

# Wisconsin TAX BULLETIN

## FOCUS ON . . . Publications

See articles on pages 1, 4, and 7

### Adult Entertainment Tax Repealed

The 5% adult entertainment tax, which was supposed to be effective for sales made on or after April 1, 1998, has been repealed by the Wisconsin Legislature. An article in *Wisconsin Tax Bulletin 107* (April 1998), indicated that the effective date of the adult entertainment tax was delayed. Due to the delay of the effective date and the subsequent repeal of the tax, no sales were ever subject to the adult entertainment tax. □

### Focus on Publications: Motor Vehicle Fuel



Do you owe Wisconsin use tax if you receive a refund of Wisconsin motor vehicle fuel tax? How do you compute and report the use tax?

The new Wisconsin Publication 222, *Motor Vehicle Fuel Users:*

*Do You Owe Use Tax?*, answers these questions and many others. The publication also includes examples of taxable and exempt fuel purchases.

A copy of Publication 222 appears on pages 47 to 50 of this Bulletin. For information about how to obtain additional copies of this and other department publications, see the article titled "Tax Publications Available" on page 7 of this Bulletin. □

### Do You Owe Use Tax on Internet Purchases?

If you buy items via the Internet from companies who do not charge Wisconsin sales or use tax, you may owe Wisconsin use tax.

Office supplies, computer equipment, computer software (except custom computer software), paper, and furniture are common examples of Internet purchases which result in the buyer owing use tax.

- **Seller's permit, use tax registration certificate, and consumers use tax registration certificate holders:** Report use tax owed on your sales and use tax return, Form ST-12.

- **Others:** Report use tax on a consumer use tax return, Form UT-5. Individuals may report use tax on their individual income tax return instead of Form UT-5. □

### Amnesty Program Ends August 14

REMINDER: The Wisconsin tax amnesty program will end on August 14, 1998. Applications must be submitted by that date to be considered.

To qualify for amnesty forgiveness taxpayers must:

- Submit an application during the nine-week amnesty period which began June 15 and ends August 14, 1998.
- Pay the required down payment.
- File any outstanding unfiled returns.
- Pay the amount due under tax amnesty within 45 days of the amnesty billing notice date.

Copies of an application for amnesty and information from an amnesty brochure appear on pages 44 to 46 of this Bulletin.

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You may also apply for amnesty via the Internet website at [www.taxamnesty.org](http://www.taxamnesty.org), or by calling the following toll-free number: 1-888-701-8818 (in the Madison area, call 261-7760).

**PRACTITIONERS:** Please encourage your clients to take advantage of the amnesty program. Taxpayers with delinquent accounts as of October 1, 1997, who are eligible for potential forgiveness under tax amnesty but do not apply and pay the reduced amount, will be subject to an additional 5% fee on the balance of their account as of August 15, 1998. □

## Sales and Use Tax Report Mailed

The July 1998 *Sales and Use Tax Report* (2-98) contains a number of articles regarding sales and use tax issues, including law changes. This Report was sent in mid-July to all persons registered for Wisconsin sales and use tax purposes. A copy of the Report appears on pages 51 to 54 of this Bulletin. □

## Wisconsin/Minnesota Sales Tax Seminars

The Wisconsin and Minnesota Departments of Revenue will again present a series of joint sales and use tax seminars this fall. The seminars will include information on differences between the two states' laws as they apply to general businesses. (**Note:** Seminars for contractors will likely be scheduled in the spring of 1999.)

If you still need additional information about amnesty, you may

- Visit the department's Internet website at [www.taxamnesty.org](http://www.taxamnesty.org)
- Call the toll-free amnesty hotline number, 1-888-317-8808 (in the Madison area, call 261-7760)
- Send written correspondence to:  
Wisconsin Tax Amnesty  
P.O. Box 8927  
Madison, WI 53708-8927.

### Wisconsin Tax Bulletin

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You are invited to attend any of the following seminars, free of charge. All seminars are from 9:00 a.m. to 12:30 p.m. at the locations indicated. To register or for more information, call the Minnesota Department of Revenue at 1-800-888-6231.

\*\*\*\*\*

October 6, 1998 – Duluth, MN  
Minnesota Department of  
Revenue Office  
2711 West Superior Street

\*\*\*\*\*

October 13, 1998 – Hudson, WI  
Hudson House  
1616 Crestview Drive

\*\*\*\*\*

October 20, 1998 – Winona, MN  
St. Mary's University  
700 Terrace Heights Drive



## Wisconsin Electronic Filing — The Future of Tax Administration

The numbers tell the story. In Wisconsin, the overall number of income tax filings is up 2% this filing season, while paper filing is down 3%, and electronic filing is up 54%. Nationwide, the overall numbers are similar. (Note: "Electronic filing" includes both the Federal/State Electronic Filing program ["Preparer ELF"] which has been in effect in Wisconsin since the 1992 filing season, and the TeleFile program, new in Wisconsin for the 1998 filing season. Also see the article on TeleFile on page 5 of this Bulletin.)

Preparer ELF continues its extraordinary growth and represents the largest segment of the electronic filing market. In Wisconsin, the number of Preparer ELF returns increased 18% this tax season to 269,471, and this method of filing now accounts for over 10% of all income tax returns filed in Wisconsin. This year Wisconsin reached an important milestone on April 9, when the 1,000,000<sup>th</sup> Preparer ELF return was filed.

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

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

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

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

- **Sole Proprietors Located in Wisconsin** — If you are authorized by the IRS to file electronically, you will automatically be included in the Wisconsin Preparer ELF program. No further action is necessary.
- **All Others** — Provide the Wisconsin Electronic Filing Office with your latest copy of federal Form 8633 (Application to Participate in Electronic Filing) showing your IRS-assigned Electronic Filing Identification Number (EFIN). Alternatively, provide your firm's name, your EFIN, and a listing of your officers'/partners' names, addresses, and social security numbers.

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

Additional information about the Wisconsin Preparer ELF program is available in Wisconsin Publication 115, *Handbook for Federal/State Electronic Filing*. For information about how to obtain this publication, see the article titled "Tax Publications Available" on page 7 of this Bulletin.

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

## Sales Tax Publications Updated

Three Wisconsin publications relating to sales and use taxes have been updated recently. The revised publications are:

- Publication 200, *Electrical Contractors – How Do Wisconsin Sales and Use Taxes Affect Your Business?*
- Publication 202, *Sales and Use Tax Information for Motor Vehicle Sales, Leases, and Repairs*
- Publication 207, *Sales and Use Tax Information for Contractors*

Publication 200 was revised in March 1998. It explains how sales and use taxes apply to electrical contractors' receipts when they act as retailers, and to their purchases when they act as consumers.

Publication 202 was revised in April 1998. It provides information about sales and use taxes for new and used motor vehicle dealers, lessors, and operators of garages, body shops, and service stations.

Publication 207 was revised in March 1998. It explains how sales and use taxes affect contractors and includes a chart to help them distinguish between real property activities and personal property activities.

In addition to the three revised publications, two new sales and use tax publications have been

published this year. The new publications are:

- Publication 222, *Motor Vehicle Fuel Users: Do You Owe Use Tax?* (new in April)
- Publication 223, *Bakeries – How Do Wisconsin Sales and Use Taxes Affect Your Business?* (new in February)

Publication 222 is described in the "Focus" article on page 1 of this Bulletin, and a copy appears on pages 47 to 50. Publication 223 is described in the "Focus" article on page 4 of *Wisconsin Tax Bulletin* 107 (April 1998).

See the article titled "Tax Publications Available" on page 7 of this Bulletin for information about how to obtain free copies of these or other Wisconsin publications. □

## Occupational License Revocation Program Expanded

As part of post-amnesty legislation, the Budget Adjustment Bill, 1997 Wisconsin Act 237, expands the withholding of occupational licenses or credentials of taxpayers who owe delinquent Wisconsin taxes. Effective January 1, 1999, the Department of Revenue (DOR) is authorized to certify tax delinquencies to additional Wisconsin agencies, which must then deny initial or renewal applications or suspend or revoke licenses or credentials.

The agencies included in the occupational license revocation program are as follows:

Administration  
Commerce  
Commissioner of Insurance  
Ethics Board  
Financial Institutions  
Health and Family Services  
Natural Resources  
Public Instruction  
Regulation and Licensing  
Transportation  
Workforce Development  
Supreme Court (if the Supreme Court agrees)

The above-listed agencies, and examining boards and affiliated credentialing boards attached to the agencies, issue certain professional and occupational credentials. Most credentials renew yearly or every two years. Credential holders will be screened at initial issuance, renewal, or periodically to identify individuals and businesses with Wisconsin tax delinquencies. Those with delinquent tax liabilities will be notified and allowed ten days to pay the amounts due.

A person or business whose initial or renewal application has been denied, or whose credential has been suspended or revoked, is entitled to a hearing before DOR. This hearing is limited to questions of: a) mistaken identity of the credential holder; and b) whether the credential holder has paid the delinquent taxes for which he or she is liable.

If, after the hearing, DOR affirms its certification that the credential holder is liable for delinquent taxes, the agency issuing the license must affirm its denial, suspension, or revocation of the credential holder's license. The credential holder may then seek

judicial review in the Dane County Circuit Court.

The Act provides that if a credential holder's license is denied, suspended, or revoked, and the credential holder reapplies for the credential, the issuing agency must deny the reapplication unless the credential holder submits a certificate from DOR stating that he or she is no longer liable for delinquent taxes.

In addition to the other agencies, DOR is authorized to deny, suspend, or revoke business tax registration certificates, or property assessment certifications or recertifications, of taxpayers who owe delinquent Wisconsin taxes.

For further information regarding this program, contact Gary Garczynski at Wisconsin Department of Revenue, P.O. Box 8902, Madison, WI 53708-8902, or by telephone at (608) 267-1344. □

## TeleFile Exceeds Expectations

Wisconsin's TeleFile program for individual income tax reporting became operational for the 1998 filing season. About 350,000 WI-Z filers were invited to file their 1997 Wisconsin taxes by telephone. These people received a special TeleFile booklet in the mail. They also received a PIN, for security.

Projections for TeleFile were for 35,000 1997 Wisconsin returns to be filed via TeleFile, and this number was surpassed in the first week of February. When TeleFile

closed on April 16, 81,926 TeleFile returns had been filed.

Here are some reasons why TeleFile is so popular:

- TeleFile is available 7 days a week, 24 hours a day. Multiple phone lines are available in both Madison and Milwaukee. Taxpayers can call when it's convenient for them.
- TeleFile is fast and easy. The average length of a phone call is 6 minutes. Each entry is repeated back to the caller, so there is plenty of opportunity for corrections. The caller can hang up at any time prior to confirmation, and the return is not filed.
- The taxpayer receives a confirmation number, which assures that the tax return is received – no need to worry about the return getting lost in the mail.
- TeleFile is accurate. TeleFile does the math to ensure that computations are error-free.
- TeleFile refunds are mailed just four business days after the TeleFile call. Taxpayers who owe money can use TeleFile early in the season and wait until April 15 to send payment.

The department plans to expand the number of individuals invited to use TeleFile next season. Research shows that TeleFile does not take business from preparers using the Federal/State Electronic Filing ("Preparer ELF") program,

since very few TeleFile participants previously filed Preparer ELF returns. (Also see the article on Federal/State Electronic Filing, on page 3 of this Bulletin.) □

## Automatic 4-Month Extension Expires August 17

If your 1997 Wisconsin and federal individual income tax returns were due April 15, 1998, but you filed an application for an automatic 4-month extension for filing your federal return with the Internal Revenue Service (IRS), both your federal and Wisconsin returns are due August 17, 1998 (August 15 is a Saturday). When you file your Wisconsin return, be sure to attach to it a copy of the federal extension application, Form 4868.

Any filing extension available under federal law may be used for Wisconsin purposes, even if you are not using that extension to file your federal return. If you did not file a federal extension application but needed a 4-month extension for Wisconsin only, your 1997 Wisconsin return, ordinarily due April 15, 1998, must be filed by August 17, 1998.

If you are extending the time to file your Wisconsin return only, attach one of the following items to the 1997 Wisconsin return you file:

- A statement indicating that you are filing under the federal automatic 4-month extension provision; or

- A copy of federal Form 4868 with only the name, address, and social security number completed.

**Note:** You were not required to pay your 1997 taxes by April 15, 1998, as a condition for receiving an extension of time to file your Wisconsin tax return. ☐



### Do You Need a Speaker?

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

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

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

### Information or Inquiries?

Listed below are telephone numbers to call if you wish to contact the Department of Revenue about any of the taxes administered by the Income, Sales, and Excise Tax Division. A comprehensive listing of telephone numbers and addresses appears in *Wisconsin Tax Bulletin* 107 (April 1998), pages 35 to 38.

#### Madison X Main Office Area Code (608)

Amnesty*.....	261-7760
OR .....	1-888-317-8808
<b>*only until 8/14/98</b>	
Appeals.....	266-0185
Audit of Returns: Corporation, Individual, Homestead.....	266-2772
Beverage.....	266-6702
Cigarette, Tobacco Products .....	266-8970
Copies of Returns .....	267-1266
Corporation Franchise and Income .....	266-1143
Delinquent Taxes.....	266-7879
Electronic Filing .....	264-9959
Estimated Taxes.....	266-9940
Fiduciary, Estate .....	266-2772
Forms Request:	
Taxpayers.....	266-1961
Practitioners .....	267-2025
Fax-A-Form .....	261-6229
Homestead Credit .....	266-8641
Individual Income.....	266-2486
Motor Vehicle Fuel.....	266-3223
Refunds.....	266-8100
Sales, Use, Withholding .....	266-2776
TTY .....	267-1049

#### District Offices

Appleton.....(920)	832-2727
Eau Claire.....(715)	836-2811
Milwaukee:	
General.....(414)	227-4000
Refunds.....(414)	227-4907
TTY.....(414)	227-4147

### Any Suggestions for 1998 Tax Forms?

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

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

### 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 55 of this Bulletin. □

## Question and Answer

**Question:** I filed my Wisconsin income tax return by telephone (TeleFile). I received an additional W-2 after I filed. What should I do?

**Answer:** You must amend your TeleFile return. This is done by filing Wisconsin Form 1X.

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**Question:** How do I complete an amended return (Form 1X) when I filed my original return by telephone?

