than 30 days by establishments primarily engaged in the short-term rental of vehicles without drivers. The lessor is required to collect the tax from the person to whom the vehicle is rented. For more information about the rental vehicle fee, refer to *Wisconsin Tax Bulletin 104* (November 1997), page 35.

Question: Is the 3% rental vehicle fee (imposed under sec. 77.995, Wis. Stats., as created by 1997 Wisconsin Act 27) included in gross receipts and sales price for purposes of imposing Wisconsin sales or use tax on the rental of a vehicle?

Answer: No. Although termed a “fee” in the statutory language, the rental vehicle fee is considered a “tax.” Under sec. 77.51(4)(a)4 and (15)(a)4, Wis. Stats. (1995-96), gross receipts and sales price do not include any **tax** imposed by Wisconsin upon or with respect to retail sales, whether imposed upon the retailer or the consumer, if the state tax is measured by a stated percentage of sales price or gross receipts.

Example: Company B, located in Madison, rents to Customer A an automobile for one week. The rental is \$200 plus taxes and fees. The total charge to Customer A is computed as follows:

Rental charge	\$	200
Sales tax (5.5% x \$200)		11
Rental vehicle fee (3% x \$200)		<u>6</u>
Total charge to customer	\$	<u><u>217</u></u>

□



Private Letter Rulings

“Private letter rulings” are written statements issued to a taxpayer by the department, that interpret Wisconsin tax laws based on the taxpayer’s specific set of facts. Any taxpayer may rely upon the ruling to the extent the facts are the same as those in the ruling.

The ruling number is interpreted as follows: The “W” is for “Wisconsin”; the first four digits are the year and week the ruling becomes available for publication (80 days after it is issued to the taxpayer); the last three digits are the number in the series of rulings issued that year. The date is the date the ruling was issued.

Certain information that could identify the taxpayer has been deleted. Additional information is available in Wisconsin Publication 111, “How to Get a Private Letter Ruling From the Wisconsin Department of Revenue.”

The following private letter rulings are included:

Corporation Franchise and Income Taxes

Reorganizations
W9807002 (p. 30)

Sales and Use Taxes

Computer software – programs
(canned vs. custom)
W9810003 (p. 31)

Exemptions – telecommunication
services purchased for resale
W9801001 (p. 33)

✱ **W9807002**, November 24, 1997

Type Tax: Corporation Franchise and Income

Issue: Reorganizations

Statutes: Sections 71.02(1), 71.20(1), and 71.22(1), Wis. Stats. (1995-96), as amended by 1997 Wisconsin Act 27

This letter is in response to your request for a private letter ruling as to the Wisconsin franchise or income tax consequences of converting DEF Company (DEF) into a new limited purpose national banking association with trust powers, but without deposit-taking powers, which would be formed pursuant to 12 United States Code (“USC”) § 35.

Facts

DEF is now a Wisconsin-chartered state bank, organized under subchapter II of chapter 221 of the Wisconsin Statutes.

Currently XYZ Corporation (XYZ) owns all the outstanding stock of XYZ Corporation of Wisconsin (XYZW), which, at the time of the proposed transaction, will own all the outstanding stock of DEF.

DEF would be converted into a new limited purpose national banking association with trust powers, but without deposit-taking powers, which would be

formed pursuant to 12 USC § 35. This conversion is accomplished by authorization of the Office of the Comptroller of Currency pursuant to § 35, followed by execution and filing of articles of association under 12 USC § 21 and of an organization certificate under 12 USC §§ 22 and 23. The new association would not be a depository institution and thus would not have FDIC-insured deposits. Assuming the new association would be classified as a division of its sole owner, the transaction for tax purposes would be classified as a liquidation of the existing corporation which would be tax free under section 332 of the Internal Revenue Code.

XYZW would be eliminated by merger into XYZ. This merger is likely to take place prior to the conversion of DEF, but since it is independent of the conversion the merger may occur afterward. This merger will qualify as a section 332 liquidation under the Code.

