

Wisconsin TAX BULLETIN

FOCUS ON ... **Electronic funds transfer (EFT)**

see articles on pages 1 and 11

New Tax Laws to Be Described in Special Issue

What Wisconsin tax laws will be enacted in 1999? Because of delays in passing the 1999-2001 Budget Bill, this was unknown at the time this Bulletin went to press. New tax laws enacted in 1999 will be described in a special issue of the *Wisconsin Tax Bulletin* later this year.

The *Sales and Use Tax Report* ("Report") will also explain the major changes to the sales and use tax laws. The Report is sent to active sales and use tax registrants. In addition, a copy of the Report will likely be included in the January 2000 issue of the *Wisconsin Tax Bulletin*. □

Form Changes for 1999

Following are brief descriptions of the major changes to the Wisconsin individual income tax forms (including Schedules H and FC, the

homestead credit and farmland preservation credit forms) for 1999.

- Boxes are added to entry areas of Form 1 to facilitate electronic processing of the form.
- The space for entering information on wages earned in Illinois is removed from all income tax forms.
- The area for entering tax district and school district information is moved to page 1 of Form 1.
- The line for the temporary recycling surcharge is removed from Forms 1 and 1NPR. The surcharge expired for taxable years that end after April 1, 1999.

(See "Form Changes" page 4)

Electronic Funds Transfer Mandated for Some Tax Payments

Mandatory and Voluntary EFT Payments

Section Tax 1.12, Wisconsin Administrative Code, (titled "Electronic Funds Transfer") became effective October 1, 1999. This new rule authorizes the Department of Revenue to mandate the use of electronic funds transfer (EFT) for taxpayers whose tax payments exceed certain amounts.

The following taxes and fees will be required to be paid by EFT:

- Withholding taxes when required deposits in the prior calendar year were \$10,000 or more.

**1999
Tax
Filing**

Season at a Glance

Number of returns

2,776,779 - up 1.2%

Number of refunds

1.9 million - up 11%

Average refund

\$425 - up 28%

Electronic filing

Preparer 346,392 - up 28%

TeleFile 100,208 - up 22%

Internet 16,786 - (new)

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- State, county, and special district or stadium sales and use tax when the aggregate amount due in the prior calendar year was \$10,000 or more.
- Corporation tax due with the tax return and estimated tax payments when the net tax less refundable credits on the prior year's tax return was \$40,000 or more.
- Individual and fiduciary income estimated tax payments when the estimated tax payments required in the prior taxable year were \$40,000 or more.

- Cigarette tax when the tax due in the prior calendar year was \$40,000 or more.
- Tobacco products tax when the net tax due before printing and shipping costs in the prior calendar year was \$40,000 or more.
- Motor vehicle fuel tax and petroleum inspection fee when the aggregate amount due in the prior calendar year was \$40,000 or more.
- Alternative fuels tax when the total tax due in the prior calendar year was \$40,000 or more.

- General aviation fuel tax when the tax due in the prior calendar year was \$40,000 or more.
- Liquor or distilled spirits and wine tax and administrative fee when the aggregate amount due in the prior calendar year was \$40,000 or more.
- Fermented malt beverages tax when the tax due after adjustments in the prior calendar year was \$40,000 or more.

The rule also provides that taxpayers not required to pay by EFT may elect to do so.

Payers that will be mandated to pay by EFT will be notified by the department and will have 90 days to register for the EFT program. Payers of withholding tax will begin receiving notification in December 1999. Payers of other types of taxes and fees will begin receiving notification in February 2000.

The mandatory EFT payment requirement applies to the first payment due date following the end of the 90-day registration period. For example, an employer required to make semi-monthly deposits of withholding tax is notified of mandatory EFT payments on January 10, 2000. The first EFT payment is due April 15, 2000, which is the first deposit due date following the end of the 90-day registration period.

Many employers have already received a registration packet containing an "invitation" to voluntarily register for EFT payments of withholding tax. A similar "invitation" will be sent to payers of sales and use taxes and other taxes in December 1999.

Advantages of using EFT

EFT eliminates the need for writing and processing paper checks and filling out payment vouchers. Funds and payment information are transferred electronically through the Automated Clearing House (ACH) network. Making a tax payment using EFT is as easy as a toll-free telephone call.

The payer has more control over the payment when EFT is used. There is no need to rely on the post office for timely delivery of the payment. When the transaction is initiated by 4:00 p.m. Central Time at least one business day before the due date, it will be received on time. On the other hand, payers can elect to phone in their payments up to 30 days before the due date and not have the payments deducted from their bank account and paid to the state until the actual due date.

EFT is secure and safe. All transactions are governed by strict, nationally established security procedures. EFT payments occur between financial institutions and only at the payer's request. A confirmation number is available immediately as proof of payment.

Additional information available

The text of the new EFT administrative rule, sec. Tax 1.12, is reproduced in this Bulletin, beginning on page 11. See the article titled "Recently Adopted Rules Summarized."