**Answer:** The TeleFile Worksheet that you completed when filing your return by telephone has all the information needed to complete Form 1X. The instructions for Form 1X tell you where to enter the various amounts from the TeleFile Worksheet on Form 1X. □

## 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)
- 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)



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| <p>201 Wisconsin Sales and Use Tax Information (12/97)</p> <p>202 Sales and Use Tax Information for Motor Vehicle Sales, Leases, and Repairs (4/98)</p> <p>203 Sales and Use Tax Information for Manufacturers (12/94)</p> <p>205 Use Tax Information for Individuals (2/97)</p> <p>206 Sales Tax Exemption for Nonprofit Organizations (9/90)</p> <p>207 Sales and Use Tax Information for Contractors (3/98)</p> <p>210 Sales and Use Tax Treatment of Landscaping (5/94)</p> <p>211 Cemetery Monument Dealers - How Do Wisconsin Sales and Use Taxes Affect You? (3/97)</p> <p>212 Businesses: Do You Owe Use Tax on Imported Goods? (2/97)</p> <p>213 Travelers: Don't Forget About Use Tax (2/97)</p> <p>214 Businesses: Do You Owe Use Tax? (2/97)</p> <p>216 Filing Claims for Refund of Sales or Use Tax (9/95)</p> <p>217 Auctioneers - How Do Wisconsin Sales and Use Taxes Affect Your Operations? (3/96)</p> <p>219 Hotels, Motels, and Other Lodging Providers - How Do Wisconsin Sales and Use Taxes Affect Your Operations? (6/96)</p> <p>220 Grocers - How Do Wisconsin Sales and Use Taxes Affect Your Operations? (8/96)</p> | <p>221 Farm Suppliers and Farmers - How Do Wisconsin Sales and Use Taxes Affect Sales to Farmers? (4/97)</p> <p>222 Motor Vehicle Fuel Users: Do You Owe Use Tax? (4/98)</p> <p>223 Bakeries - How Do Wisconsin Sales and Use Taxes Affect Your Business? (2/98)</p> <div style="background-color: #cccccc; text-align: center; padding: 2px;"><b>Other Taxes and Credits</b></div> <p>400 Wisconsin's Temporary Recycling Surcharge (12/97)</p> <p>403 Premier Resort Area Tax (2/98)</p> <p>410 Local Exposition Taxes (11/94)</p> <p>503 Wisconsin Farmland Preservation Credit (12/97)</p> <p>508 Wisconsin Tax Requirements Relating to Nonresident Entertainers (8/94)</p> <p>W-166 Wisconsin Employer's Withholding Tax Guide (3/96)</p> <div style="background-color: #cccccc; text-align: center; padding: 2px;"><b>Audits and Appeals</b></div> <p>501 Field Audit of Wisconsin Tax Returns (2/96)</p> <p>505 Taxpayers' Appeal Rights of Office Audit Adjustments (6/96)</p> <p>506 Taxpayers' Appeal Rights of Field Audit Adjustments (5/97)</p> <p>507 How to Appeal to the Tax Appeals Commission (10/97)</p> <div style="background-color: #cccccc; text-align: center; padding: 2px;"><b>Other Topics</b></div> <p>111 How to Get a Private Letter Ruling From the Wisconsin Department of Revenue (10/97)</p> | <p>114 Wisconsin Taxpayer Bill of Rights (11/97)</p> <p>115 Handbook for Federal/State Electronic Filing (12/97)</p> <p>117 Guide to Wisconsin Information Returns (10/96)</p> <p>118 Electronic Funds Transfer Guide (4/96)</p> <p>124 Petition for Compromise of Delinquent Taxes (4/97)</p> <p>130 Fax A Form (9/97)</p> <p>401 Extensions of Time to File (11/97)</p> <p>500 Tax Guide for Wisconsin Political Organizations and Candidates (1/97)</p> <p>502 Directory of Wisconsin Tax Publications (6/98)</p> <p>504 Directory for Wisconsin Department of Revenue (10/97)</p> <p>509 Filing Wage Statements and Information Returns on Magnetic Media (3/94)</p> <p>700 Speakers Bureau presenting . . . (2/93) <input type="checkbox"/></p> |
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### **Wisconsin Tax Bulletin Annual Index Available**



Once each year the *Wisconsin Tax Bulletin* includes an index of materials that have appeared in past Bulletins. The latest index available appears in *Wisconsin Tax Bulletin* 107 (April 1998), pages 43 to 69. It includes information for issues 1 to 102 (July 1997), except the court case section, which lists all cases summarized in issues 1 to 107. ☐



## Restaurant Operator Guilty of Tax Evasion

Accountant and tax preparer Steven H. Kremer, 45, of Ladysmith, was found guilty in June 1998, of failure to timely file a Wisconsin income tax return for 1996. As part of a plea agreement relating to charges of failure to timely file Wisconsin returns for 1994, 1995, and 1996, Kremer pleaded no contest to one count.

According to the criminal complaint, Kremer failed to timely file Wisconsin income tax returns for 1994, 1995, and 1996. During those years, the complaint alleges, Kremer had gross receipts from his accounting business of \$89,120 in 1994, \$93,412 in 1995, and \$107,544 in 1996.

Rusk County Circuit Judge Frederick Henderson placed Kremer on four years of probation and ordered him to serve 401 hours of community service.

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.

\* \* \* \* \*

Gerald J. Becker, former operator of Tony's Place, an Oshkosh bar and restaurant, pleaded guilty in May 1998, to two counts of filing false Wisconsin income tax returns for 1994 and 1995. Winnebago County Circuit Court Judge Robert Hawley sentenced Becker to three years probation, with the conditions that he serve

30 days in jail without huber privileges and that he make restitution to the state of Wisconsin of \$11,202 in evaded state income taxes.

According to the criminal complaint, Becker operated Tony's Place from June 1989 until November 1996. He allegedly failed to report \$70,586 of income in 1994 and \$72,031 in 1995, which he skimmed from his restaurant. The amount of additional tax due was \$5,571 in 1994 and \$5,631 in 1995.

The criminal charges were initiated by the Winnebago County District Attorney's Office following an investigation by the Fraud Unit of the Wisconsin Department of Revenue. Filing a false or fraudulent income tax return in Wisconsin is a felony which carries a penalty of up to five years in prison and fines up to \$10,000 for each count.

\* \* \* \* \*

In May 1998, two persons were charged with one count each, of filing a false return to evade sales tax. Criminal complaints allege that they both listed an incorrect vehicle purchase price on the application for Title/Registration.

Todd L. Guthrie, of Mukwonago, was charged by the Walworth County District Attorney's Office. According to the criminal complaint, his application for Title/Registration listed the full purchase price of a 1990 Ford F250 truck as \$2,000 and a sales tax due of \$110. The complaint alleges he actually paid \$10,000 for the vehicle.

Darlene A. Martin, of Jefferson, was charged by the Jefferson County District Attorney's Office. According to the criminal complaint, her application for Title/Registration listed a 1991 Acura with a full purchase price of \$4,000 and a sales tax due of \$220. The complaint alleges she actually paid \$10,000 for the vehicle.

If convicted, Guthrie and Martin each face up to 30 days in jail and up to \$500 in fines. □

## Delinquent Tax Warrants

Wisconsin delinquent tax warrants are filed with the Clerk of Court in the county in which a taxpayer resides or operates a business. This procedure is provided in secs. 71.91(5), 77.62, and 806.11, Wis. Stats. (1995-96).

A tax warrant acts as a lien against both real and personal property an individual owns in the county where the lien is filed. A tax warrant is filed to protect Wisconsin's interests and establish lien priority rights if a taxpayer disposes of assets. Tax warrants may be filed after a taxpayer fails to pay a bill by the due date of the bill.

A warrant satisfaction is issued to the Clerk of Court approximately 30 to 45 days after a bill is paid and/or adjusted to zero. This amount of time is needed because the taxpayer's check must first clear the bank. Also, warrant satisfactions are filed with the

Clerk of Courts only twice each month.

In situations where a taxpayer needs an immediate satisfaction of a warrant, the department will issue the satisfaction within 48 hours. To obtain an immediate satisfaction of a warrant, a taxpayer must do one of the following:

1. Submit the full tax payment (including any interest, penalties, and fees); pay either by cash, cashier's check, or money order. Also submit a note with the payment, requesting an immediate satisfaction.
2. If full payment has been made, submit a note requesting an immediate satisfaction, and provide proof that the check for the full tax payment has cleared the bank or that the full payment was made by cash, cashier's check, or money order. "Proof" could include a copy of the front and back of the cancelled check, a copy of the receipt for cash, or a copy of the cashier's check or money order.

Submit either the note and payment as explained in option 1 above, or the note and proof of payment as explained in option 2, to Wisconsin Department of Revenue, Central Collection Warrant Specialist, P.O. Box 8901, Madison, WI 53708-8901.

The department also may issue a partial release of a warrant when assets are being sold and it is clear there are insufficient pro-

ceeds to satisfy prior judgments from other creditors and the department's warrant. The partial release removes the warrant only from the specific piece of real estate or personal property that is being sold. A partial release of warrant may be requested from the Department of Revenue office nearest to the taxpayer, or by calling (608) 266-7879 in Madison. □

### **IRS File-By-Phone System Available for Some Wisconsin Businesses**

*Note: Information for this article was submitted by the Midwest District of the Internal Revenue Service.*

The Internal Revenue Service (IRS) is making it easier for some small business taxpayers to file their quarterly tax returns. The IRS recently mailed more than 71,000 Wisconsin businesses a special "941 TeleFile package." Nationally, more than three million businesses were mailed 941 TeleFile packages. With 941 TeleFile, these businesses are able to use their touch-tone telephone to file their Form 941 payroll taxes.

Similar to the TeleFile system for individual returns, 941 TeleFile is free, it is paperless, and it automatically calculates the tax and any balance owed. Last year, 941 TeleFile was successfully tested in the District of Columbia and 14 states in the southeastern

United States. More than 224,900 returns were filed by phone during the test.

Businesses may also pay their federal taxes electronically – using a telephone or a personal computer – through IRS's Electronic Federal Tax Payment System (EFTPS). This system eliminates paper tax deposit coupons and trips to the bank for businesses. Over 1.5 million businesses are already enrolled and paying their taxes through EFTPS. □

### **Administrative Rules in Process**

Listed below are proposed new administrative rules and changes to existing rules that are currently in the rule adoption process. The rules are shown at their stage in the process as of July 1, 1998, or at the stage in which action occurred during the period from March 31 to July 1, 1998.

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

To receive up-to-date administrative rules of the Department of Revenue, you can use the order blank on page 55 of this Bulletin to order the Tax section of the Wisconsin Administrative Code.

### **Scope Statement Published**

- 1.12 Electronic funds transfer – NR (5-31-98)
- 11.09 Medicines–A (5-31-98)

- 11.19 Printed material exemptions—A (5-31-98)
- 11.26 Other taxes in taxable gross receipts and sales price—A (5-31-98)
- 11.28 Gifts and other advertising specialties—A (5-31-98)
- 11.32 “Gross receipts” and “sales price”—A (5-31-98)
- 11.41 Exemption of property consumed or destroyed in manufacturing—A (5-31-98)
- 11.56 Printing industry—A (3-31-98)
- 11.68 Construction contractors—A (5-31-98)
- 11.70 Advertising agencies—A (5-31-98)
- 11.83 Motor vehicles—A (5-31-98)

### Rules Reviewed by Legislative Council Rules Clearinghouse

- 11.56 Printing industry—A

### 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 ☐



## Report on Litigation

Summarized below are recent significant Wisconsin Tax Appeals Commission (WTAC) and Wisconsin Court decisions. The last paragraph of

each decision indicates whether the case has been appealed to a higher Court.

The following decisions are included:

### Individual Income Taxes

Compensation for services  
*Robert and Joan Sorensen* (p. 12)

Domicile  
*Estate of Konstantine George, and Marion George* (p. 12)

Farm loss limitation  
*David G. and Patricia Stauffacher* (p. 13)

Native Americans — reservation of another tribe  
*Joan LaRock* (p. 14)

Penalties — attempt to defeat or evade tax  
*Thomas B. Shepard* (p. 14)

Refunds, claims for — statute of limitations  
*Kurt H. Van Engel* (p. 16)

### Homestead Credit

Housing subject to property tax  
*Jimmy D. Bean* (p. 17)

Property taxes accrued — co-ownership  
*Calvin B. and Sharon M. Gates* (p. 17)

Property taxes accrued — more than one unit  
*Glendora Miller* (p. 17)

### Corporation Franchise and Income Taxes

Deductions — state franchise or income taxes  
*Delco Electronics Corporation* (p. 18)

Manufacturer's sales tax credit  
*Wausau Paper Mills Company* (p. 19)

Refunds — claims after field audit refund  
*National Presto Industries, Inc.* (p. 19)

### Sales and Use Taxes

Construction — exempt entities  
*Precision Metals, Inc.* (p. 20)

Motor vehicles and trailers — payment of tax before registration  
*Albert Berchanskiy* (p. 21)

Motor vehicles — rebates  
*David and Carole Schenker* (p. 22)

Officer liability  
*Frank A. Calarco* (p. 22)

Time-share property  
*Vacation Owner's Association, Inc.* (p. 23)

### Withholding of Tax

Officer liability  
*Kathy J. Keimig* (p. 24)

### Sales and Use Taxes, and Withholding of Taxes

Officer liability  
*James M. Callen* (p. 25)

Officer liability  
*Kenneth Higgs and Richard F. Wagner* (p. 25)

Officer liability  
*Scott W. Wolf* (p. 26)

## INDIVIDUAL INCOME TAXES

**— Compensation for services.** *Robert and Joan Sorensen vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, April 30, 1998). The issue in this case is whether the value of a trip to Cancun, Mexico is properly includable as income by the taxpayers.

Taxpayers Robert and Joan Sorensen are husband and wife. In 1991, Mrs. Sorensen began spending substantial amounts of time at Rode Heating & Cooling in Kenosha, a small business operated by her sister. Mrs. Sorensen testified that she often spent seven hours a day at the business in 1991 and even more time in 1992. However, she was not an owner of the business, and she was not paid for her work. Robert Sorensen also did uncompensated work at his sister-in-law's business - as much as 15 hours per week.

In February 1992, Mrs. Sorensen's sister, Alberta Rode, advised the taxpayers that Rode Heating had earned four places on a group trip to Cancun, Mexico, sponsored by a wholesale distributor which had sold a substantial number of air conditioners to Rode in 1991. The distributor's long-standing practice was to give its customers an "incentive" to purchase by promising them participation in an annual trip based on the amount of their purchases.

Alberta Rode invited the taxpayers to go on the trip with her,

together with a "girlfriend" who had worked for Rode Heating in the past. The taxpayers did not learn about the trip until shortly before they went, and they received no tax form from the distributor or Rode indicating either the value of the trip or that they should report the trip as income.

The department audited the distributor, learned of the annual trips, and began to assess taxpayers who had neglected to report the value of the trips as income on their Wisconsin income tax returns. Since the Sorensens did not report the Cancun trip as income, the department subsequently assessed them additional tax and interest, on their joint return, for the trip - purportedly valued at \$2,600.

The Commission concluded that the value of the Cancun trip, under the circumstances here, must be counted as income because, in effect, it was compensation for work performed in the past and work anticipated to be performed in the future. The trip was essentially a means by which Alberta Rode thanked and rewarded the Sorensens, for their loyalty and hard work for her business. The trip might have been viewed as a gift if given to relatives or friends who did not do work for her, but here the taxpayers were acting the same as employees, except that they were not paid. Mrs. Rode was acting the same as an appreciative employer would act toward her employees.

The taxpayers have not appealed this decision.

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

**— Domicile.** *Estate of Konstantine George, and Marion George vs. Wisconsin Department of Revenue* (Circuit Court for Dane County, December 23, 1997). This is a judicial review of a May 21, 1997 decision by the Wisconsin Tax Appeals Commission ("Commission"). See *Wisconsin Tax Bulletin* 103 (October 1997), page 13, for a summary of the Commission's decision. The issue is whether Konstantine George was a resident of Wisconsin for income tax purposes for the tax years 1987 through 1991.

Konstantine S. George ("the taxpayer") was born, raised, and educated in Greece. He came to the United States to pursue his medical profession as an orthopedic surgeon and married Marion George, an anesthesiologist. They moved to Wisconsin in 1961. They acquired a home in Elm Grove, and the taxpayer set up a surgery practice in West Allis.

In the early 1980s, the taxpayer developed heart trouble which ultimately forced his retirement from medical practice, gradually from 1986 until by 1988 he was performing only gratuitous services. He maintained his Wisconsin medical license until 1993 and never obtained a medical license. The taxpayer sold his ownership interest in his medical

practice in 1989 and in the building which housed it in 1991.