Separate from the conversion, trust business in certain banks owned by XYZ may be transferred from the banks to DEF. Such transfer will be for the purpose of consolidating all trust activities.

Since DEF will be conducting trust operations in several states, it is preferable to be a national

banking association because these entities are authorized by the Comptroller of the Currency to operate an interstate trust business. In addition, the proposed conversion would improve DEF's ability to predict and comply with fiduciary regulations, because there is a far larger body of case law and regulatory authority governing national banks with trust powers, than similar Wisconsin-chartered banks. DEF does not now take deposits from the general public and its only deposits are from related entities, which it would discontinue.

The elimination of XYZW is to simplify the structure of the "X" affiliated group. XYZW holds most of the Wisconsin and Illinois institutions owned by XYZ and was used principally as an acquisition vehicle. Mid-tier holding companies such as XYZW are no longer viewed as necessary, and it is anticipated that most of "X's" banks (not including DEF) will eventually be combined into one bank for administrative efficiency.

Request

You have requested that the Department rule that, if DEF is reorganized as a national banking association pursuant to 12 USC § 35, does not have deposits insured under the Federal Deposit Insurance Act, and has a single owner, it will be treated for Wisconsin franchise and income tax purposes as a division of its single owner.

Ruling

If DEF is reorganized as a national banking association pursuant to 12 USC § 35, does not have deposits insured under the Federal Deposit Insurance Act, and has a single owner, it will be treated for Wisconsin franchise and income tax purposes as a division of its single owner, provided it would be treated as a division under Treasury Regulation § 301.7701-2(c)(2)(i).

Analysis

For Wisconsin franchise and income tax purposes, the term "corporation" includes "corporations, publicly traded partnerships treated as corporations in section 7704 of the internal revenue code, limited liability companies treated as corporations under the internal revenue code, joint stock companies, associations, common law trusts and all other entities treated as corporations under section 7701 of the Internal Revenue Code ..." Section 71.22(1), Wis. Stats., as amended by 1997 Wisconsin Act 27, effective for taxable years beginning on or after January 1, 1997.

A single-owner entity that is disregarded as a separate entity under section 7701 of the Internal Revenue Code is disregarded as a separate entity for Wisconsin franchise and income tax purposes, and its owner is subject to the tax on or measured by the entity's income. Sections 71.02(1), 71.20(1), and 71.22(1), Wis. Stats., as amended

by 1997 Wisconsin Act 27. Therefore, if DEF is disregarded as a separate entity for federal income tax purposes, it will be disregarded as a separate entity for Wisconsin franchise and income tax purposes. Instead, it will be treated as a division of its single owner.

Since the Wisconsin Department of Revenue will not issue private letter rulings involving interpretations of the Internal Revenue Code and Treasury Regulations, the department will not rule that Treasury Regulation § 301.7701-2(c)(2)(i) applies, nor will the department rule that Treasury Regulation § 301.7701-2(c)(2)(ii) does not apply in this situation. □

✳ **W9810003**, December 17, 1997

Type Tax: Sales and Use

Issue: Computer software – programs (canned vs. custom)

Statutes: Sections 77.51(20) and 77.52(1), Wis. Stats. (1995-96)

Wis. Adm. Code: Section Tax 11.71 (April 1993 Register)

Thank you for your request for a private letter ruling and the additional information that was provided by telephone, regarding the Wisconsin sales tax treatment of computer software sold by ABC Company (ABC).

Facts

ABC develops and markets software products for both main-frame and client service environments. The products are

functionally rich, focused on user needs, and require minimal user training. The software can be used immediately with little or no modification of customer development practices and standards and can be quickly integrated into day-to-day operations.