For more information about EFT, contact your financial institution, write to Wisconsin Automated Clearing House Association (WACHA), 16655 W. Bluemound Road, Suite 370, Brookfield, WI 53005, or call or e-mail WACHA at (414) 796-0252 or WACHA@execpc.com.

If you have questions specific to the department's EFT program, call the department's EFT information line in Madison at (608) 264-9918 or write to Wisconsin Department of Revenue, EFT Unit, P.O. Box 8912, Madison, WI 53708-8912.

To request EFT registration forms and instructions, write to Wisconsin Department of Revenue, Forms Request Office, P.O. Box 8951, Madison, WI 53708-8951, or call (608) 266-1961. □

Final Amnesty Report Issued

The Department of Revenue issued the final tax amnesty report in September 1999. The report is available at the department's Internet web site at www.dor.state.wi.us.

The department collected \$30.9 million under the amnesty program. This exceeded the department's projection of \$27 million but fell short of the \$40 million projected by the Legislative Fiscal Bureau. About \$26.8 million was collected in the 1985 amnesty program.

A total of 23,074 applicants filed for amnesty (compared to 25,700 in 1985). Only 6,271 completely satisfied the terms. Many did not file the required returns or pay the amnesty balance due in 45 days as required.

Amnesty "uncovered" 323 persons who were completely unknown to the department (compared to 235 in 1985). This group paid \$1.79 million. Although 88% of the amnesty applicants were individual taxpayers, taxes from businesses accounted for 62 percent of the dollars collected. Sales tax delinquencies represented 41% of the collections, with income tax delinquencies close behind at 38%. Withholding tax collections made up 9%, corporation

franchise and income tax contributed 5%, and the remaining 7% came from all the other taxes collected by the department.

The program cost \$1.9 million to operate, including \$834,000 for the promotional campaign. □

Application for Business Tax Registration Delayed

Development of the "Application for Business Tax Registration" (Form BTR-101) has been delayed, and use of that form will not be implemented this year as planned. Therefore, the Department of Revenue requests that the Form BTR-101 that appears in the 1998 Package WI-X not be used to register for seller's permits, use tax and consumer's use tax certificates, local exposition tax, or Wisconsin employer registration certificates. The Form BTR-101 was placed in the 1998 Package WI-X in anticipation of its implementation in 1999.

To register for these permits or certificates, please use the "Application for Permit/Certificate" (Form A-101) rather than the Form BTR-101. The current version of Form A-101 has a revision date of 8-99. A copy of the form and instructions appears on pages 49 to 52 of this Bulletin. Additional copies of Form A-101 may be obtained by any of the following methods:

- *In Person*

Visit any Wisconsin Department of Revenue office.

- *By Mail*

Write to
Wisconsin Department of Revenue
Forms Request Office
PO Box 8951
Madison WI 53708-8951

Telephone (608) 266-1961.

Fax a request to (608) 261-6239.

- *Via Your Fax Machine (Fax-A-Form)*

Call (608) 261-6229 from a fax telephone.

Enter retrieval code 701.

- *Via the Internet*

Access the department's web site at www.dor.state.wi.us.

Click on "1998 Tax Forms" (under "Forms and Publications"); "Sales and Use Tax"; "Form A-101." □

Form Changes (continued from page 1)

- The amount of qualified earned income used to compute the married couple credit and the rate of credit have changed. A maximum credit of \$350 is available for 1999.
- The percentage rate for computing the farmland tax relief credit on Forms 1 and 1NPR is increased from 10% to 13%. The maximum credit is \$1,500.
- On Schedule 4 on the back of Schedule H, "caretaker of a newborn child" payments are moved to line 1 to reflect the law change requiring the one-twelfth reduction of property taxes or rent for months those payments were received. (**Note:** This change is tentative, contingent on whether it is enacted as part of the 1999-2001 Budget Bill, which was still pending at the time this Bulletin went to press.)

- On Schedule FC, line 17 is added. This line includes a checkbox to certify if all information on a previously submitted zoning certificate still applies. This is to reflect a 1998 law change which provides that it is no longer necessary to attach a zoning certificate if one was submitted with a previous year's claim and no changes have occurred.

Preliminary copies of the 1999 Forms 1, 1A, and WI-Z, and Schedules H and FC, the homestead credit and farmland preservation credit claim forms, are reproduced on pages 39 to 48 of this Bulletin. The copies are subject to further revision.

Preliminary copies of these and other Wisconsin income tax forms are available from the department's Internet web site at www.dor.state.wi.us. □

Motor Vehicle Dealers' Measure of Use Tax Increased to \$106



Wisconsin licensed motor vehicle dealers are permitted to report use tax on a fixed dollar amount per plate per month for the use of motor vehicles assigned to certain employees.

Effective January 1, 2000, the amount subject to use tax is increased from \$104 to \$106 per plate per month. (Note: The use tax per plate per month is not \$106. Rather, \$106 is multiplied by the appropriate use tax rate [5%, 5.1%, 5.5%, or 5.6%] to arrive at the use tax due per plate per month.)