The taxpayer maintained majority ownership interests in other Wisconsin businesses during the review period, the last of which was sold in 1990. One corporation's annual reports listed a Wisconsin address for the taxpayer until 1991, and one listed a Wisconsin address until September 30, 1989. The taxpayer also maintained ownership of real estate in Milwaukee and Franklin.

The taxpayer purchased a Jeep in Milwaukee, which he registered in Wisconsin for six months in 1991 prior to shipping it to Greece in January 1991.

Apparently, the Georges had been looking into retiring to Florida since the early 1980s. In 1986, the taxpayer acquired financing to construct a condominium in Florida, and he occupied it in early 1987. Commencing in 1987, he received a Florida permanent resident homestead real estate tax exemption.

In February 1987, he registered to vote in Florida and voted in subsequent elections there, not in Wisconsin. He acquired a Florida driver's license in 1987, but he also retained his Wisconsin driver's license. He made charitable contributions to Florida entities in 1987, 1988, and 1989.

The taxpayer did not file annual Florida individual intangible tax returns during the review period, even though forms prepared by his accountant indicated that he had tax liabilities of \$89 for

1987, \$279 for 1988, \$26 for 1990, and \$100 for 1991. He filed the returns for years following 1991. During the review period, the taxpayer divided his time among Florida, Wisconsin, Greece, and Colorado. The time spent in Florida per year during the years from 1987 through 1991 ranged from 35% to 48% while time spent in Wisconsin ranged from 16% to 23%.

When in Wisconsin, the taxpayer stayed in the Elm Grove home which continued to be Marion George's residence and in which he continued to have a joint ownership interest with her. For the years 1987 through 1991, the Georges filed joint nonresident and part-year resident tax returns. The address listed for each return was the taxpayer's Florida address. For 1987, all of his W-2 and W-2P forms listed Wisconsin addresses. For 1988, a single W-2 form listed a Wisconsin address. For 1989, one W-2 form and one W-2P form listed Florida addresses.

The Circuit Court concluded that the Commission correctly determined that Konstantine George was a resident of Wisconsin for income tax purposes for the years 1987 through 1991.

The taxpayers have not appealed this decision. □

### **Farm loss limitation.**

*David G. and Patricia Stauffacher vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, August 31, 1995, and March 4, 1998). This matter was heard in two parts. In a decision dated

August 31, 1995, limited to the issue of whether the taxpayers were, during the period under review, engaged in a farming business for purposes of sec. 71.05(6)(a)10, Wis. Stats., the Tax Appeals Commission ("Commission") determined that the taxpayers were so engaged and therefore subject to the farming business loss limitations contained in the statute. See *Wisconsin Tax Bulletin 95* (January 1996), page 23, for a summary of that decision.

The issue before the Commission with respect to this decision is to what extent, if any, the activities and deductions at issue which resulted in the claimed losses can be properly characterized as other than part of the farming business and therefore not subject to the statutory loss limitations imposed by the department. The following additional findings of fact were presented at the hearing relating to this decision.

Prior to the period under review, and prior to moving into the building on the taxpayers' rural farm property, the operations of Golden Forest, including production of mushroom spawn and of the particulate logs, were conducted in a combination warehouse and office facility in the City of Madison. With the help of an entrepreneur named Alan Zech, Frank Vojtik helped develop the Golden Forest business plan and then served as its full-time operations manager, reporting to Dr. Leonard during the period under review.

During 1987 and 1988, Golden Forest made expenditures for

research at the University of Wisconsin and at the U.S. Forest Products Laboratory. These research expenditures were deducted on Golden Forest's income tax returns, and totaled \$133,136 for 1987 and \$21,414 for 1988. These expenditures were incidental to and in pursuit of Golden Forest's business of producing and marketing Shiitake mushrooms for profit.

With respect to the farm loss limitation issue, the Commission concluded that all of the activities and expenditures of Golden Forest Limited Partnership, which resulted in the losses claimed by the taxpayers and disallowed by the department, were incurred in the operation of a farming business. The taxpayers have not shown that any portion of the activities or expenditures of Golden Forest Limited Partnership may be characterized as something other than "incurred in the operation of a farming business" as that phrase is defined in sec. 71.05(6)(a)10, Wis. Stats.

The taxpayers have appealed this decision, as well as the decision dated August 31, 1995, to the Circuit Court. □

**Native Americans — reservation of another tribe.** *Joan La Rock vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, May 11, 1998). The issue in this case is whether an unmarried Indian member of one tribe who is living and working on the reservation of another tribe is subject to the Wisconsin income tax, when the reservation

is located within the state of Wisconsin.

The taxpayer is an enrolled member of the Menominee Indian Tribe of Wisconsin. She resides on land owned by the Oneida Tribe of Indians of Wisconsin ("the Oneida Tribe"). The land is part of the Oneida Indian Reservation, located in the state of Wisconsin. The taxpayer has resided on Oneida Reservation land for more than 10 years and has been employed by the Oneida Tribe for more than five years.

The taxpayer married an enrolled member of the Oneida Tribe, with whom she had four children, two of whom still reside with her at their residence on the Oneida Reservation. The children are enrolled members of the Oneida Tribe. The taxpayer was divorced in 1993.

The taxpayer timely filed a 1994 Wisconsin income tax return. On that return, she claimed a deduction of her federal adjusted gross income, based on her status as a member of a federally-recognized Indian tribe. As a result of this deduction, the taxpayer claimed a refund from the department.

The department disallowed the deduction and issued an assessment against the taxpayer. She filed a petition for redetermination, which was denied in a notice issued April 3, 1996. Thereafter she timely appealed to the Commission.

The Commission concluded that Wisconsin may impose an income tax on the taxpayer, an unmarried Indian who is an

enrolled member of the Menominee Indian Tribe but lives and works on the Oneida Indian Reservation, because she is not a member of the Oneida Tribe.

The taxpayer has not appealed this decision. □

## **Penalties — attempt to defeat or evade tax.**

*Thomas B. Shepard vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, April 10, 1998). The issue in this case is whether the department has met its burden of proof to impose a 50% penalty against the taxpayer on his underpayment of income tax in 1981, 1982, and 1984, and a 100% penalty against him for his underpayment of income tax in 1991, 1992, and 1993, on account of his failure each year to make a timely report with "intent to defeat or evade the income tax assessment required by law."

The taxpayer is a Milwaukee businessman who has been active for a number of years in the restaurant business. In September 1985, the department sent the taxpayer a letter, informing him that it was unable to locate his 1981 to 1984 Wisconsin individual income tax returns, and requesting that he file the returns if he had not already done so.

After a follow-up in January 1986, the department issued an estimated assessment against the taxpayer in March 1986, in the amount of \$13,747, for failure to file Wisconsin individual income tax returns for any of the years 1981 through 1984.

After a series of subsequent contacts regarding this matter, the department sent a letter to the taxpayer in January 1989, informing him that the department also had not received Wisconsin individual income tax returns from him for the years 1985 through 1987. In May 1989, the department issued an estimated assessment against the taxpayer for 1985, 1986, and 1987 taxes in the amount of \$12,985, for failure to file income tax returns for any of those years.

Again after numerous subsequent contacts, a Special Tax Agent of the department wrote to the taxpayer in July 1992, informing him that his Wisconsin income tax file had been referred to the Intelligence Section for special investigation of possible criminal violations of Wisconsin tax laws, for failure to file Wisconsin individual income tax returns for the years 1981 through 1991, inclusive.

In April 1995, the taxpayer was charged criminally in Milwaukee County Circuit Court, with three counts of failure to file Wisconsin individual income tax returns for 1991, 1992, and 1993. The taxpayer pled guilty and was found guilty by the Milwaukee County Circuit Court on the three counts. He was sentenced in November 1995.

On June 28, 1995, the taxpayer filed Wisconsin individual income tax returns with the department for the years 1981 through 1984, 1987 through 1989, and 1991 through 1994, inclusive. In February 1996, the department issued a Notice of

Amount Due in the amount of \$46,218, for tax years 1981, 1982, 1983, and 1984. The Notice included additional tax of \$13,370 for 1981, 1982, and 1984, as well as 50 per cent penalties for those years, of \$6,685. On the same date, the department issued a Notice of Amount Due in the amount of \$35,354, for tax years 1991, 1992, 1993, and 1994. The Notice included additional tax of \$12,616 for 1991, 1992, and 1993, as well as 100 per cent penalties for those years, of \$12,616.

The amounts of the six penalties are not in dispute. In April 1996, the taxpayer filed petitions for redetermination with the department, objecting to the 50 per cent and 100 per cent penalties. The department rejected the taxpayer's position on the penalty issues, and the taxpayer filed timely petitions for review with the Commission.

The taxpayer testified that he did not file state income tax returns in the 1991 to 1993 period because he was afraid that the department would close down or otherwise jeopardize his new business ventures in order to collect back taxes. He testified that he put some of his income during this period back into his business ventures. His income during this period was \$97,131 for 1991, \$245,974 for 1992, and \$101,291 for 1993.

The Commission concluded as follows:

A. The taxpayer's failure to file state income tax returns for

1981, 1982, 1983, and 1984 until June 1995, plus his disregard of a doomage assessment and other official notices, failure to appear at three tax hearings and respond to multiple letters and telephone calls from the department, and many unkept promises to make payments and file returns, fully support a determination that he intended to defeat the tax assessments required by law, subjecting him to the 50% penalty in former sec. 71.11(6), Wis. Stats., for underpayment of tax in 1981, 1982, and 1984.

B. The taxpayer's failure to file state income tax returns for 1991, 1992, and 1993 until June 1995, after he had pled guilty to three counts of "willfully" failing to file required tax reports for these years, plus his admissions that he was afraid to file returns because they would disclose his substantial income and energize the department to pursue his past non-filings and tax delinquencies, possibly disrupting his new business and preventing him from putting his money back into his business, fully support a determination that he intended to defeat the tax assessments required by law, subjecting him to the 100% penalty in sec. 71.83(1)(b)1, Wis. Stats., for his underpayment of tax in 1991, 1992, and 1993.

The taxpayer has not appealed this decision. □



## Refunds, claims for — statute of limitations.

*Wisconsin Department of Revenue vs. Kurt H. Van Engel* (Circuit Court for Milwaukee County, February 17, 1998). The department sought review of an April 24, 1997 decision of the Wisconsin Tax Appeals Commission (“Commission”), which allowed the taxpayer’s refund claims for 1988 and 1989 to be applied to assessments for 1990, 1991, and 1992, under the equitable recoupment doctrine.

In May 1988, the taxpayer, a Milwaukee businessman, was notified that he was the target of a federal criminal investigation. Although the charges against him were subsequently resolved through the federal legal system, he was, in 1991, indicted by the United States for federal tax crimes. After learning he was the target of a federal criminal investigation and on the advice of counsel, the taxpayer did not file returns for a number of years, including Wisconsin returns for 1988 through 1992. He believed that if he was to timely file his returns he would be confronted with a real hazard of self-incrimination. Although he did not file returns, he did make estimated payments to the State of Wisconsin for each of the years in question.

In March 1995, after the federal criminal proceedings had concluded, the taxpayer filed state income tax returns for 1988 through 1992 with the department. By the time he filed these returns, more than four years had lapsed since the unextended dates

when his 1988 and 1989 returns were due. On his 1988 tax return, the taxpayer claimed a refund of \$97,562, which he asked to be applied to his 1989 tax; for 1989, he claimed a refund of \$71,532 to be applied to his 1990 tax; for 1990, he claimed a refund of \$72,625 to be applied to his 1991 tax; for 1991, he claimed a refund of \$55,450 to be applied to his 1992 tax; and for 1992, he claimed a refund of \$62,890. As a result of adjustments allowed by the department to the taxpayer’s 1987 return, the refunds claimed have been reduced. Prior to the adjustment, the refunds for 1988 and 1989 together totaled \$169,094.

In August 1995, the department notified the taxpayer that the claims for refund for 1988 and 1989 were rejected, because the returns were filed more than four years after the original due date. Nothing in the record reflects that any communication included a notice that the taxpayer had a right to seek a redetermination of the department’s decision or to appeal to the Commission. In fact, the taxpayer did not seek a redetermination of the August 1995 letter.

Subsequently, the department determined deficiencies in the amount of \$18,890 for 1990, 1991, and 1992 and issued a notice of assessment in September 1995. The department denied the taxpayer’s petition for redetermination, and in July 1996 he sent to the Commission a petition for review covering 1988, 1989, 1990, 1991, and 1992. In that petition, he requested, since


“overpayment credits from 1988 and 1989 are in excess of the total tax, interest and penalty balance due . . .,” that the credits offset the balance due. On April 24, 1997, the Commission issued its decision which requires the department to offset a portion of the untimely refund claims filed by the taxpayer against the assessments for 1990 through 1992.

The department argued on appeal that the Commission acted in excess of its powers, i.e. outside of its jurisdiction, in applying the equitable recoupment doctrine. It asserted that the Commission has no authority to grant refund claims made more than four years after the “unextended date . . . on which the tax return was due.” The department further argued that even if there is jurisdiction to apply the equitable recoupment doctrine, it was improperly applied in this case because even though the taxpayer made estimated payments to cover his tax liability, he did not file timely any tax return for the years 1988 to 1992.

The Circuit Court concluded that the Commission properly determined the relative equities of the parties and properly applied the equitable recoupment doctrine. The Circuit Court agreed with the Commission’s finding that 1988 through 1992 is “the tax period involved,” and these years are part of the “same transaction” for tax purposes.

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

## HOMESTEAD CREDIT

 **Housing subject to property tax.** *Jimmy D. Bean vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, February 12, 1998). The issue in this case is whether a person who lives in property which is exempt from property taxes is eligible for homestead credit.

Jimmy D. Bean (“the claimant”) has resided for a number of years as a renter in an apartment located at 1033 West Atkinson Avenue, Milwaukee. For 1992, 1993, 1994, and 1995, he claimed homestead credits. These credits, which were initially granted, were later disallowed, because the claimant lived in tax-exempt housing for all 12 months in each of these years. The property in question is exempt from property taxes; its owner is a religious order.


A person who lives in property which is exempt from property taxes is not eligible for homestead credit unless the owner of the property makes payments in lieu of taxes under sec. 66.40(22), Wis. Stats. No payments in lieu of taxes are made on the property at issue.

The Commission concluded that the claimant was not eligible for homestead credits for 1992, 1993, 1994, and 1995.

The claimant has not appealed this decision.

**CAUTION:** This is a small claims decision of the Wisconsin

Tax Appeals Commission and may not be used as a precedent. This decision is provided for informational purposes only. □

 **Property taxes accrued — co-ownership.** *Calvin B. and Sharon M. Gates vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, February 5, 1998). The issue in this case is whether the full amount of property taxes may be claimed for computing homestead credit, when the homestead is co-owned with others.

Sharon M. Gates (“the claimant”) moved to Franksville, Wisconsin, from Michigan in June 1993. She purchased her mother’s portion of a duplex - this portion being 43 per cent of the property.

The property in question needed repairs, so the claimant sought to borrow money to pay these expenses. She was advised by a local banking officer to add the names of her two children to her deed, because her income was too low to qualify for a home equity loan. She quit-claimed her interest in the property to “Sharon M. Gates, Judith K. Zywicki & James A. Behr, Jr., as tenants in common with William R. & Rita L. Cieszynski, Scott W. Cieszynski & Bonnie J. Cieszynski” in a document recorded in November 1994.