Other facts are as follows:

- The exact programs or modules licensed exist at the time that the customer places the order. Prior to licensing ABC software, the customer has the option to evaluate the product without charge for up to 45 days.
- An analysis is performed of the customer's hardware and software to determine the make, model, operating system, and all other software running within the computer. Based on this information, ABC creates a tape which allows the software to operate on the customer's computer system. The uniqueness is due to the combination of pre-existing modules selected by the customer and the addition of identifications and passwords specific to that customer.
- In addition to the software, the customer is sent installation and security parameters. In the event that the customer desires use of the software at a different location or on a different system, the software will continue operating in a new client server environment but not in a different mainframe installation unless new passwords are provided

to the customer for the mainframe product.

- The software is loaded, installed, and tested by the customer. User manuals are provided depending on the type of software. Training is provided depending on the software.
- An assumption is made that the cost of the software is more than \$10,000.
- Maintenance and improvements are provided to the software without charge for 12 months from the initial license date. Thereafter, the customer can continue maintenance by paying an annual fee. Maintenance includes updates to the software as well as technical support by telephone.
- No modifications are made to the existing program modules in order that they be useable by the customer. No fixes (i.e., short-term programming solutions to potential problems) are provided by ABC.
- Sales tax is charged to the customer and remitted to the department on all software licensed in Wisconsin.

Request

You ask whether the license of software described above is subject to Wisconsin sales or use tax.

Ruling

The software described above is tangible personal property. Therefore, the gross receipts from the license of such software are

subject to Wisconsin sales or use tax.

Analysis

Section 77.52(1), Wis. Stats. (1995-96), imposes a Wisconsin sales tax on sales of tangible personal property and taxable services at retail in Wisconsin.

“Tangible personal property” for purposes of imposing Wisconsin sales tax is defined in sec. 77.51(20), Wis. Stats. (1995-96), to include computer programs, except custom computer programs.

Section Tax 11.71(1)(e), Wis. Adm. Code (April 1993 Register), defines “custom programs” to mean utility and application software which accommodate the special processing needs of the customer. The determination of whether a program is a custom program shall be based upon the facts and circumstances, including the following:

1. The extent to which the vendor or independent consultant engages in significant presale consultation and analysis of the user's requirements and system.
2. Whether the program is loaded into the customer's computer by the vendor and the extent to which the installed program must be tested against the program's specifications.
3. The extent to which the use of the software requires substantial training of the customer's personnel and

substantial written documentation.

4. The extent to which the enhancement and maintenance support by the vendor is needed for continued usefulness.
5. There is a rebuttable presumption that any program with a cost of \$10,000 or less is not a custom program.
6. Custom programs do not include basic operational programs or prewritten programs.
7. If an existing program is selected for modification, there must be a significant modification to the program by the vendor so that it may be used in the customer's specific hardware and software environment.

Although the cost of the software is more than \$10,000 and maintenance is available, the following facts lead to the determination that the software is not custom:

- There is no significant presale consultation by ABC. Analysis by ABC consists merely of receiving a description from the customer of its hardware and software and selecting the existing modules for that particular hardware and software.
- ABC does not load the software on the customer's hardware, nor do they test the software on the customer's hardware.

- There has been no showing that maintenance is necessary for continued usefulness.
- Training is provided only for certain software.
- No modifications are made to the existing modules to make the software useable by the customer.

The decision by the Court of Appeals in the case of *Wisconsin Department of Revenue v. International Business Machines* (CCH 202-983, June 23, 1988), is not controlling since the stipulated facts in that case are not identical to the facts above. In *IBM*, the pre-existing modules were extensively modified for an individual customer.

Additionally, the issue in *IBM* was whether the software in question was tangible personal property or an intangible under the case of *Janesville Data Center, Inc. v. Wisconsin Department of Revenue* (CCH 201-498, June 30, 1978). The Supreme Court determined that coded "data" was an intangible.