The reason for the increase to \$106 per plate is that sec. 77.53(1m)(a), Wis. Stats. (1997-98), requires that

the Department of Revenue annually adjust the amount subject to use tax to reflect the annual percentage change in the U.S. Consumer Price Index for All Urban Consumers, U.S. City Average, as determined by the U.S. Department of Labor for the 12-month period ending June 30. The percentage change for the period July 1998 to June 1999 was 1.96% ($\$104 \times 1.0196 = \106 , rounded to the nearest whole dollar). □

Forms and Publications Available by Fax

The Wisconsin Department of Revenue offers a Fax-A-Form document retrieval system. This retrieval system enables taxpayers and tax practitioners to obtain tax forms and publications via their facsimile machine or fax modem.

What is Available Via Fax-A-Form?

Wisconsin individual income, homestead credit, farmland preservation credit, partnership, corporation, estate, fiduciary income, sales and use, withholding, and alcohol beverage tax forms are available, along with the instructions for the forms. In January 2000, tax forms for the years 1995, 1996, 1997, 1998, and 1999 will be available.

Publications published by the department are also available. See the article titled "Tax Publications Available" on page 8 of this Bulletin for a list of the publications.

The catalog of retrieval codes for the forms and publications is updated throughout the year as forms and publications are added and revised. For updated information, order the current catalog using Fax-A-Form.

How Does it Work?

- From the handset on your fax machine or the touch-tone keypad of your fax modem call the Fax-A-Form telephone number (608) 261-6229 (at this point do not enter “start” on your fax machine).
- If you have a newer model fax machine without a handset, you may use the keypad by pressing the “Hook Button,” if tones are transmitted; if tones are not transmitted you must connect a touch-tone telephone to your fax machine to retrieve a document.
- Follow the voice prompts, then use the touch-tone keypad on your fax machine or telephone to enter the proper retrieval codes for the items desired.
- Receive the items you select, via your fax machine, by pushing the “start,” “send,” or “copy” button of your fax machine (on most fax machines this is the “start” button). Fax modem users will need to click on manual receive for their software. The handset of your system must stay **off** the hook the entire time the forms are being faxed to you.

When Can Fax-A-Form Be Used?

The Fax-A-Form retrieval system is available 24 hours a day, 7 days a week.

How Much Does it Cost?

The Department of Revenue does not charge a fee for using the Fax-A-Form service. Your only costs are the normal telephone charges, plus fax machine operating costs, if applicable.

Questions?

If you have other questions about Fax-A-Form, you may call the department’s Fax-A-Form coordinator, at (608) 267-2025. □

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* 113 (April 1999), pages 33 to 36.

Madison — Main Office
Area Code (608)

Appeals.....	266-0185
Audit of Returns: Corpora- tion, Individual, Homestead	266-2772
Beverage	266-6702
Cigarette, Tobacco Prod- ucts.....	266-8970
Copies of Returns	267-1266
Corporation Franchise and Income	266-1143
Delinquent Taxes.....	266-7879
Electronic Filing	264-9959
Electronic Funds Transfer	264-9918
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

Guidelines for Reproduced and Substitute Tax Forms

Tax returns may generally be filed on forms that have been reproduced or on substitute forms that have been approved by the department. However, certain guidelines must be followed to ensure that the reproduced or substitute forms are compatible with the department’s processing system.

A copy of the “Guidelines for Reproduced and Substitute Tax Forms” appears on pages 53 and 54 of this Bulletin. □

1999 Package WI-X Available in January

Wisconsin’s Package WI-X will be available by January 31, 2000. Package WI-X will contain actual size copies of most 1999 Wisconsin individual and fiduciary income tax, corporation franchise and income tax, partnership, estate tax, motor vehicle fuel tax, sales and use tax, and withholding tax forms.

The cost of the 1999 Package WI-X is \$7.00 plus sales tax. It may be ordered on the tax form order blank (Form P-744). This order blank is being mailed in October. See the following article titled “Tax Form Order Blanks Mailed,” for more information.

If you do not receive an order blank and want to purchase copies of 1999 Package WI-X, mail your request indicating the number of copies you require, along with your remittance for the amount due, to Wisconsin Department of Revenue, Forms Request Office, P.O. Box 8951, Madison, WI 53708-8951. □

Tax Form Order Blanks Mailed

During October, the department is mailing order blanks (Form P-744) to 9,000 tax preparers. Use these original order blanks (not copies) to request bulk orders of 1999 Wisconsin tax forms that require payment. Forms that do not require payment are not listed on the order blank.

Some of the forms you order will be accompanied by additional information. For example, your order will include instructions for the forms you request; Schedules 2K-1 and WD for Form 2 will be included with fiduciary Form 2 orders; and Schedules 3K-1 will be included with partnership Form 3 orders.

The department is also mailing order blanks (Forms P-744b and P-744L) to banks, post offices, and libraries for their use in requesting bulk orders of 1999 Wisconsin income tax forms. No charge is made for forms used for distribution to the general public (for example, in a bank, library, or post office).