In February 1996, the claimant filed for a homestead credit, claiming a property tax payment of \$1,479.40. To substantiate her claim, she submitted a copy of her property tax bill, which indicated that the “Net Property


Tax Before Lottery” on the duplex was \$3,236.96. A lottery credit of \$106.02 was then subtracted, leaving a tax of \$3,130.94, before ineligible special charges. The claimant’s 43 per cent share was \$1,346.30.

The Commission concluded that the correct amount of property tax which may be claimed is one-third of \$1,346.30, or \$448.76. The one-third limitation is derived from sec. 71.52(7), Wis. Stats. Since the claimant’s two children were not members of her household, only one-third of the tax she paid on the property may be claimed.

Wisconsin tax rules also permit the claimant to list as a “rent” payment 25 per cent of the remaining two-thirds of the property tax she paid. This “rent” would amount to approximately \$225.00. Adding these two amounts yields a total less than the amount required for a person with the claimant’s income to qualify for the credit. As a result, no homestead credit is allowed.

The claimant has not appealed this decision.

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

 **Property taxes accrued — more than one unit.** *Glendora Miller vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, February 12, 1998). The issue in this case is whether the claimant

is entitled to additional homestead credit for 1995.

Glendora Miller (“the claimant”) is the owner of a duplex located on North 28th Street in Milwaukee. She resides in one part of the duplex; her daughter resides in the other part of the duplex.


The claimant applied for homestead credit for 1995. She reported \$12,912 in income and \$720.95 in property taxes. After the department calculated her homestead credit as \$68, the claimant objected that the credit was too low. The department recalculated the credit based on new information about her income (she received rent income in 1995) and new information about her living situation (the property is a duplex and she resides in one part of the duplex). This calculation showed that the claimant was not entitled to any credit for 1995.

The Commission concluded that even though the claimant pays all the property taxes on her duplex, under sec. 71.52(7), Wis. Stats., she is entitled to claim only that portion of the property tax payment (one-half) which corresponds to **her** residence. In addition, the evidence shows that the claimant inadvertently failed to report any rent payments from the other half of the duplex for 1995. Hence, the department’s determination that the claimant was entitled to \$68 in homestead credits was actually more generous than the law allowed. She does not qualify for additional homestead credit for 1995.

The claimant has not appealed this decision.

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

## CORPORATION FRANCHISE AND INCOME TAXES

 **Deductions — state franchise or income taxes.** *Delco Electronics Corporation vs. Wisconsin Department of Revenue* (Circuit Court for Dane County, March 20, 1998). The taxpayer appealed the Wisconsin Tax Appeals Commission’s decision that the Michigan single business tax was not deductible by a corporation from its gross income in calculating its liability under the Wisconsin franchise tax. See *Wisconsin Tax Bulletin* 103 (October 1997), page 15, for a summary of the Commission’s decision.

The taxpayer, Delco Electronics Corporation (“Delco”), is a subsidiary of General Motors Corporation (“GM”) and is engaged in the business of manufacturing automotive electronics. It has plants in Wisconsin, Michigan, and Indiana and engages in business in those and other states. During the years under review, 1986 through 1989, Delco incurred a liability for the Michigan single business tax (MSBT), a form of value added tax (VAT). Delco’s Michigan tax was included in the returns of its

parent, GM, as provided by Michigan law. For the period under review, Delco claimed its estimated MSBT as a deduction on its federal corporate income tax returns.

Delco timely filed Wisconsin franchise tax returns, claiming in them a deduction for the MSBT equal to the amounts claimed in its federal returns. The department disallowed the deduction for the MSBT.

For 1986, sec. 71.04(3), Wis. Stats., permitted businesses to deduct from its tax base certain other taxes paid by the business except that “[t]axes imposed by this or any other state or the District of Columbia on or measured by all or a portion of net income, gross income, gross receipts, or capital stock are not deductible.”


Commencing with tax year 1987, the legislature “federalized” the state corporate tax scheme so that, in general, the corporate franchise and income tax calculation would track the federal corporate income tax scheme. However, Wisconsin adopted several substantial modifications to the federal scheme. Among these was sec. 71.26(3)(g), Wis. Stats., which stated that “Section 164(a)(3) [of the Internal Revenue Code] is modified so that state taxes and taxes of the District of Columbia on or measured by all or a portion of net income, gross income, gross receipts or capital stock are not deductible.”

The Circuit Court concluded that because the Michigan single

business tax is manifestly and substantially different from income and gross receipts taxes, it cannot be on or measured by all or a portion of income or gross receipts in the sense intended by the Wisconsin statutes. Therefore, the Court reversed the Commission's decision.

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

□

 **Manufacturer's sales tax credit.** *Wausau Paper Mills Company vs. Wisconsin Department of Revenue* (Circuit Court for Marathon County, December 2, 1997). The taxpayer appealed the decision of the Wisconsin Tax Appeals Commission upholding a ruling of the department. The department had ruled that the electricity used in the taxpayer's waste treatment plant is not "consumed in manufacturing." Therefore, the sales and use tax paid by the taxpayer on the electricity consumed in the operation of its wastewater treatment plant is not eligible for the manufacturing sales tax credit against the Wisconsin franchise tax. For a summary of the Commission's decision, see *Wisconsin Tax Bulletin* 102 (July 1997), page 15.

The taxpayer is a Wisconsin corporation engaged in the business of the manufacturing of fine printing and writing papers in Wausau, Wisconsin. In its manufacturing process, the taxpayer uses water from the Wisconsin River and the Village of Brokaw which is used as a mixing and transportation me-

dium for the raw materials as well as other manufacturing uses.

In accordance with federal and state environmental standards, the taxpayer must treat the water used in the manufacturing process in its wastewater treatment plant before discharge into the Wisconsin River. The water is removed throughout the manufacturing process, collected by a series of U-drains and closed sewers, and then conveyed from the paper production areas to a sump pump at the head end of a wastewater treatment plant. This plant is adjacent to, but separate and distinct from, the rest of the taxpayer's manufacturing facilities. The use of water is crucial to the paper making process and hence the wastewater treatment plant is essential to the taxpayer's business.

The taxpayer consumes electricity in the operation of the wastewater treatment plant and pays sales and use tax on it under ch. 77, Wis. Stats. The taxpayer contends that the electricity used in its wastewater treatment plant qualifies for the manufacturer's sales tax credit under sec. 71.28(3)(b), Wis. Stats. However, after a field audit, the department disallowed those credits.

The Circuit Court found that sec. 71.28(3), Wis. Stats., is clear and unambiguous. The legislature adopted the popular understanding of "manufacturing" in determining eligibility for the tax credit. The significant contributive factor test is consistent with that traditional and popular understanding of the term.


The argument that the wastewater treatment plant is now legally required and hence a part of the manufacturing process would expand the traditional and popular understanding of what constitutes a manufacturing process. While it is a reasonable legal interpretation, it is not the best interpretation consistent with the legislative intent.

The principal and primary utility of the wastewater treatment plant is not as a significant contributive factor in the production of the end product of the manufacturing process. Instead, its principal and primary utility is to treat the wastewater after it has made its contribution to that process. The treated water does not make a contribution to the manufacturing process but instead is legally discharged into the Wisconsin River.

The Circuit Court concluded that the fuel and electricity expended in the wastewater treatment plant is not "consumed in manufacturing" and hence is not entitled to the tax credit of sec. 71.28(3), Wis. Stats.

The taxpayer has not appealed this decision.

□

 **Refunds — claims after field audit refund.** *National Presto Industries, Inc., vs. Wisconsin Department of Revenue* (Court of Appeals, District III, December 23, 1997). The Department of Revenue appealed an order reversing a Wisconsin Tax Appeals Commission's ruling dismissing for lack of jurisdiction National Presto Industries, Inc.'s petition for

review. The department raises two issues: whether (1) National Presto's petition for redetermination was timely under sec. 71.88, Wis. Stats., and (2) a taxpayer can file a refund claim under sec. 71.75(5), Wis. Stats., within two years of a field audit that resulted in a refund. See *Wisconsin Tax Bulletin* 101 (April 1997), page 14, for a summary of the Circuit Court's decision.

National Presto was the subject of an income/franchise tax audit by the department culminating in a document referred to as a notice of field action, dated November 4, 1992, and covering the years 1985, 1986, and 1987. National Presto did not file a petition for redetermination with respect to the notice, but accepted a refund check reflecting a 1987 overpayment minus a 1985 and 1986 underpayment. Approximately 22 months later, on or about September 13, 1994, National Presto filed with the department a letter and attached 1985 tax form 4X, claiming a refund for 1985.

By letter dated November 10, 1994, the department notified National Presto that its refund claim was barred by sec. 71.75(4), Wis. Stats., and was rejected. The letter was sent by ordinary mail and included no explanation of the taxpayer's appeal rights. National Presto did not understand the letter to constitute a statutory denial of its claim and that prompt action was required to appeal it.

Seven months later, on June 13, 1995, National Presto wrote the department objecting to the conclusions reached in the de-

partment's November 10, 1994, letter. Through July 17, 1995, the department and National Presto exchanged letters which essentially claimed the other was incorrect in its interpretation of Wisconsin tax law. National Presto ultimately filed a petition with the Tax Appeals Commission.

The Commission granted the department's motion to dismiss, concluding that National Presto failed to file its petition for redetermination within 60 days from the rejection of its refund claim and that its original claim for refund was not timely filed. The Circuit Court reversed the Commission and remanded to the Commission for a decision on the merits.


National Presto contended that the time limits under sec. 71.88(1), Wis. Stats., were not triggered because the department failed to include in its denial of National Presto's claim the notice of appellate rights, as required by sec. 227.48, Wis. Stats. National Presto also argued that equitable estoppel prevented the department from applying the sec. 71.88(1), Wis. Stats., time limits because its failure to include notice of appellate rights is inconsistent with its publications and practices.

The Court of Appeals concluded that sec. 227.48, Wis. Stats., does not apply; no specific statute or regulation requires that the department notify the claimant of appellate rights under the circumstances presented here; and a rational basis exists to deny National Presto equitable relief.

Therefore, the Court of Appeals reversed the Circuit Court order without reaching the broader second issue.

The taxpayer has not appealed this decision. □

## SALES AND USE TAXES

 **Construction — exempt entities.** *Precision Metals, Inc., vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, January 7 and May 13, 1998). The issue decided in the partial summary judgement of January 7, 1998, is whether the taxpayer acted as a contractor or subcontractor engaged in real property construction activities for purposes of sec. 77.51(2), Wis. Stats., and is thus liable for use tax on its purchase of raw materials.

The taxpayer's primary business is that of custom manufacturing and selling hollow metal frame products. The taxpayer submitted three separate bids to the City of Milwaukee Housing Authority ("Housing Authority") to supply the prime door and hardware at each of three housing projects. The taxpayer also submitted three separate bids to install the prime door and hardware at each of the three housing projects. A bid bond was also submitted by the taxpayer for each of the six bids submitted to the Housing Authority.

The Housing Authority acted as a general contractor. The taxpayer was awarded all six bids. To fulfill each of the supply contracts, the taxpayer purchased

raw materials and then used these materials to manufacture property that it delivered to various housing projects at times determined by the Housing Authority. To fulfill each of the installation contracts, the taxpayer installed the property it previously manufactured and delivered to the housing projects at the direction of the Housing Authority.

The taxpayer presented manufacturer's exemption certificates and paid no sales tax on any of the raw materials it purchased and used in the manufacture of the property supplied to the Housing Authority. The department assessed use tax, interest, and penalties on the cost of raw materials used by the taxpayer to manufacture property that it supplied to the Housing Authority.

Section 77.51(2), Wis. Stats., provides that "Contractors' and 'subcontractors' are the consumers of tangible personal property used by them in real property construction activities and the sales and use tax applies to the sale of tangible personal property to them. . . . A contractor engaged primarily in real property construction activities may use resale certificates only with respect to purchases of property which the contractor has sound reason to believe the contractor will sell to customers for whom the contractor will not perform real property construction activities involving the use of such property."

The taxpayer claimed that it acted as a manufacturer when it submitted bids to the Housing

Authority, and its bids on the installation contracts were separate and distinct from its bids on the supply contracts. The taxpayer asserts that the Housing Authority was the general contractor and the consumer of the property supplied.

The Commission concluded that the taxpayer is liable for use tax under sec. 77.51(2), Wis. Stats., because it acted as a contractor or subcontractor engaged in real property construction activities with regard to the six contracts with the Housing Authority.

The taxpayer and the department reached an agreement with respect to remaining issues, and both parties signed a stipulation in May 1998. The Commission affirmed the stipulation on May 13, 1998. The case is closed. □

**Motor vehicles and trailers — payment of tax before registration.** *Albert Berchanskiy vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 12, 1998). The issue in this case is whether the department correctly assessed the taxpayer sales tax on an amount higher than the taxpayer's claimed purchase price of an automobile.

The taxpayer purchased a 1987 Honda Accord from a private party seller. Upon titling and registering the vehicle with the Wisconsin Department of Transportation, the taxpayer listed a purchase price of \$1,200. The taxpayer paid Wisconsin sales tax based on that amount.


The department contacted the seller, requesting information about the selling price of the automobile. The seller responded that the automobile had been sold for \$3,300 to the taxpayer. The department assessed the taxpayer the additional sales tax, interest, and penalty on the difference.

Upon reflection, the seller acknowledged that his recollection of a cash payment of \$3,300 was not accurate, but he insisted that he would not have sold the vehicle for less than \$3,000. The seller had purchased the vehicle for \$4,338 less than one year before selling the vehicle to the taxpayer. The seller listed a selling price of \$3,200 in the newspaper advertisement. The taxpayer did not provide any proof of his purchase price of the vehicle.

The Commission modified the determination of the department to reflect a sale price of \$3,000. The Commission acknowledges that the sale may have been for less than \$3,000; however, it has no basis for picking a lesser figure based on the evidence presented.

The taxpayer has not appealed this decision.

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

 **Motor vehicles — rebates.** *David and Carole Schenker vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 11, 1998). The issues in this case are:

- A. Whether the definition of “gross receipts” set forth in sec. 77.52(4)(c)1, Wis. Stats., includes amounts received by a retailer from a manufacturer in the form of a manufacturer’s rebate or employee discount.
- B. Whether amounts received by a retailer from a manufacturer in the form of a manufacturer’s rebate or employee discount are excluded from the definition of “gross receipts” by sec. 77.51(4)(b)1, Wis. Stats., as cash or term discounts.

The taxpayers purchased two vehicles on separate occasions from Burtness Chevrolet, Inc. (“the dealer”). On each purchase, the dealer computed the amount due as follows: cash price of auto, less trade-in allowance, plus applicable sales tax (on trade difference), plus license and title fees, less manufacturer’s rebate and employee discount. The taxpayer paid the amount computed by the dealer for the automobiles.


The taxpayers filed a Buyer’s Claim for Refund of Wisconsin state and county sales taxes. The refund claimed was for sales tax paid on the portion of the purchase price of the two motor vehicles represented by the manufacturer’s rebates and employee discounts. The department denied the taxpayers’ claim for refund.

The Commission concluded that the department was correct in denying the taxpayers’ claim for refund:

- A. The definition of “gross receipts” for purposes of the sales tax includes manufacturer’s rebates and employee discounts where the manufacturer of the tangible personal property sold compensates the retailer for the amount of the rebate and discount allowed (sec. 77.51(4)(a) and (c)1, Wis. Stats.).
- B. Manufacturer’s rebates and employee discounts are not cash or term discounts excluded from the definition of gross receipts where the manufacturer of the tangible personal property sold compensates the retailer for the amount of the rebate and discount allowed.

The taxpayers have appealed this decision to the Circuit Court.