In *IBM*, it was determined that coded "instructions" were also intangible. The Wisconsin Legislature has since limited that holding by defining computer programs, except custom programs, as tangible personal property. Therefore, the focus is now on whether the programming is custom, or not, as described above. □

✴ **W9801001**, October 14, 1997

Type Tax: Sales and Use

Issue: Exemptions – telecommunication services purchased for resale

Statutes: Sections 77.51(14)(intro.), 77.52(13) and (14), and 77.53(1) and (2), Wis. Stats. (1995-96)

Wis. Adm. Code: Section Tax 11.66 (September 1997 Register)

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

Facts

As stated in your request, GHI Corporation (GHI) is an Internet service provider located in Wisconsin. GHI charges its customers a monthly fee for Internet access. GHI sells individual consumers the use of telephone communications lines used to access computers. In accessing the Internet, GHI's customers use their own computers and modem to communicate with other computers using access to telephone lines provided by GHI.

GHI purchases bulk long distance access services in the form of an access circuit that allows a large quantity of individual users to communicate simultaneously over this line. GHI purchases local telephone access services using approximately "X" lines. GHI has more customers than the lines purchased but, at any given peak usage time, the amount of lines are sufficient to handle

customer demand. Local lines are equipped with interstate access to tie in with long distance providers.

The lines to which access is purchased may be used on occasion by GHI solely for testing the quality of the lines to ensure that newly added lines are properly connected to the computer modems necessary for Internet access. In addition, GHI uses three of the lines for its own business and does not provide customers with access to these lines.

Request

You ask the following questions:

1. Is GHI's purchase of access to local and long distance telephone lines subject to Wisconsin sales or use tax?
2. How should GHI and suppliers account for lines that are not exempt from Wisconsin sales or use tax?

Ruling

1. GHI's purchase of access to local and long distance telephone lines, which are used in providing Internet access to customers, is not subject to Wisconsin sales or use tax because the access is for resale. GHI's occasional use of the lines to inspect for quality does not invalidate the resale exemption.

GHI's use of access to local and long distance telephone lines (e.g., used to contact suppliers and customers regarding billings, used for

office fax machine, etc.) is subject to Wisconsin sales or use tax because the access originates in Wisconsin, is charged to a service address in Wisconsin, and is not resold.

2. GHI should provide its supplier with a properly completed resale certificate. If a supplier provides both access which is resold by GHI and access which is consumed by GHI in a taxable manner, GHI should indicate to its supplier which access is not resold so that the supplier allocates its billing correctly between charges subject to and not subject to tax.

Note: If the seller fails to charge tax on the sale of access to local and long distance lines that is not resold, GHI is required to report and remit to the department the Wisconsin sales or use tax on its purchase of such access.

Analysis

1. Section 77.51(14)(intro.), Wis. Stats. (1995-96), defines "sale," for purposes of imposing Wisconsin sales or use tax, to include the transfer of the ownership of, title to, possession of, or enjoyment of tangible personal property or services for use or consumption but not for resale as tangible personal property or services.

Section Tax 11.66(4)(c), Wis. Adm. Code (September 1997 Register), further provides access services that resellers

purchase, repackage, and resell to customers are not subject to Wisconsin sales or use tax.

GHI, in providing Internet access, is transferring to customers the enjoyment of access to telephone lines that allow connection of the customer's computer to other computers. Therefore, GHI is reselling the access to telephone lines it purchases.

2. Section 77.52(13), Wis. Stats. (1995-96), provides that, in order to prevent the evasion of sales tax, it is presumed that all receipts are subject to tax until the contrary is established. The burden of proving that a sale of services is not a taxable sale is upon the person who makes the sale unless that person takes from the purchaser a certificate that the service is purchased for resale.

Section 77.52(14), Wis. Stats. (1995-96), provides that the seller must take a certificate in good faith. A certificate can be taken in good faith by a seller if the seller does not know or has no reason to know that the purchaser will not resell the service.

Section 77.53(1) and (2), Wis. Stats. (1995-96), imposes a Wisconsin use tax on the storage, use, or consumption of taxable services in Wisconsin. A person's liability for the tax is not extinguished until the tax has been paid to the state. □