If you do not receive an order blank by October 31, 1999, you may request one by: contacting any department office; writing to Wisconsin Department of Revenue, Forms Request Office, P.O. Box 8951, Madison, WI 53708-8951; or calling (608) 267-2025.

Place your order as early as possible after receiving the order blank. Orders are expected to be filled in late December and early January.

As an alternative to ordering forms, most forms in Package WI-X may be reproduced. Package WI-X will be mailed separately in late January. □

Magnetic Media Filing Required for Some Forms

Employers and payers may be required to file wage statements and information returns on magnetic media with the Wisconsin Department of Revenue. Wisconsin magnetic media filing is required if all of the following apply:

- Comparable wage statements or information returns are required to be filed on magnetic media with the Internal Revenue Service or Social Security Administration.
- The income on the form is required to be reported to Wisconsin.
- The number of any one type of form required to be filed with Wisconsin is 250 or more.
- The Combined Federal/State Filing Program is not being used.
- No waiver has been granted by the department.

Wisconsin Publication 509, *Filing Wage Statements and Information Returns on Magnetic Media*, provides more information about magnetic media filing. For information about how to obtain this publication, see the article titled "Tax Publications Available" on page 8 of this Bulletin. □

IRS 1999 Mileage Rates Apply for Wisconsin

The 1999 optional standard mileage rates specified by the Internal Revenue Service (IRS) for computing automobile expenses for business, charitable, medical, and moving ex-

pense purposes also apply for Wisconsin.

For 1999 the IRS **decreased** the business standard mileage rate from 32.5¢ per mile to 31¢ per mile for all business miles driven, but the effective date was delayed to April 1, 1999. The 32.5¢ per mile rate still applies through March 31, 1999.

The 32.5¢/31¢ per mile rate is allowed without regard to whether the automobile was previously considered fully depreciated. If the standard mileage rate of 32.5¢/31¢ per mile is used, depreciation is considered to be allowed at 12¢ per mile for 1999, the same rate as for 1998. However, no portion is considered to be depreciation after the adjusted basis of the automobile reaches zero.

For 1999 the mileage rate allowed for calculating automobile expenses for charitable deduction purposes remains at 14¢ per mile. The rate for medical expense and moving expense deductions remains at 10¢ per mile. □

91 Fraudulent Claims

Woman Charged with Homestead Credit Fraud

Susanna R. Kittleson, 29, Milwaukee, was charged in August 1999 with two counts each of misappropriation of identity and filing a fraudulent homestead credit claim, as a result of her attempt to steal \$88,756 from the Department of Revenue. She was charged with using the names and social security numbers of 30 different people to file 91 fraudulent homestead credit claims in 1997 and 1998. Even though 91 claims were involved, she was charged with only four counts, since four charges would expose her to an appropriate amount of prison time.

The criminal complaint alleges that Kittleson obtained the names and social security numbers of elderly or disabled persons who either resided in group homes or participated in daytime activities at three Milwaukee locations. She had been employed at these locations and had access to internal records. These persons were unaware of the homestead credit claim filings.

In filing the false claims, Kittleson made up rent certificates listing locations where the persons never lived and listing rent they never paid. She also forged the signatures of the “claimants” on the false homestead credit claims.

Filing a fraudulent claim for homestead credit is a felony punishable by up to five years imprisonment and up to \$10,000 in fines. If convicted on all four counts, Kittleson faces up to 20 years in prison and \$40,000 in fines. In addition to the criminal penalties, Wisconsin law provides for substantial civil penalties.

In another homestead credit fraud case, Jerry L. Miller, 40, of Milwaukee, was sentenced in August, for filing false homestead credit claims for 1995, 1996, and 1997. Miller was given a suspended 90-month jail term and ordered to serve 3 months in the House of Correction, followed by four years of probation. He was also ordered by Circuit Judge Elsa C. Lamelas to pay restitution.

According to the felony charges against him, in each of Miller’s fraudulent acts, he prepared a false rent certificate claiming a false amount of rent. He then forged the signature of the landlord’s agent.

In June 1999, Kym Pogrant, d/b/a Jordan Cole Jewelers, Marinnette, pled no contest to operating and selling without a valid seller’s permit. She was ordered to serve five days in jail and pay fines/court costs.

This is the third time in the past 10 years that Pogrant has been charged with operating without a permit, following revocation of her permit. She was not ordered to serve jail time following the previous charges.

In July 1999, Ronald K. Key, age 62, Prairie du Chien, was found guilty in Crawford County Circuit Court on three counts of failure to file Wisconsin income tax returns for 1995, 1996, and 1997. Judge Robert P. Van de Hey pronounced Key guilty after he pled no contest to each count.

Key has also been charged with 11 other non-tax charges, including theft and extortion. Those charges are still pending. He faces up to 27 months imprisonment and fines of up to \$30,000 on the tax charges. In addition substantial civil penalties on the civil tax liability are possible, and assessment and collection of the taxes, interest, and penalties follows the conviction for criminal violations.