**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. □

 **Officer liability.** *Frank A. Calarco vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 12, 1998). The issue in this case is whether the taxpayer is a responsible person who is liable for the delinquent sales taxes of Dimicelli’s Charthouse, Inc. (“the corporation”) under sec. 77.60(9), Wis. Stats.

The taxpayer was hired by the corporation during the last week of May 1993 to manage the restaurant portion of its operation. As of May 28, 1993, the taxpayer had sole check-writing authority for the corporation. Until he resigned, the taxpayer signed checks on behalf of the corporation.

The taxpayer resigned from the corporation no later than August 29, 1993. The corporation continued to operate; however, after he resigned, the taxpayer was not involved in any of the corporation’s affairs. The taxpayer signed all of the corporation’s checks during August 1993. When the taxpayer resigned, he reasonably believed that there would be operating funds available to pay the corporation’s August 1993 sales tax liability at the time the payment for that month was due.

The taxpayer did not manage the bar operations of the corporation and was only tangentially involved in the bar operations. Ultimate decisions concerning restaurant and bar operations were made by one of the corporation’s owners, Frank Dimicelli, including decisions concerning which creditors and vendors were to be paid. During the summer of 1993, Dimicelli died.


The Commission concluded that the taxpayer was not a responsible person under sec. 77.60(9), Wis. Stats., and was not personally liable for the unpaid sales taxes.



The taxpayer can be held liable for the sales tax obligations of the corporation if the following elements are met: 1) the taxpayer had **authority** to direct payment of the corporation's taxes, 2) the taxpayer had a **duty** to pay the corporation's taxes, and 3) the taxpayer **intentionally breached his duty** to pay the corporation's taxes.

The taxpayer's last day of employment was no later than August 29, 1993, and the sales tax payment at issue was due on September 20, 1993. The taxpayer no longer had the **authority** to pay these taxes at the time that the sales taxes were due to be paid. A person who does not have authority to pay sales taxes when the sales taxes are due to be paid cannot be held liable for their non-payment under sec. 77.60(9), Wis. Stats.

The department has not appealed this decision. ☐

 **Time-share property.** *Vacation Owner's Association, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 3, 1998 and April 2, 1998). The issues in the case are:

- A. Whether the taxpayer is liable for the sales tax on the proceeds from sales of time-share property sold, under sec. 77.52(2)(a)1, Wis. Stats.
- B. Whether the taxpayer is liable for sales tax on its receipts from members in the form of conveyance and maintenance fees associated with time-share units sold on or after August 9, 1989, under sec. 77.51(4)(c)6, Wis. Stats.
- C. Whether the taxpayer is liable for sales tax on its receipts from members in the form of conveyance and maintenance fees associated with time-share units sold prior to August 9, 1989, under sec. 77.52(2)(a)1, Wis. Stats.

The taxpayer is a Wisconsin non-stock corporation with its principal place of business in Oconomowoc, Wisconsin. The taxpayer was in the business of managing certain time-share property within a complex. The taxpayer also sold a small number of time-share units.

During the period under review, the taxpayer did not collect or pay to the department any sales or use tax on its: 1) sale of time-share property, 2) collection of conveyance fees, or 3) collection of maintenance fees. The time-share property managed and sold consisted of time-share units that are commonly referred to as flexible use time-share units.

Use of a member's time-share property was contingent on that member's making a timely reservation. Members were designated a "unit type" rather than a specific unit number. Members were issued the right to use the time-share property during a "season" rather than a specific week or any other date. A conveyance fee was paid by members to the taxpayer, who placed these fees in a fund that was to be used to pay expenses associated with time-share property managed by the taxpayer.

Members paid maintenance fees on an annual basis to be used for: 1) operation, repair, maintenance, and improvement of time-share property; 2) administration of the taxpayer's vacation plan; and 3) reimbursing the taxpayer's expenses to manage the time-share property. A member could not reserve or occupy a time-share unit if the member was not current on the member's maintenance fee obligation.

The Commission concluded as follows:

- A. The taxpayer is liable for sales tax on the proceeds from the sale of time-share property sold during the period at issue.
- B. The taxpayer is liable for sales tax on the amounts it received from members in the form of conveyance fees and maintenance fees associated with time-share units that were sold on or after August 9, 1989.
- C. The taxpayer is not liable for sales tax on the amounts it received from members in the form of maintenance fees associated with time-share units that were sold before August 9, 1989.

The payment of a one-time conveyance fee is part and parcel of the sales price of the time-share property. Therefore, this fee is taxable under sec. 77.52(2)(a)1, Wis. Stats. In addition, all conveyance fees at issue fall within the definition of "gross receipts" found in sec. 77.51(4)(c)6, Wis. Stats., because

such charges are associated with the time-share property that is taxable under sec. 77.52(2)(a)1, Wis. Stats.


Maintenance fees are “gross receipts” because they are charges associated with time-share property as provided in sec. 77.51(4)(c)6, Wis. Stats. Section 77.52(2)(a)1, Wis. Stats., was amended effective August 9, 1989, to apply to the sale of flexible use time-share property. Time-share property sold before August 9, 1989 is not time-share property that is taxable under sec. 77.52(2)(a)1, Wis. Stats. Maintenance fees charged for time-share property that was sold prior to August 9, 1989 do not fall within the definition of gross receipts in sec. 77.51(4)(c)6, Wis. Stats.

The taxpayer has not appealed the decision. The department did not appeal the decision but has adopted a position of nonacquiescence regarding the application of sec. 77.54(18), Wis. Stats., to maintenance fees charged in connection with time-share units sold prior to August 9, 1989.

The department maintains that modification on or after August 8, 1989, of any written contractual document or agreement “by which the seller is unconditionally obligated to provide the service or property for the amount fixed under the contract” within the meaning of sec. 77.54(18), Wis. Stats., subjects the seller of such services and property to sales taxation as of the date of modification of the contractual document or agreement. The department also maintains that, with respect to

time-share units sold prior to August 9, 1989, sec. 77.54(18), Wis. Stats., subjects the payer of any maintenance fees for periods on or after August 9, 1989, to use tax even if such a contractual document or agreement is not modified. □

## WITHHOLDING OF TAX

 **Officer liability.** *Kathy J. Keimig vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, February 6, 1998). The issue in this case is whether the taxpayer is a responsible person under sec 71.83(1)(b)2, Wis. Stats.

The taxpayer owned all of the stock of Family Care Center, SC. (“the company”) and was a member of the company’s board of directors. During the period under review, the taxpayer was president and vice-president of the company. The taxpayer was also employed by the company as a physician, and was a signatory on the company’s checking and savings accounts. At all times, the taxpayer had the authority to hire and fire employees of the company.

Prior to the period under review, the taxpayer hired an office manager to handle the business finances of the company. After the taxpayer discovered that the office manager had not paid certain state and federal tax obligations (including state withholding tax payments), the taxpayer took charge of paying the company’s accounts payable. The taxpayer continued to favor


other creditors over the company’s obligation to remit withholding tax payments.

The Commission concluded the taxpayer was a responsible person under sec. 71.83(1)(b)2, Wis. Stats., and was liable for a penalty equal to the company’s unpaid withholding taxes, plus interest. The taxpayer had the **authority** and the **duty** to pay the corporation’s withholding taxes, and the taxpayer **intentionally breached that duty**.

During the period under review, the taxpayer was the company’s sole shareholder and served as president and vice-president. Therefore, as a matter of law, the taxpayer had *authority* to pay the company’s taxes. The taxpayer’s *duty* to pay the amounts owed to the department arose as soon as she became aware of the company’s withholding delinquency. Once a person with authority to pay taxes learns that amounts are owing, that person has a *duty* to make sure such taxes are paid. The taxpayer concedes that after she became aware of the company’s tax delinquency, she caused the use of the company funds to pay creditors while the amounts owed to the department went unpaid. This is sufficient to show that the taxpayer *intentionally breached her duty* to pay taxes owed to the department.

The taxpayer has not appealed this decision. □

## SALES AND USE TAXES, AND WITHHOLDING OF TAXES

 **Officer liability.** *James M. Callen vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, February 25, 1998). The issue in this case is whether the taxpayer is a responsible person who is liable for the delinquent withholding and sales taxes of Packline USA, Inc. (“the corporation”) under sec. 71.83(1)(b)2, Wis. Stats. and sec. 77.60(9), Wis. Stats.

The taxpayer became a 5% stockholder of the corporation in May 1994. He also became a member of the corporation’s Board of Directors and received a contract to serve as the sole advertising agent of the corporation for a commission based on sales. When the corporation experienced financial problems in 1994, the taxpayer invested an additional \$135,000 in the corporation in the form of a loan to the principal stockholder. When the corporation continued to face financial problems, the taxpayer agreed to assume the position of president of the corporation and to cosign all checks with the corporation’s principal stockholder. The taxpayer was also made a member of a 3-person executive committee to make corporate decisions. The taxpayer became aware of the corporation’s delinquencies in withholding and sales and use taxes at this time (July 1994).

The taxpayer served as president until September 1994, when he resigned. During the time that he

served as president, the corporation continued to operate, but no withholding or sales taxes were remitted to the department. During that time the taxpayer cosigned checks to employees and other creditors drawn on both the payroll and non-payroll checking accounts. The corporation went out of business at the end of 1994.


The Commission concluded that the taxpayer is a responsible person under sec. 71.83(1)(b)2, Wis. Stats. and sec. 77.60(9), Wis. Stats., and that he is personally liable for the unpaid withholding and sales taxes up to the time that he resigned as president in September 1994. The taxpayer had the **authority** and the **duty** to pay the corporation’s withholding and sales taxes that were due prior to his resignation, and the taxpayer **intentionally breached that duty**. He is not personally liable, however, for the taxes which became due after he resigned.

The taxpayer served as the president and had **authority** to direct corporate decisions and to control what payments were made to creditors from July 1994 through September 1994, which included sales and withholding tax delinquencies from earlier in 1994. There is no evidence of **authority** after September 1994 when the taxpayer resigned as president. The taxpayer *can* be held personally liable for any subsequent estimated assessments issued by the department against the corporation due to the taxpayer’s failure to see to the timely filing of actual returns

while he was president and *did* have **authority**.

The taxpayer knew of the corporation’s tax delinquencies. Knowing that such tax problems existed, the taxpayer was **duty-bound** to address them upon assuming the presidency, even though he believed that the major stockholder had assumed responsibility for the unpaid taxes which accrued while the major stockholder was president. The taxpayer did not see to the payment of those taxes or the current taxes as he was **duty-bound** to do. The taxpayer paid at least \$35,000 to creditors other than the department while he was president and cosigning corporate checks. This establishes his **intentional breach of duty**.

The taxpayer has not appealed this decision. The department has not appealed the decision but has adopted a position of nonacquiescence in regard to the part of the decision that concludes that personal liability does not attach until a failure to pay occurs, i.e. when the return is due. The effect of this action is that the decision regarding this issue is not binding in cases other than this case. □

 **Officer liability.** *Kenneth Higgs and Richard F. Wagner vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 11, 1998). The issue in this case is whether the taxpayers are responsible persons who are liable for the delinquent withholding and sales taxes of the Fourth Street Corporation (“the corporation”) under sec. 71.83(1)(b)2, Wis.

Stats. and sec. 77.60(9), Wis. Stats.


The Milwaukee Turners Foundation, Inc. ("the Turners") is a tax exempt, non-profit organization prominent in Milwaukee for many years. In 1969, the Turners created the corporation as a for-profit corporation to operate a restaurant and bar in a historic building owned by the Turners. In 1991, the Turners board recruited, nominated, and elected the taxpayers to serve as president and vice-president and on the corporation's board without compensation. Both taxpayers accepted their positions with the corporation with the belief that they were volunteers in an honorary capacity and with the understanding that they would not be involved in the day-to-day business operations of the corporation.

Taxpayer Wagner joined taxpayer Higgs in setting up a special tax account to pay back taxes. He personally wrote numerous checks on that tax account. He admitted he knew about actions taken by taxpayer Higgs to address the corporation's adversities. Taxpayer Higgs was the principal officer of the corporation, with full check-signing authority on both its regular checking account and its tax account.

The Commission concluded that the taxpayers are both responsible persons under secs. 71.83(1)(b)2 and 77.60(9), Wis. Stats., and that they are personally liable for the unpaid withholding and sales taxes. The officers of a corporation have a

legal **duty** to see that the corporation's taxes are timely paid. Both taxpayers had **authority** to pay taxes, understanding of the obligation to pay taxes, and **intentionally breached their duty** to pay the taxes due. The fact the taxpayers were volunteers does not excuse them from personal liability.

The taxpayers have not appealed this decision. □

 **Officer liability.** *Scott W. Wolf vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 3, 1998). The issue in this case is whether the taxpayer is a responsible person who is liable for the delinquent sales and withholding taxes of Truck Equipment & Service Co, Inc. ("the corporation") under sec. 71.83(1)(b)2, Wis. Stats. and sec. 77.60(9), Wis. Stats.

The taxpayer was employed by the corporation from June 1994 through May 1995 as its general manager and vice-president. The taxpayer was hired by the president, who resides primarily in Florida. In June 1994, the taxpayer was added to the signature card on the corporation's checking account. The taxpayer became aware of the corporation's delinquency in withholding and sales and use taxes in June 1994, upon which the taxpayer called the department to negotiate payment arrangements. An installment agreement, which included staying current on all withholding and sales and use taxes accruing after the date of the agreement, was made between the department and the

taxpayer, who was the corporation's primary contact. The corporation did not comply with the terms of the agreement.

From June 1994 until March 1995, the taxpayer signed checks on behalf of the corporation, paying the corporation's creditors and employees. The taxpayer signed some, if not all, of the corporation's withholding tax deposit reports. The taxpayer also signed some of the corporation's sales and use tax returns. After the corporation's checking account was closed in March 1995, the taxpayer paid the employees in cash. The taxpayer also negotiated with many of the corporation's creditors in an effort to settle debts owed by the corporation.

The Commission concluded 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 corporation's unpaid withholding and sales 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 served as the vice-president and had **authority** to make financial decisions for the corporation. The taxpayer was a signatory on the corporation's checking account, signed the corporation's checks, and negotiated payment arrangements with the department as well as other creditors.

When the taxpayer learned that the corporation had an unpaid tax obligation, he had a **duty** to see that it was paid. The taxpayer learned of the tax delinquencies no later than June 1994. From that point, as a person with **authority** to direct the payment of taxes, the taxpayer had a **duty** to make sure that they were paid. The taxpayer favored other creditors and suppliers over the corporation's obligations to the department. This establishes that the taxpayer **intentionally breached his duty** to direct payment of taxes to the department.

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:

### Corporation Franchise and Income Taxes

1. Basis in Tax-Option (S) Corporation Stock When Losses in Excess of Basis Were Claimed in Closed Years (p. 27)
2. Wisconsin Tax Treatment of Limited Service Health Organizations (LSHOs) (p. 28)
3. Years in Which a Wisconsin Net Business Loss Carryforward May Be Used (p. 29)

### Sales and Use Taxes

4. Boat Launching Fees (p. 31)
5. Common and Contract Carrier Exemption (p. 31)
6. House Watching Services (p. 37)
7. Iced Coffee (p. 38)

### CORPORATION FRANCHISE AND INCOME TAXES

#### **1** Basis in Tax-Option (S) Corporation Stock When Losses in Excess of Basis Were Claimed in Closed Years

**Statutes:** Sections 71.33 and 71.365, Wis. Stats. (1995-96)

**Background:** Under secs. 1366 and 1367 of the Internal Revenue Code (IRC), a shareholder's federal basis in stock of an S corporation is increased by income items and decreased by expense and loss items which flow through from the S corporation to the shareholder. A shareholder's basis in stock and loans to the corporation may not go below zero. Any expense or loss item which is not deductible by the shareholder due to the basis limitation may be carried over indefinitely by the shareholder and allowed as a deduction when the shareholder has sufficient basis to deduct the expense or loss item.

Section 71.365, Wis. Stats. (1995-96), provides that the adjusted basis of a shareholder in the stock and indebtedness of a tax-option (S) corporation shall be determined in the manner prescribed by the Internal Revenue Code for a shareholder of an S corporation, except that the nature and amount of items affecting that basis shall be determined under ch. 71, Wis.

Stats. Section 71.33, Wis. Stats. (1995-96), states that it is the intent of subch. V of ch. 71 and other subchapters relating to the treatment of tax-option (S) corporations and their shareholders to prevent the double inclusion or omission of any item of income, deduction, or basis.

**Facts and Question:** The shareholder of a tax-option (S) corporation had a stock basis of \$75,000 and loan basis of \$25,000 on January 1, 1993. The corporation incurred a \$150,000 ordinary loss for the 1993 calendar year which was passed through and deducted by the shareholder on his 1993 Wisconsin individual income tax return. Thus, the shareholder deducted \$50,000 more than the total of his stock and loan bases. This error was discovered after the 1993 year was closed to adjustments by the statutes of limitations provided in sec. 71.77, Wis. Stats. (1995-96). The shareholder contributed an additional \$50,000 to the corporation during 1994.

What are the shareholder's stock and loan bases for 1994 after he made the additional capital contribution of \$50,000 but before taking into account any items of income, loss, or deduction passed through from the tax-option (S) corporation in 1994?

**Answer:** The shareholder's 1994 stock and loan bases are both zero before taking into account any tax-option (S) corporation items of income, loss, or deduction passed through for 1994. The department may invoke sec. 71.33, Wis. Stats. (1995-96), to require the shareholder to reduce

the \$50,000 basis from additional capital contributions made during 1994 by the \$50,000 loss claimed in excess of basis in 1993. Applying excess losses used in closed years to reduce stock or loan basis in open years prevents the omission of any item of basis. □

## 2 Wisconsin Tax Treatment of Limited Service Health Organizations (LSHOs)

**Statutes:** Sections 71.01(2), (3), and (4), Wis. Stats. (1985-86), secs. 71.26(1)(a), 71.43(2), and 71.45, Wis. Stats. (1989-90), and secs. 71.26(1)(a), 71.43(2), and 71.45, Wis. Stats. (1995-96)

**Background:** Beginning with the calendar year 1972 and thereafter, insurance companies organized under Wisconsin law, with certain exceptions, became subject to the Wisconsin franchise or income tax. The exceptions included income of:

- mutual insurers that was exempt from federal income taxation pursuant to sec. 501(c)(15) of the Internal Revenue Code,
- bona fide cooperatives operated without pecuniary profit to any shareholder or member, and
- other corporations or associations of individuals not organized or conducted for pecuniary profit.

However, for 1986 and prior taxable years, the income of societies, organizations, or corporations organized under ch. 613,

Wis. Stats., operating by virtue of sec. 148.03 (plans of sickness care), 447.13 (dental care), 449.15 (prepaid optometric service plans), or 613.80 (hospital services), Wis. Stats., was not exempt from taxation. These corporations were subject to tax upon their Wisconsin net income determined by applying the provisions of the Internal Revenue Code applicable to mutual insurance companies, other than life insurance companies or mutual marine insurance companies, having total receipts over \$500,000. The amount computed was subject to any applicable additions or subtractions provided in sec. 71.01(4)(a), Wis. Stats. (1985-86). [Section 71.01(2), Wis. Stats. (1985-86).]

Beginning with the 1987 taxable year, the federal Tax Reform Act of 1986 revised the federal income taxation of mutual insurance companies and eliminated the distinction, for federal tax purposes, between stock and mutual insurance companies.

Effective for the taxable year 1987 and thereafter, 1989 Wisconsin Act 31 retroactively eliminated the requirement that insurers organized under ch. 613, Wis. Stats., operating by virtue of sec. 148.03, 447.13, 449.15, or 613.80, Wis. Stats., must determine their Wisconsin net income by applying the provisions of the Internal Revenue Code applicable to mutual insurance companies having total receipts over \$500,000. [Sections 71.43(2) and 71.45(1) and (2)(a)(intro.), Wis. Stats. (1989-90).]

For taxable years beginning on or after January 1, 1996, 1995 Wisconsin Act 27 repealed the exemption available for income from a cooperative sickness care association organized under sec. 185.981, Wis. Stats., or a service insurance corporation organized under ch. 613, Wis. Stats., that is derived from a health maintenance organization (HMO), as defined in sec. 609.01(2), Wis. Stats., or a limited service health organization (LSHO), as defined in sec. 609.01(3), Wis. Stats. The net income subject to Wisconsin tax is the amount that would be determined if the entity were subject to federal income tax and as if that income were that of an insurance company. [Sections 71.26(1)(a) and (2)(a) and 71.45(1), (2)(a)(intro.), and (5), Wis. Stats. (1995-96).]

An LSHO, as defined in sec. 609.01(3), Wis. Stats. (1995-96), means a health care plan offered by an organization established under ch. 185, 611, 613, or 614, Wis. Stats., or issued a certificate of authority under ch. 618, Wis. Stats., that makes available to its enrolled participants, for consideration other than predetermined periodic fixed payments, either comprehensive health care services or a limited range of health care services performed by providers selected by the organization.

**Question 1:** Are all LSHOs, as defined under sec. 609.01(3), Wis. Stats, and organized under ch. 613, Wis. Stats., exempt from Wisconsin franchise and income tax for all taxable years begin-

ning after 1986 and before January 1, 1996?

**Answer 1:** Yes. All LSHOs, as defined under sec. 609.01(3), Wis. Stats, and organized under ch. 613, Wis. Stats., are exempt from Wisconsin franchise and income tax for all taxable years beginning after 1986 and before January 1, 1996.

**Question 2:** Does the exemption from Wisconsin franchise and income tax apply even if the LSHO is subject to federal income taxation?

**Answer 2:** Yes. The Wisconsin exemption applies even if the LSHO is subject to federal income tax. The Wisconsin statutes for that period of time did not pick up the federal provisions under which the federal income tax is imposed.

**Question 3:** If an LSHO was exempt from tax but had filed Wisconsin franchise or income tax returns for taxable years after 1986 and before January 1, 1996, are net business losses reported on the Wisconsin returns for prior years allowable as an offset against 1996 net income?

**Answer 3:** No. Since LSHOs were not subject to Wisconsin franchise or income taxation for taxable years beginning after 1986 and before January 1, 1996, they cannot carry forward losses incurred in years for which no tax was imposed. □

### 3 Years in Which a Wisconsin Net Business Loss Carryforward May Be Used

**Statutes:** Sections 71.26, 71.75, 71.76, and 71.77, Wis. Stats. (1995-96)

**Background:** Section 71.26(4), Wis. Stats., provides that a corporation may offset against its Wisconsin net business income any Wisconsin net business loss sustained in any of the next 15 preceding taxable years. The corporation had to be subject to Wisconsin franchise or income taxation in the taxable year in which the loss was sustained. The loss may be carried forward to the extent not offset by other items of Wisconsin income in the loss year and by Wisconsin net income of any year between the loss year and the taxable year for which an offset is claimed.

**Facts X Example 1:** Corporation A computed a Wisconsin net business loss of \$300,000 on its Wisconsin franchise or income tax return for the 1995 calendar year.

For 1996, Corporation A has Wisconsin net income of \$250,000 before subtracting its 1995 Wisconsin net business loss carryforward. Corporation A computes a \$4,750 manufacturer's sales tax credit for 1996. In addition, it has a \$125,000 manufacturer's sales tax credit carryforward available for 1996. Corporation A's manufacturer's sales tax credit carryforward includes a \$15,000 credit from its 1981 taxable year, which will expire if not used in 1996. Under



sec. Tax 2.11(3)(b), Wis. Adm. Code (February 1990 Register), Corporation A must first use its 1996 manufacturer's sales tax credit to offset its 1996 Wisconsin tax before it may claim an unused credit from a prior year.

**Question 1:** May Corporation A choose not to deduct any part of its 1995 Wisconsin net business loss carryforward on its 1996 Wisconsin return so that it may claim its manufacturer's sales tax credit?

**Answer 1:** Yes, Corporation A may choose not to deduct any part of its 1995 Wisconsin net business loss carryforward on its 1996 Wisconsin return. Corporation A may claim the net business loss carryforward in any year between the loss year and the next 15 succeeding years.

**Facts X Example 2:** On December 31, 1988, Corporation P liquidated its wholly owned subsidiary, Corporation S, pursuant to sec. 332 of the Internal Revenue Code (IRC). At the time of liquidation, Corporation S had a federal net operating loss carryover under IRC sec. 172 of \$150,000, and a Wisconsin net business loss carryforward under sec. 71.26(4), Wis. Stats., of \$2,000,000.

For federal income tax purposes, Corporation P filed its 1988 tax return utilizing Corporation S's net operating loss carryover in full. Upon examination of the return by the Internal Revenue Service (IRS), Corporation P was required to limit Corporation S's net operating loss deduction to zero for 1988 due to IRC sec. 381

limitations. However, Corporation P was allowed to deduct in full Corporation S's net operating loss carryover in its 1989 federal return pursuant to IRC sec. 381.

Corporation P did not claim any deduction for Corporation S's Wisconsin net business loss carryforward on its 1988 Wisconsin franchise tax return, nor did it claim any deduction related to Corporation S's Wisconsin net business loss carryforward on any subsequent Wisconsin franchise return.

Other IRS audit adjustments were also made to Corporation P's federal 1989 tax return which impact Corporation P's Wisconsin 1989 franchise tax liability. Corporation P is obligated by sec. 71.76, Wis. Stats., to file an amended Wisconsin return to report the 1989 IRS adjustments.

**Question 2a:** On its amended 1989 Wisconsin return, may Corporation P claim a refund for the Wisconsin net business loss carryforward from Corporation S?

**Answer 2a:** Yes, Corporation P may claim a refund for the Wisconsin net business loss carryforward from Corporation S on its amended 1989 Wisconsin return. Section 71.77(7)(b), Wis. Stats., allows the department to issue a refund if a taxpayer reports federal audit adjustments within 90 days after the IRS's final determination or within 4 years after the department discovers the federal adjustments.

**Question 2b:** May Corporation P utilize the entire \$2,000,000

Wisconsin net business loss carryforward on its 1989 return or is its deduction limited to the \$150,000 federal net operating loss?

**Answer 2b:** Corporation P may utilize the entire \$2,000,000 Wisconsin net business loss carryforward on its 1989 return, provided the full amount would be allowed under IRC secs. 381 and 382. A corporation computes its net income for Wisconsin purposes under sec. 71.26(2), Wis. Stats., with the modifications provided in sec. 71.26(3), Wis. Stats. One of the modifications, sec. 71.36(3)(n), provides that IRC secs. 381, 382, and 383, relating to carryovers in certain corporate acquisitions, are modified so that they apply to losses under sec. 71.26(4), Wis. Stats., and Wisconsin credits instead of to federal credits and federal net operating losses. □

## 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*.

## 4 Boat Launching Fees

**Statutes:** Sections 77.52(2)(a)2 and 77.54(10), Wis. Stats. (1995-96)

**Wis. Adm. Code:** Section Tax 11.65(4)(a), Wis. Adm. Code (June 1991 Register)

**Background:** Section 77.52(2)(a)2, Wis. Stats. (1995-96), imposes a sales or use tax on admissions to amusement, athletic, entertainment, or recreational events or places. "Admissions" includes the furnishing for dues, fees, or other consideration, the privilege of access to clubs or the privilege of having access to or the use of amusement, entertainment, athletic, or recreational devices or facilities.

Section 77.54(10), Wis. Stats. (1995-96), allows an exemption for certain admission fees and stickers for state parks and state forest campgrounds under sec. 27.01(7) to (11), Wis. Stats. (1995-96). An admission sticker that qualifies for this exemption (e.g., a Wisconsin state park admission sticker that allows a vehicle access to the state parks) is exempt from sales tax.

### Boat Launching Fees Paid

#### **Facts 1:**

- Company A owns and maintains a boat launching area.
- The boat launching area consists of a ramp between

two piers. A vehicle with a boat and trailer can back into the launching area, allowing the boat entry to the lake.

- A \$5 fee is charged by Company A for use of its launching area.

**Question 1:** Is the fee paid to Company A for launching a boat subject to Wisconsin sales and use tax?

**Answer 1:** Yes. Launching a boat is subject to sales and use tax under sec. 77.52(2)(a)2, Wis. Stats. (1995-96). However, if the boat is used for a business purpose (e.g., commercial fishing), the \$5 fee is not subject to sales and use tax.

### Boat Launching Fees Paid to a Governmental Unit

#### **Facts 2:**

- Same as in Facts 1, except that the owner of the launching area is a Wisconsin governmental unit (e.g., state of Wisconsin, or a city, county, village, or township).

**Question 2:** Is the fee paid to the governmental unit for launching a boat subject to Wisconsin sales and use tax?

**Answer 2:** Yes, unless the fee paid to the governmental unit qualifies for exemption under sec. 77.54(10), Wis. Stats. (1995-96).

### Boat Launching Donations Paid

#### **Facts 3:**

- Same facts as in Facts 1, except that instead of a fee being charged, there is a donation box at the launching site.
- A sign is posted next to the box, soliciting donations and thanking the boater, but a donation is not required to use the launching area.
- No price is listed.

**Question 3:** Is the donation for launching a boat subject to Wisconsin sales and use tax?

**Answer 3:** No. Donations are not subject to sales and use tax (sec. Tax 11.65(4)(a), Wis. Adm. Code (June 1991 Register)). The donation must be totally voluntary, and no restriction may be placed on persons not making the donation. □

## 5 Common and Contract Carrier Exemption

**Statutes:** Sections 77.54(5)(b), 194.01(1), (2), and (4), and 340.01(4), (31), (34), (53), (57), (71), and (73), Wis. Stats. (1995-96)

**Wis. Adm. Code:** Section Tax 11.16, Wis. Adm. Code (June 1991 Register)

**I. Background:** This tax release explains the requirements that must be met for sales of trucks, trailers,

etc., to common or contract carriers to qualify for the sales and use tax exemption in sec. 77.54(5)(b), Wis. Stats. (1995-96).

Section 77.54(5)(b), Wis. Stats. (1995-96), provides a sales and use tax exemption for the gross receipts from the sale of and the storage, use, or other consumption of:

“Motor trucks, truck tractors, road tractors, buses, trailers and semitrailers, and accessories, attachments, parts, supplies and materials therefor, sold to common or contract carriers who use such motor trucks, truck tractors, road tractors, buses, trailers and semitrailers exclusively as common or contract carriers, including the urban mass transportation of passengers as defined in s. 71.38.”

## II. Requirements for Exemption:

### A. General

Three requirements must be met to qualify for the sales and use tax exemption in sec. 77.54(5)(b), Wis. Stats. (1995-96).

1. Item must be **sold to a common or contract carrier**.
2. Item sold must be a **motor truck, truck tractor,**

**road tractor, bus, trailer, or semitrailer, or accessory, attachment, part, supply, or material for a motor truck, truck tractor, road tractor, bus, trailer, or semitrailer.**

3. Item sold must be **used** by the common or contract carrier **exclusively as a common or contract carrier**.

Additional information about each of the three requirements follows.