The former operator of a state and county funded program for wayward youths was charged in August 1999 with three felony counts of filing false Wisconsin income tax returns for 1994, 1995, and 1996. James A. Mitchell Jr., 47, of Greenfield, was the founder of the now-defunct Fresh Start Center in 1992. He was charged in a criminal complaint that stated he owed over \$22,000 in state

withholding taxes for employees for five consecutive years ending in 1996, yet he filed forms indicating he had sent in the appropriate sums.

The complaint further states that as of 1994, when he owed state and federal withholding taxes of more than \$44,000, Mitchell vowed to begin paying the money in 1995, but since 1992 he has paid only \$400 in state income taxes. If convicted, he faces prison terms totaling 15 years.

Susan M. Heffele, 49, the former office manager for an asbestos removal company in West Milwaukee, pled guilty in August to filing fraudulent state income tax returns and to stealing \$218,000 from the firm in 3 ½ years. By not reporting the stolen money as income on her income tax returns, she evaded state taxes of over \$13,000 during a three-year period.

Heffele pled guilty to one count of theft and three counts of filing fraudulent income tax returns. In exchange for her guilty pleas, one tax fraud charge and three theft charges were dismissed.

The criminal complaint charged that Heffele regularly wrote illegal checks to herself to pay personal bills, and that she falsified checkbook records and a computerized accounting system to conceal payments of personal expenses. The complaint also alleges that Heffele padded the payroll for two other employees by drawing illegitimate checks for them. She faces prison terms up to 25 years on the four counts to which she pled guilty. □



Wanted: Your Comments About the Wisconsin Tax Bulletin

The *Wisconsin Tax Bulletin* (WTB) is published to provide tax information to **YOU**, the readers. To make the WTB more useful, the department is seeking suggestions for items that may be of interest to you, and ways to make the WTB more valuable to you.

How could the department improve on the information it publishes? What topics do you want covered or expanded? Do you have particular likes or dislikes about the WTB? Do you have ideas, comments, or suggestions you'd like to share?

Please take a few moments to give us your comments or ideas, and be a part of improving *your* WTB. Send your comments or ideas to Mark Wipperfurth, Wisconsin Department of Revenue, Administration Technical Services, P.O. Box 8933, Madison, WI 53708-8933. If you prefer, you may fax your comments to him at (608) 261-6240, or you may e-mail or call him at mwipperf@dor.state.wi.us or (608) 266-8253. We'd like to hear from you! □



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. □

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 sub-

scription 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. □

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* 112 (January 1999), pages 71 to 98. It includes information for issues 1 to 111 (through 1998). □

Tax Publications Available

Listed below are more than 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 web site at www.dor.state.wi.us, and click on "Forms and Publications."

Income and Franchise Taxes	Sales and Use Taxes	
102 Wisconsin Tax Treatment of Tax-Option (S) Corporations and Their Shareholders (12/98)	200 Electrical Contractors - How Do Wisconsin Sales and Use Taxes Affect Your Business? (3/98)	221 Farm Suppliers and Farmers - How Do Wisconsin Sales and Use Taxes Affect Sales to Farmers? (4/97)
103 Reporting Capital Gains and Losses for Wisconsin by Individuals, Estates, Trusts (11/98)	201 Wisconsin Sales and Use Tax Information (10/98)	222 Motor Vehicle Fuel Users: Do You Owe Use Tax? (4/98)
104 Wisconsin Taxation of Military Personnel (10/98)	202 Sales and Use Tax Information for Motor Vehicle Sales, Leases, and Repairs (9/98)	223 Bakeries – How Do Wisconsin Sales and Use Taxes Affect Your Business? (2/98)
106 Wisconsin Tax Information for Retirees (10/98)	203 Sales and Use Tax Information for Manufacturers (12/94)	224 Veterinarians - How Do Wisconsin Sales and Use Taxes Affect Your Business? (6/99)
109 Tax Information for Married Persons Filing Separate Returns and Persons Divorced in 1998 (10/98)	205 Use Tax Information for Individuals (1/99)	Other Taxes and Credits
112 Wisconsin Estimated Tax and Estimated Surcharge for Individual, Estates, Trusts, Corporations, Partnerships (1/99)	206 Sales Tax Exemption for Nonprofit Organizations (9/90)	127 Wisconsin Homestead Credit Situations and Solutions (11/98)
113 Federal and Wisconsin Income Tax Reporting Under the Marital Property Act (10/97)	207 Sales and Use Tax Information for Contractors (9/98)	128 Wisconsin Farmland Preservation Credit Situations and Solutions (11/98)
116 Income Tax Payments Are Due Throughout the Year (12/95)	210 Sales and Use Tax Treatment of Landscaping (5/94)	400 Wisconsin's Temporary Recycling Surcharge (12/98)
119 Limited Liability Companies (LLCs) (12/98)	211 Cemetery Monument Dealers - How Do Wisconsin Sales and Use Taxes Affect You? (1/99)	403 Premier Resort Area Tax (2/98)
120 Net Operating Losses for Individuals, Estates, and Trusts (11/98)	212 Businesses: Do You Owe Use Tax on Imported Goods? (1/99)	410 Local Exposition Taxes (2/99)
121 Reciprocity (5/99)	213 Travelers: Don't Forget About Use Tax (4/99)	503 Wisconsin Farmland Preservation Credit (11/98)
122 Tax Information for Part-Year Residents and Nonresidents of Wisconsin for 1998 (10/98)	214 Businesses: Do You Owe Use Tax? (4/99)	508 Wisconsin Tax Requirements Relating to Nonresident Entertainers (8/94)
123 Business Tax Credits for 1998 (12/98)	216 Filing Claims for Refund of Sales or Use Tax (3/99)	W-166 Wisconsin Employer's Withholding Tax Guide (3/96)
125 Credit for Tax Paid to Another State (11/98)	217 Auctioneers - How Do Wisconsin Sales and Use Taxes Affect Your Operations? (3/96)	Audits and Appeals
126 How Your Retirement Benefits Are Taxed (9/98)	219 Hotels, Motels, and Other Lodging Providers - How Do Wisconsin Sales and Use Taxes Affect Your Operations? (4/99)	501 Field Audit of Wisconsin Tax Returns (2/96)
600 Wisconsin Taxation of Lottery Winnings (10/97)	220 Grocers - How Do Wisconsin Sales and Use Taxes Affect Your Operations? (10/98)	505 Taxpayers' Appeal Rights of Office Audit Adjustments (6/96)
601 Wisconsin Taxation of Pari-Mutuel Wager Winnings (10/97)		506 Taxpayers' Appeal Rights of Field Audit Adjustments (3/98)
		507 How to Appeal to the Tax Appeals Commission (7/98)

Other Topics

- 111 How to Get a Private Letter Ruling From the Wisconsin Department of Revenue (10/97)
- 114 Wisconsin Taxpayer Bill of Rights (11/97)
- 115 Handbook for Federal/State Electronic Filing (12/98)
- 117 Guide to Wisconsin Information Returns (10/98)
- 118 Electronic Funds Transfer Guide (4/96)
- 124 Petition for Compromise of Delinquent Taxes (7/98)
- 130 Fax A Form (12/98)
- 401 Extensions of Time to File (1/99)
- 500 Tax Guide for Wisconsin Political Organizations and Candidates (8/99)
- 502 Directory of Wisconsin Tax Publications (6/98)
- 504 Directory for Wisconsin Department of Revenue (11/98)
- 509 Filing Wage Statements and Information Returns on Magnetic Media (3/94)
- 700 Speakers Bureau presenting . . . (12/98) ☐



Over 1.9 Million Refunds Issued

More than 1.9 million income tax refunds were issued to taxpayers during January through July 1999 (primarily 1998 returns), for an average refund of \$425. The average refund for 1997 returns was \$331.

There were 2,776,779 Wisconsin individual income tax returns filed during the twelve months ending June 30, 1999. This compares to

2,744,800 returns for the prior year. The 2,776,779 returns, which included joint tax returns, were filed by 3,913,642 individuals.

An itemized deduction credit was claimed by 23% of the taxpayers on their 1998 returns. The average credit was \$465, compared to \$431 on 1997 returns.

There were 165,367 homestead credit claims filed during the year, and the average credit was \$500. This compares to 179,600 homestead credit claims averaging \$448 for the prior year. About 47% of the claimants were age 65 or older, 52% were renters, and 48% were homeowners.

About 21,900 farmland preservation credit claims, averaging \$827 per claim, were filed during the year ending June 30, 1999. During the prior year, 22,600 farmland preservation credit claims were filed, and the average payment was \$936. ☐

Taxpayers Designate \$329,000 to State Election Campaign Fund

Wisconsin income tax returns include a box for taxpayers to designate \$1 to the State Election Campaign Fund.

During July 1998 to June 1999 (primarily 1998 tax returns), taxpayers designated \$329,014 to the election campaign fund on their Wisconsin tax returns. This compares to \$311,954 for the prior year. ☐

Endangered Resources Contributions Total \$639,000



The 1998 Wisconsin income tax returns included a line for taxpayers to designate a contribution to the Wis-

consin Endangered Resources Fund. These contributions help protect and care for Wisconsin's endangered species, nongame wildlife, and rare plant and animal habitats.

Donations to the Endangered Resources Fund can be made on both paper filed tax returns and electronically filed returns.

During July 1998 through June 1999 (primarily 1998 returns), 44,304 taxpayers contributed \$639,530 to the Endangered Resources Fund. This compares with 1997 income tax returns, where 42,424 taxpayers contributed \$547,462. ☐

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 October 1, 1999, or at the stage in which action occurred during the period from July 2 to October 1, 1999.

The listing includes rule numbers and names, and whether a rule is amended (A), repealed and recreated (R&R), or a new rule (NR). Rules followed by an asterisk list anticipated actions.