### B. Requirement 1: Item must be sold to a common or contract carrier.

For purposes of the exemption in sec. 77.54(5)(b), Wis. Stats. (1995-96), “**common carrier**” has the same meaning as “common motor carrier” in sec. 194.01(1), Wis. Stats. (1995-96). “**Contract carrier**” has the same meaning as “contract motor carrier” in sec. 194.01(2), Wis. Stats. (1995-96). See definitions below.

“**Common motor carrier**” is defined in sec. 194.01(1), Wis. Stats. (1995-96), as “any person who holds himself or herself out to the public as willing to undertake for hire to transport passengers by motor vehicle between fixed end points or over a regular route upon the public highways or property over regular or irregular routes upon the public high-

ways. The transportation of passengers in taxicab service or in commuter car pool or van pool vehicles with a passenger-carrying capacity of less than 16 persons or in a school bus under s. 120.13 (27) shall not be construed as being that of a common motor carrier.” (underlining supplied)

“**Contract motor carrier**” is defined in sec. 194.01(2), Wis. Stats. (1995-96), as “any person engaged in the transportation by motor vehicle over a regular or irregular route upon the public highways of property for hire”. (underlining supplied)

“**For hire**” as used in sec. 194.01(1) and (2), is defined in sec. 194.01(4), Wis. Stats. (1995-96). It means “for compensation, and includes compensation obtained by a motor carrier indirectly, by subtraction from the purchase price or addition to the selling price of property transported, where the purchase or sale thereof is not a bona fide purchase or sale. Any person who pretends to purchase property to be transported by such person or who purchases property immediately prior to and sells it immediately after the transportation thereof shall be deemed to be transporting the property for hire and not a bona fide purchaser or seller thereof. The rental of a motor vehicle to a person for transportation of the person’s

property which rental directly or indirectly includes the services of a driver shall be deemed to be transportation for hire and not private carriage. This subsection does not apply to motor vehicle operations which are conducted merely as an incident to or in furtherance of any business or industrial activity.”

**C. Requirement 2: Item sold must be a motor truck, truck tractor, road tractor, bus, trailer, or semitrailer, or accessory, attachment, part, supply, or material for a motor truck, truck tractor, road tractor, bus, trailer, or semitrailer.**

**1. Definitions of Motor Truck, etc.**

For purposes of the exemption in sec. 77.54(5)(b), Wis. Stats. (1995-96), the following definitions apply:

**“Bus”** means a motor vehicle designed primarily for the transportation of persons rather than property and having a passenger-carrying capacity of 16 or more persons, including the operator. Passenger-carrying capacity shall be determined by dividing by 20 the total seating space measured in inches. (Same as definition of “motor bus” in

sec. 340.01(31), Wis. Stats. (1995-96).)

**“Motor truck”** means every motor vehicle designed, used or maintained primarily for the transportation of property. (sec. 340.01(34), Wis. Stats. (1995-96))

**“Road tractor”** means a motor vehicle designed and used for drawing other vehicles and not so constructed as to carry any load thereon either independently or any part of the weight of the vehicle or load so drawn. (sec. 340.01(53), Wis. Stats. (1995-96))

**“Semitrailer”** means a vehicle of the trailer type so designed and used in conjunction with a motor vehicle that some part of its own weight and that of its own load rests upon or is carried by another vehicle, but does not include a mobile home. A vehicle used with a ready-mix motor truck to spread the load is considered a semitrailer. (sec. 340.01(57), Wis. Stats. (1995-96))

**“Trailer”** means a vehicle without motive power designed for carrying property or passengers wholly on its own structure and for being drawn by a motor

vehicle, but does not include a mobile home. (sec. 340.01(71), Wis. Stats. (1995-96))

**“Truck tractor”** means a motor vehicle designed and used primarily for drawing other vehicles and not so constructed as to carry a load other than a part of the weight of the vehicle and load so drawn. (sec. 340.01(73), Wis. Stats. (1995-96))

(**Note:** Motor truck, road tractor, and truck tractor do not include an automobile as defined in sec. 340.01(4), Wis. Stats. (1995-96), unless the automobile is registered as a truck.)

**2. Accessories, attachments, parts, supplies, and materials for motor trucks, etc.**

Accessories, attachments, parts, supplies, and materials for motor trucks, etc., includes items that are assigned to and carried on an exempt vehicle.

Examples include dollies, pianoboards, ladders, walkboards, tire chains, fire extinguishers, flares, bug deflectors, engine block heaters, defroster fans, auxiliary heaters and cooling units and their fuel, radios, flag kits in-

cluding flags and reflectors, and items designed to be used with a vehicle which protect or secure the vehicle's load including tape, fitted tarpaulins, tarpaulin straps, furniture pads and covers, load holding chains, logistic straps, and shoring beams.

The exemption in sec. 77.54(5)(b), Wis. Stats. (1995-96), for accessories, etc., does not include corrugated boxes, containers, and related materials that are transferred to customers in conjunction with the selling, performing, or furnishing of a moving service.

Equipment acquired by a carrier for the repair, service, or maintenance of its exempt vehicles is also not exempt, including repair tools, welding torches, battery chargers, and grinding discs.

**D. Requirement 3: Item sold must be used by the common or contract carrier exclusively as a common or contract carrier.**

“Exclusively,” as used in sec. 77.54(5)(b), Wis. Stats. (1995-96), means that “the motor trucks, truck tractors, road tractors, buses, trailers and semitrailers are used solely as common or contract carriers to the exclusion of all other uses, except that

the sales and use tax exemption for this tangible personal property will not be invalidated by an infrequent and sporadic use other than as a common or contract carrier.” (Section Tax 11.16(1)(am), Wis. Adm. Code (June 1991 Register))

### III. Examples

The following examples illustrate how the exemption provided in sec. 77.54(5)(b), Wis. Stats. (1995-96), applies to purchases of motor trucks, etc.

**A. Company engaged in business as a common or contract carrier only**

**Example 1:**

*Facts:*

- Company A holds itself out to the public as willing to transport property for compensation upon the public highways by advertising in the yellow pages and by other advertising (i.e., Company A is a common carrier).
- Company A is not engaged in any business other than as a common carrier.

*Tax Treatment:*

Company A qualifies for exemption under sec. 77.54(5)(b), Wis. Stats. (1995-96), on its purchases of motor trucks, etc., which

it uses exclusively as a common carrier.

**Example 2:**

*Facts:*

- Company B enters into an agreement with Company C to transport Company C's products for compensation upon the public highways to various locations, as determined by Company C. Company B only hauls for persons it contracts with and does not hold itself out to the public as willing to transport persons or property for hire (i.e., Company B is a contract carrier).
- Company B is not engaged in any business other than as a contract carrier.

*Tax Treatment:*

Company B qualifies for exemption under sec. 77.54(5)(b), Wis. Stats. (1995-96), on its purchases of motor trucks, etc., which it uses exclusively as a contract carrier.

**B. Company engaged in business as a common or contract carrier and has non-carrier business activities**

**Example 3:***Facts:*

- Company F is engaged in business as a manufacturer and seller of widgets and as a common carrier.
- Company F's primary business is the manufacture and sale of widgets.
- Company F has 10 motor trucks; 9 of which it uses exclusively in private carriage to transport its own widgets, and one which it uses exclusively in for-hire transportation of property.
- Company F's common carrier operations account for approximately 5% of its business activities.
- For its common carrier operations, Company F meets the definition of "common carrier" (i.e., Company F holds itself out to the public as willing to transport property for hire over the public highways by advertising in the yellow pages and by other advertising).

*Tax Treatment:*

Company F must pay sales or use tax on the 9 motor trucks it uses to transport its own widgets. It qualifies for exemption under sec. 77.54(5)(b), Wis. Stats. (1995-96), on its purchase of

the one motor truck which it uses exclusively as a common carrier.

**Example 4:***Facts:*

- Company G is engaged in business as a manufacturer and seller of widgets and as a contract carrier.
- Company G's primary business is the manufacture and sale of widgets.
- Company G has 10 motor trucks; 9 of which it uses exclusively in private carriage to transport its own widgets, and one which it uses exclusively as a contract carrier.
- Company G's contract carrier operations account for approximately 5% of its business activities.
- For its contract carrier operations, Company G enters into an agreement with Company H to transport Company H's products to various locations, as determined by Company H.

*Tax Treatment:*

Company G must pay sales or use tax on the 9 motor trucks it uses to transport its own widgets. It qualifies for exemption under sec. 77.54(5)(b), Wis. Stats. (1995-96), on its purchase of

the one motor truck which it uses exclusively as a contract carrier.

**Example 5:***Facts:*

Company D meets the definition of "common carrier" (i.e., Company D holds itself out to the public as willing to transport property for hire over the public highways by advertising in the yellow pages and by other advertising).

- Company D does not hold itself out to the public as being engaged in business as a retailer of gravel.
- Company D enters into an agreement with Company E to transport gravel upon the public highways to Company E's construction site.
- Company D purchases gravel from a gravel pit operator who immediately loads the gravel into Company D's motor trucks.
- Company D transports the gravel to Company E's construction site and immediately transfers possession of the gravel to Company E by dumping it in a pile.
- Company D bills Company E for the gravel plus

a charge for transportation.

- Company D makes its profit by hauling. Company D's hauling operations are not conducted as an incident to or in furtherance of any business or industrial activity.
- Company D is not engaged in any business other than that described above, and does not use its motor trucks other than as described above.

*Tax Treatment:*

Company D qualifies for exemption under sec. 77.54(5)(b), Wis. Stats. (1995-96), on its purchases of motor trucks.

Company D meets the definition of "common motor carrier" in sec. 194.01(1), Wis. Stats. (1995-96), because it holds itself out to the public as willing to transport property (gravel) upon the public highways "for hire." The transportation performed by Company D is "for hire," as defined in sec. 194.01(4), Wis. Stats. (1995-96), because: (1) Company D purchases property immediately prior to transporting it and sells it immediately after transporting it; and (2) Company D's motor vehicle operations are not conducted merely as an incident to or in furtherance

of any business or industrial activity.

Company D qualifies for exemption under sec. 77.54(5)(b), Wis. Stats. (1995-96), on its purchases of motor trucks because it uses the motor trucks exclusively as a common carrier.

**Example 6:**

*Facts:*

- Company A is engaged in business as a landscaper.
- Company A also holds itself out to the public as a seller of fill dirt and topsoil as part of its landscaping business.
- Company A enters into an agreement with customers to sell fill dirt and topsoil and deliver the fill dirt and topsoil to the customers.
- Company A purchases fill dirt and topsoil from various suppliers and immediately loads the fill dirt and topsoil into Company A's trucks.
- Company A transports the fill dirt and topsoil to the customers' locations and transfers possession of the fill dirt and topsoil to the customers, by dumping it in piles.
- Company A bills the customers for the fill dirt

and topsoil, plus a charge for transportation.

- Company A makes its profit from buying and selling fill dirt and topsoil, from transporting fill dirt and topsoil, and from landscaping activities.

*Tax Treatment:*

Company A must pay sales or use tax on the trucks it uses to transport fill dirt and topsoil to its customers. Company A's transportation of fill dirt and topsoil is not "for hire," as defined in sec. 194.01(4), Wis. Stats. (1995-96), because the transportation is conducted in furtherance of its business of landscaping and buying and selling fill dirt and topsoil.

**C. Company engaged in a non-carrier business only**

**Example 7:**

*Facts:*

- Company I is engaged in business as a manufacturer and seller of widgets.
- Company I has 10 motor trucks, all of which it uses to transport the widgets it manufactures to its customers (i.e., private carriage).



### *Tax Treatment:*

Company I must pay sales or use tax on the 10 motor trucks which it uses in private carriage.

## **D. Non-exclusive use**

### **Example 8:**

#### *Facts:*

- Company J is engaged in business as a manufacturer and seller of widgets and as a common carrier.
- For its common carrier operations, Company J meets the definition of “common carrier” (i.e., Company J holds itself out to the public as willing to transport property for hire over the public highways by advertising in the yellow pages and by other advertising).
- Company J has one motor truck which it uses 40% in private carriage to transport its own widgets and 60% as a common carrier.

#### *Tax Treatment:*

Company J does not qualify for exemption under sec. 77.54(5)(b), Wis. Stats. (1995-96), on its purchase of the motor truck because it is not used exclusively as a common or contract carrier.

## **E. Garbage and snow hauling**

### **Example 9:**

#### *Facts:*

- Company M hires Hauler N to transport its garbage to Landfill L.
- The garbage has no value.
- Landfill L charges Company M an amount per ton for dumping.
- Hauler N uses its motor truck exclusively to haul garbage for Company M, as described above.

#### *Tax Treatment:*

Hauler N does not qualify for exemption under sec. 77.54(5)(b), Wis. Stats. (1995-96), on its purchase of the motor truck because it is not used in hauling property of others. The garbage, because it has no value, is not considered “property” for purposes of the definition of “common motor carrier” in sec. 194.01(1), Wis. Stats. (1995-96), or the definition of “contract motor carrier” in sec. 194.01(2), Wis. Stats. (1995-96).

### **Example 10:**

#### *Facts:*

- Municipality O has excess snow which has been plowed from streets. Mu-

nicipality O does not have room to store the snow.

- Municipality O hires Hauler P to haul excess snow to an empty lot where it will melt.

#### *Tax Treatment:*

Hauler P does not qualify for exemption under sec. 77.54(5)(b), Wis. Stats. (1995-96), on its purchase of the motor truck because it is not used in hauling property of others. The snow, because it has no value, is not considered “property” for purposes of the definition of “common motor carrier” in sec. 194.01(1), Wis. Stats. (1995-96), or the definition of “contract motor carrier” in sec. 194.01(2), Wis. Stats. (1995-96). □

## **6 House Watching Services**

**Statutes:** Section 77.52(2)(a)10, Wis. Stats. (1995-96)

**Background:** Section 77.52(2)(a)10, Wis. Stats. (1995-96), provides that the gross receipts from the repair, service, alteration, fitting, cleaning, painting, coating, towing, inspection, and maintenance of all items of tangible personal property are subject to Wisconsin sales and use tax unless, at the time of such repair, service, alteration, fitting, cleaning, painting, coating, towing, inspection, or maintenance, a sale of such type of tangible personal

property would have been exempt from sales and use tax. The repair, service, etc., to real property is not a service subject to Wisconsin sales and use tax.

Section 77.52(2)(a)10, Wis. Stats. (1995-96), also provides that certain items retain their character as tangible personal property for purposes of repair, service, alteration, fitting, cleaning, painting, coating, towing, inspection, and maintenance, regardless of the extent to which they are fastened to, connected with, or built into real property. Some of these items are furnaces, bathroom fixtures, and burglar and fire alarm systems (list not all inclusive).

#### **Facts:**

Company A is in the business of watching houses while the owners are gone for extended periods of time (e.g., owners taking a two-week vacation or owners leaving their home to go to Florida for the winter).

- Watching the house includes the following services:
  - a) Checking the furnace to see that it is providing heat;
  - b) Testing fire alarm systems;
  - c) Watering plants;
  - d) Flushing toilets and running water in sinks; and
  - e) Inspecting and testing the refrigerator, stove, and air conditioner.

**Question:** Is the charge for house watching subject to Wisconsin sales tax?

**Answer:** Yes. Since the services performed by Company A are services, inspection, and/or maintenance to items that are tangible personal property or retain their character as tangible personal property, the services are subject to Wisconsin sales tax under sec. 77.52(2)(a)10, Wis. Stats. (1995-96). □

## **7 Iced Coffee**

**Statutes:** Sections 77.54(20) and 97.29(1)(i), Wis. Stats. (1995-96)

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

**Background:** Section 77.54(20)(intro.), Wis. Stats. (1995-96), provides: “Except as provided in par. (c), there are exempt from the taxes imposed by this subchapter the gross receipts from the sales of, and the storage, use or other consumption of, food, food products and beverages for human consumption.”