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 (7/15/99)

- 14.01 Administrative provisions-A
- 14.02 Qualification for credit-A

- 14.03 Household income and income-A
- 14.04 Property taxes accrued-A
- 14.05 Gross rent and rent constituting property taxes accrued-A
- 14.06 Marriage, separation, or divorce during a claim year-A

Rules Sent to Legislative Council Rules Clearinghouse

- 11.34 Occasional sales exemption for sale of a business or business assets-A
- 11.35 Occasional sales by non-profit organizations-A
- 11.39 Manufacturing-A
- 11.535 Operators of a swap meet, flea market, craft fair or similar event-A
- 11.67 Service enterprises-A
- 11.79 Leases of highway vehicles and equipment-A
- 11.96 Delivery of ordinance; county and premier resort area taxes-NR
- 14.01 Administrative provisions-A*
- 14.02 Qualification for credit-A*
- 14.03 Household income and income-A*
- 14.04 Property taxes accrued-A*
- 14.05 Gross rent and rent constituting property taxes accrued-A*
- 14.06 Marriage, separation, or divorce during a claim year-A*

Rules Sent to Revisor for Publication of Notice

- 11.66 Telecommunications and CATV services-A
- 11.67 Service enterprises-A

Rules Sent for Legislative Committee Review

- 1.12 Electronic funds transfer-NR
- 11.03 Elementary and secondary schools and related organizations-A
- 11.05 Governmental units-A
- 11.11 Industrial or governmental waste treatment facilities-A
- 11.51 Grocers' guidelist-A
- 11.87 Meals, food, food products and beverages-A
- 11.94 Wisconsin sales and taxable transportation charges-A

Rules Being Reviewed Following Publication of Various Notices

- 1.13 Power of attorney-A
- 11.20 Waste reduction and recycling-NR
- 11.64 Background music-R&R

Rules Adopted but Not Yet Effective (anticipated effective date 11/1/99)

- 11.03 Elementary and secondary schools and related organizations-A
- 11.05 Governmental units-A
- 11.11 Industrial or governmental waste treatment facilities-A
- 11.51 Grocers' guidelist-A
- 11.87 Meals, food, food products and beverages-A
- 11.94 Wisconsin sales and taxable transportation charges-A

Rules Adopted and in Effect

- 1.12 Electronic funds transfer-NR (effective 10/1/99)
- 11.14 Exemption certificates-A (effective 9/1/99)

- 11.26 Other taxes in taxable gross receipts and sales price-A (effective 9/1/99)
- 11.32 "Gross receipts" and "sales price"-A (effective 9/1/99)
- 11.33 Occasional sales-A (effective 9/1/99)
- 11.41 Exemption of property consumed or destroyed in manufacturing-A (effective 9/1/99)
- 11.53 Temporary events-A (effective 9/1/99)
- 11.83 Motor vehicles-A (effective 9/1/99)

Emergency Rules in Effect (extended to 10/23/99)

- 11.20 Waste reduction and recycling-NR □

Recently Adopted Rules Summarized

Summarized below is information regarding a recently adopted administrative rule relating to electronic funds transfer (EFT), as well as seven recently revised sales and use tax rules. Included is information relating to Tax 1.12, created effective October 1, 1999, and Tax 11.14, 11.26, 11.32, 11.33, 11.41, 11.53, and 11.83, all amended effective September 1, 1999. See page 1 of this Bulletin for further information about the EFT rule.

In addition to the summary of changes, the text of the newly created rule and some of the text of the revised rules is reproduced. In the amendments, material lined through (~~lined through~~) represents deleted text, and underscored (underscored) material represents new text.

To order up-to-date administrative rules of the department, you can use the order blank on page 55 of this

Bulletin to obtain the Tax section of the Wisconsin Administrative Code.

Tax 1.12 Electronic funds transfer. This rule is created, to permit the department to require the use of electronic funds transfer or “EFT” to pay or deposit certain taxes and fees, when the amounts due in the prior year exceed a specified amount. The rule also provides information for taxpayers who wish to use EFT even though not required to do so. The text of Tax 1.12 is as follows:

Tax 1.12 Electronic funds transfer.

(1) **SCOPE.** This section applies to any person who is required to or elects to pay or deposit taxes or fees by electronic funds transfer, or “EFT.”

(2) **PURPOSE.** The purpose of this section is to specify which taxes and fees are required to be paid or deposited using the EFT payment method, to provide that certain persons not required to use the EFT payment method may elect to do so and to explain the procedures for using EFT.

(3) **DEFINITIONS.** In this section:

(a) “ACH” means automated clearing house, a central clearing facility operated by a federal reserve bank or a private sector organization on behalf of depository financial institutions in which depository financial institutions transmit or receive ACH entries.

(b) “ACH credit” means the EFT payment option in which the payer initiates the transfer of funds by authorizing the payer’s financial institution to transfer the payment amount to the department’s depository bank.

(c) “ACH debit” means the EFT payment option in which the payer initiates the transfer of funds by authorizing the department’s depository bank to transfer the payment amount from the payer’s account.

(d) “Electronic funds transfer” or “EFT” means any transfer of funds initiated through a terminal, telephone, computer or magnetic tape authorizing a financial institution to debit or credit an account for next day settlement.