Section 77.54(20)(a)11, Wis. Stats. (1995-96), provides that “food,” “food products,” and “beverages” include coffee, coffee substitutes, tea, and cocoa.

Section 77.54(20)(b)4, Wis. Stats. (1995-96), provides, in part, that “food,” “food products,” and “beverages” do not include soda water beverages as

defined in sec. 97.29(1)(i), Wis. Stats.

Section 77.54(20)(c)1, Wis. Stats. (1995-96), provides, in part, that sales of meals, food, food products, and beverages sold for direct consumption on the premises are taxable.

Section 97.29(1)(i), Wis. Stats. (1995-96), provides that “soda water beverage” means all beverages commonly known as soft drinks or soda water, whether carbonated, uncarbonated, sweetened, or flavored.

**Facts:** Company A is a grocery store which sells flavored coffee drinks (“iced coffee”) for consumption off the grocery store premises. The iced coffee is in bottles and cans and contains coffee, milk, sugar, and other ingredients, including flavorings. The iced coffee comes in various flavors, including mocha, frapuccino, hazelnut, french vanilla, and dark roasted. Some of the iced coffee is sold at room temperature and some is refrigerated.

**Question:** Do Company A’s sales of iced coffee qualify for exemption under sec. 77.54(20), Wis. Stats. (1995-96), as sales of “beverages” for human consumption?

**Answer:** Yes. Section 77.54(20)(a)11, Wis. Stats. (1995-96), provides that “beverages” includes coffee. Iced coffee is considered coffee. □



## 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

Wisconsin treatment of S corporations and their QSSSs  
W9819005 (p. 39)

### Sales and Use Taxes

Single-owner entities –  
“check-the-box”  
W9812004 (p. 41)

### ✱ W9819005

February 17, 1998

**Type Tax:** Corporation Franchise and Income

**Issue:** Wisconsin treatment of S corporations and their QSSSs

**Statutes:** Sections 71.09, 71.29, and 71.34(2), Wis. Stats. (1995-96); secs. 71.34(1), 71.34(1g)(L), and 71.365(4)(a), Wis. Stats. (1995-96), as amended by 1997 Wisconsin Act 27; and sec. 71.365(7), Wis. Stats., as created by 1997 Wisconsin Act 27

This letter is in response to your request for a private letter ruling regarding the Wisconsin franchise or income tax treatment of federal S corporations and their qualified subchapter S subsidiaries (QSSSs).

### Facts

Prior to January 1, 1997, DEF Company (DEF), and subsidiaries, was a C corporation owned by two domestic trusts. DEF was the common parent of a consolidated group filing a consolidated federal income tax return. Members of the group filed separate state tax returns in those states in which they conducted business. DEF did not participate in the filing of these returns and was only registered to do business in

eleven states, none of which was Wisconsin.

On November 26, 1996, GHI Corporation (GHI) was incorporated in a twelfth state (not Wisconsin). As a result of a series of transactions, GHI, wholly owned by two U.S. trusts, became the parent of DEF. GHI is not registered to do business in Wisconsin.

Effective January 1, 1997, the shareholders (the trusts) of GHI, elected federal S corporation status for GHI. Concurrently, each subsidiary (DEF and its subsidiaries) elected to be treated as a qualified subchapter S subsidiary (QSSS).

Pursuant to Internal Revenue Code (IRC) section 1361(b)(3)(A), the QSSSs are treated as “divisions” of the parent S corporation (GHI). The assets, liabilities, items of income, deduction, and credit are deemed that of the parent. Accordingly, the ultimate taxpayer for federal purposes, except for certain items which are taxable at the corporate level, are the shareholders (the trusts) of the parent S corporation.

For purposes of remitting 1997 estimated tax, payments were made to the states by or on behalf of the shareholders (the trusts). No withholding has been remitted on behalf of the trusts’ income. Where applicable, corp-

orate level estimated taxes were paid by the specific entity.

### Request

Based on the preceding fact pattern, you requested a ruling determining the treatment of federal S corporations and their QSSSs for Wisconsin tax purposes. You have requested responses to the following questions:

1. Will Wisconsin adopt the federal provisions of IRC section 1362 with respect to:
  - a) The existence of a consolidated S corporation group?
  - b) The ultimate taxpayer as the shareholders of the parent S corporation and not the corporate entity?
2. Is it required for the upper tier parent corporations, DEF and GHI, to register to do business with Wisconsin?
3. Were the procedures used in remitting estimated taxes acceptable to Wisconsin? May you continue with this procedure in future years or does Wisconsin recommend an alternative approach?
4. If the federal treatment of S corporations is not adopted, will nexus with Wisconsin be deemed upon DEF or GHI because of the ownership of its operating subsidiary?

### Ruling

For taxable years beginning on or after January 1, 1997, the federal treatment of S corporations and their QSSSs applies for Wisconsin franchise or income tax purposes, with certain exceptions. Wisconsin's tax-option (S) corporation law is mandatory for those corporations that have an election in effect under subchapter S of the Internal Revenue Code for a taxable year and have not elected out of Wisconsin tax-option status under sec. 71.365(4)(a), Wis. Stats. If an S corporation has a QSSS, neither the corporation nor its QSSS may elect out of Wisconsin tax-option (S) corporation status.

The QSSSs are disregarded as separate corporations for Wisconsin franchise or income tax purposes, and their assets, liabilities, and items of income, deduction, and credit are treated as those of the parent tax-option (S) corporation. If Wisconsin has jurisdiction to impose franchise or income taxes on a QSSS, Wisconsin has jurisdiction to tax the parent tax-option (S) corporation.

The answers to your specific questions are as follows:

1. Generally, the provisions of IRC sections 1361 and 1362, relating to the eligibility to be an S corporation, the treatment of certain wholly owned subsidiaries, and the election, revocation, and termination of S corporation status, apply for Wisconsin purposes. However, Wisconsin does not permit 80%-or-more-owned

C corporation subsidiaries to file a consolidated return with their affiliated C corporations.

With certain exceptions, the shareholders of the parent S corporation are the ultimate taxpayers. The shareholders are subject to income tax based on their proportionate share of the S corporation's net income. The parent S corporation may be subject to the franchise tax measured by certain federal, state, and municipal bond interest and to the temporary recycling surcharge.

2. The Department of Revenue is unable to issue a ruling with respect to the requirements for the upper tier parent corporations, DEF and GHI, to register to do business with Wisconsin. The laws relating to the registration of non-Wisconsin corporations are administered by the Corporation Section, Division of Corporate and Consumer Services, Wisconsin Department of Financial Institutions, P.O. Box 7846, Madison, WI 53707-7846 (telephone (608) 261-9555).
3. Since the parent S corporation may be subject to franchise tax and to the temporary recycling surcharge, it must make estimated tax and surcharge installment payments if the total amount due for 1998 will be \$500 or more.

The shareholders must make estimated tax installment payments based on their

shares of the corporation's net income.

4. Not applicable.

### Analysis

For Wisconsin franchise and income tax purposes, "tax-option (S) corporation" means a corporation which is treated as an S corporation under subchapter S of the Internal Revenue Code and has not elected out of tax-option corporation status under sec. 71.365(4)(a), Wis. Stats., for the current taxable year. Sec. 71.34(2), Wis. Stats. (1995-96).

A federal S corporation that has a QSSS may not make an election under sec. 71.365(4)(a), Wis. Stats., not to be a tax-option (S) corporation for Wisconsin purposes. Sec. 71.365(4)(a), Wis. Stats., as amended by 1997 Wisconsin Act 27.

If a tax-option (S) corporation elects to treat a subsidiary as a QSSS for federal purposes, that election also applies for Wisconsin franchise and income tax purposes. If Wisconsin has jurisdiction to impose tax on the QSSS, Wisconsin has jurisdiction to impose tax on the tax-option (S) corporation. Sec. 71.365(7), Wis. Stats., as created by 1997 Wisconsin Act 27.

"Net income or loss" of a tax-option (S) corporation means net income or loss computed under the Internal Revenue Code, with certain exceptions. Sec. 71.34(1), Wis. Stats., as amended by 1997 Wisconsin Act 27. For taxable years that begin after

December 31, 1996, and before January 1, 1998, "Internal Revenue Code" means the federal Internal Revenue Code as amended to December 31, 1996, with certain exceptions, and as amended by Public Laws 105-33 and 105-34. Sec. 71.34(1g)(L), Wis. Stats., as amended by 1997 Wisconsin Acts 27 and 37.

Corporations subject to Wisconsin franchise or income taxes may be required to make estimated tax and temporary recycling surcharge payments as provided under sec. 71.29, Wis. Stats. (1995-96). A tax-option (S) corporation's shareholders are subject to the estimated tax provisions of sec. 71.09, Wis. Stats. □

### ✴ W9812004

December 22, 1997

### Type Tax: Sales and Use

**Issue:** Single-owner entities – "check-the box"

**Statutes:** Sections 77.51(10) and 77.58(3), Wis. Stats. (1995-96), as amended by 1997 Wisconsin Act 27

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

### Facts

ABC Corporation, a Wisconsin corporation, is a closely held S corporation with all stock owned by one individual ("the owner"). ABC Manufacturer is a Wisconsin-based company that manufactures and assembles products that are sold to and

resold by ABC Corporation. ABC Manufacturer also purchases manufactured products from other Wisconsin suppliers for resale to ABC Corporation. ABC Corporation may install the products purchased from ABC Manufacturer in real property construction.

In a private letter ruling dated September 28, 1994 (W9451009, *Wisconsin Tax Bulletin* 91, pages 41 to 43), the department determined that sales of materials to ABC Manufacturer that it used to manufacture products sold to ABC Corporation were exempt from Wisconsin sales or use tax under sec. 77.54(2), Wis. Stats. The sale of products by ABC Manufacturer to ABC Corporation to be used in real property construction by ABC Corporation were not subject to Wisconsin sales or use tax where possession of the products transferred to ABC Corporation outside Wisconsin. Where possession transferred to ABC Corporation in Wisconsin, the sales of products by ABC Manufacturer to ABC Corporation were subject to Wisconsin sales or use tax unless ABC Corporation resold the products without installation.

The owner proposes to restructure his companies such that existing divisions become qualified subchapter S subsidiaries (QSSSs) under a newly formed S corporation holding company.

Specifically, the owner proposes to form a holding company, ABC Holding, which will be an S corporation. ABC Holding will form several wholly owned

subsidiaries which ABC Holding will elect to treat as QSSSs under Internal Revenue Code § 1361. Each subsidiary will conduct the activities associated with a particular product line. No sales of tangible personal property or taxable services will be made by ABC Holding. For federal and Wisconsin income tax purposes, the QSSSs will be ignored and effectively treated as divisions of the parent S corporation.

Pursuant to the reorganization, The owner will contribute his shares of ABC Corporation and ABC Manufacturer to the holding company. Simultaneously, ABC Corporation will transfer by dividend its assets (except for the assets it will retain to carry on its business as a QSSS) to ABC Holding. Again simultaneously, ABC Holding will contribute to the capital of each QSSS the assets needed by the QSSS for the business it will carry on after the reorganization. The various transfers will be accomplished by appropriate corporate resolutions, assignments, bills of sale, and other legal documentation such that, effective January 1, 1998, the former business of ABC Corporation will be conducted under the new multi-corporation format. Also, as part of the reorganization, ABC Manufacturer will change its name to ABC Products.

Additional assets and functions will be added to ABC Products so that the dock leveler/restraint business will include business activities other than just manufacturing (e.g., marketing, administration, and sales support).

However, sales and installations of products of ABC Products will be made through ABC Corporation or other QSSSs. Thus, ABC Products will continue to manufacture or assemble products to be sold to or resold by ABC Corporation.

ABC Products will not be party to any installation or construction activities. ABC Products will sell its products to ABC Corporation and deliver the products using common or contract carriers retained and paid by ABC Products. Possession of the products will not pass to ABC Corporation or its customers until delivered to the state of ultimate destination or installation.

### Request

You ask whether the following statements are correct:

1. ABC Holding is not a seller or retailer of tangible personal property sold by its qualified subchapter S subsidiaries, but shall report their taxable transactions on their behalf pursuant to sec. 77.58(3), Wis. Stats. (1995-96), as amended by 1997 Wisconsin Act 27.
2. The private letter ruling issued September 28, 1994, shall continue in effect as to the tax consequences of the sales transactions between ABC Products and ABC Corporation. The restructuring of these entities as qualified subchapter S subsidiaries of ABC Holding has no attendant sales and use tax consequences for the sales by

ABC Products to ABC Corporation.

3. ABC Holding and each QSSS making taxable sales shall each hold a seller's permit.

### Ruling

1. ABC Holding is not a seller or retailer solely because its qualified subchapter S subsidiaries, which sell tangible personal property or taxable services, are disregarded as separate entities for Wisconsin franchise or income tax purposes.
2. The private letter ruling issued September 28, 1994, shall continue in effect as to the tax consequences of the sales transactions between ABC Products and ABC Corporation. The restructuring of these entities as qualified subchapter S subsidiaries of ABC Holding has no attendant sales and use tax consequences for the sales by ABC Products to ABC Corporation.
3. ABC Holding is responsible for reporting the gross receipts and taxable purchases of each QSSS, however, if it makes no sales of tangible personal property or taxable services, it cannot be required to hold a seller's permit. Each QSSS making sales of tangible personal property or taxable services is required to hold a seller's permit.

## Analysis

Various income and franchise tax statutes were amended and created by 1997 Wisconsin Act 27 to adopt federal provisions that allow qualified subchapter S subsidiaries (QSSSs) and certain single-owner entities to be disregarded as separate entities for Wisconsin income or franchise tax purposes.

As part of this same legislation, two sales and use tax provisions were amended as described below:

1. The definition of “person” in sec. 77.51(10), Wis. Stats., was amended to include single-owner entities disregarded as separate entities under ch. 71, Wis. Stats.
2. Section 77.58(3)(a), Wis. Stats., was amended to provide that the owner of a

qualified subchapter S subsidiary or single-owner entity disregarded as a separate entity for Wisconsin income or franchise tax purposes must report taxable sales and purchases of the disregarded entity on the owner’s sales and use tax return.

No sales and use tax provisions, other than 1 and 2 above, were amended or created to state that a qualified subchapter S subsidiary or single-owner entity that is disregarded as a separate entity for Wisconsin income and franchise tax purposes is also disregarded as a separate entity for Wisconsin for sales and use tax purposes. Therefore, for sales and use tax purposes other than reporting and collecting sales and use tax, ABC Products is an entity separate from ABC Holding and other QSSSs. The transfer of ownership to, posses-

sion of, title to, or enjoyment of property between these separate legal entities is a “sale” as the term is defined in sec. 77.51(14), Wis. Stats. (1995-96).

Each QSSS required to hold a seller’s permit will be assigned a seller’s permit that has a common number but a different letter suffix. The account for that common number will be referenced in some manner to ABC Holding, who is the owner and responsible for filing a sales and use tax return reporting receipts and purchases of each QSSS. Permits held at the time of reorganization should be surrendered and new permits, as required, applied for. Applications should indicate that the QSSS applying for the permit is a QSSS that is disregarded as a separate entity for reporting purposes and such reporting will be done by the owner, ABC Holding. □