Note: The EFT payment method allows funds to be transferred electronically from the payer’s financial

institution to the department’s depository bank eliminating the need to prepare and process a paper check.

(e) “Entry” means an electronic item representing the transfer of funds in the ACH system.

(f) “Financial institution” means any bank, savings and loan, credit union, industrial bank or other institution organized under either national or state banking laws capable of both accepting deposits and making loans.

(g) “Payer” means any person who is required to or elects to pay or deposit taxes or fees by electronic funds transfer.

(h) “Settle” or “settlement” means to transfer funds, or a transfer of funds, between two parties in cash or negotiable items or on the books of a mutual depository to complete one or more prior transactions and made subject to a final accounting.

(i) “Settlement date” means the date on which an exchange of funds with respect to an entry or entries is reflected on the books of the department’s depository bank.

(j) “Trace number” means a character code uniquely identifying each ACH entry.

(4) **REQUIREMENT OR ELECTION TO USE EFT.** (a) Except as provided in sub. (11), the department requires a person who owes taxes and fees as described in subds. 1. to 11. to pay or deposit the taxes and fees using the EFT payment method. The following taxes and fees are included in the EFT payment requirement:

1. Corporate income and franchise tax estimated tax payments and tax due with the tax return when the net tax less refundable credits on the prior year’s tax return was \$40,000 or more.

2. Income tax withholding payments when the required deposits were \$10,000 or more in the prior calendar year.

3. General, county and stadium sales and use tax when the aggregate amount due in the prior calendar year was \$10,000 or more.

Note: See s. Tax 11.001(4) for the definition of stadium tax.

4. Fermented malt beverages tax when the tax due after the adjustment for any overpayment or additional amount due for a previous period was

\$40,000 or more in the prior calendar year.

5. Liquor or “distilled spirits and wine” tax and administrative fee when the aggregate net amount of tax and fee due in the prior calendar year was \$40,000 or more.

6. Cigarette tax when the net tax due before printing and shipping costs was \$40,000 or more in the prior calendar year.

7. Tobacco products tax when the tax due in the prior calendar year was \$40,000 or more.

8. Alternate fuels tax when the total tax due in the prior calendar year was \$40,000 or more.

9. General aviation fuel tax when the tax due in the prior calendar year was \$40,000 or more.

10. Motor vehicle fuel tax and petroleum inspection fee when the aggregate amount due in the prior calendar year was \$40,000 or more.

11. Individual and fiduciary income tax estimated tax payments when the estimated tax payments as required under s. 71.09, Stats., were \$40,000 or more in the prior taxable year.

(b) Any person not required to use the EFT payment method under par. (a) may elect to use the EFT payment method to pay or deposit the taxes or fees specified in par. (a).

(5) **DATE FIRST EFT PAYMENT REQUIRED.** The department shall notify a person when EFT payments or deposits are required. A 90-day EFT registration period shall follow the notification. The first required EFT payment or deposit shall be due on the first payment or deposit due date following the end of the registration period.

Example: An employer required to make semi-monthly deposits of withholding tax is notified of the EFT requirement on November 10, 1999. The first EFT deposit is due February 15, 2000, which is the first deposit due date following the end of the 90-day registration period.

(6) **REGISTRATION FOR EFT.** (a) Payers shall register with the department to use the EFT payment method before making EFT payments or deposits. Payers required to pay or deposit by EFT shall be notified by the department as provided in sub. (5) and given registration instructions. Persons who elect

to pay or deposit by EFT may request an EFT registration packet from the department.

Note: A request for an EFT registration packet may be made by calling the department's forms request line at (608)266-1961, or by writing to Forms Request Office, Wisconsin Department of Revenue, P.O. Box 8903, Madison, WI 53708-8903.

(b) As part of the registration process, the payer shall provide a signed authorization statement to the department authorizing the department to make ACH debit transfers through its depository bank or to receive ACH credit transfers from the payer's financial institution.

(7) **EFT PAYMENT PROCEDURES.** EFT payments or deposits shall be credited by the department directly to the payer's tax account. The payer may use the ACH debit or ACH credit transfer option, or both, as follows:

(a) **ACH debit transfers.** 1. ACH debit transfers shall be made using a touch tone telephone, a computer with a modem or another department approved method. A toll free telephone number and voice instructions shall be provided by the department for the payer to use when initiating an ACH debit transfer via telephone. Required payment information includes the tax type code for the tax being paid, the tax period date to which the payment should be applied, the amount of the payment and the effective date of the payment.

Note: written requests for department approval of another ACH debit transfer method should be addressed to Electronic Funds Transfer, Wisconsin Department of Revenue, P.O. Box 8912, Madison, WI 53708-8912.

2. The payer shall initiate ACH debit transfers before 4:00 p.m. central standard time or central daylight savings time, as applicable, at least one business day before the prescribed due date of the payment in order for the payment to have a settlement date on or before the prescribed due date.

(b) **ACH credit transfers.** 1. A payer shall initiate ACH credit transfers through the payer's financial institution following directions specific to that financial institution.

2. In order for the payment to have a settlement date on or before the prescribed due date, ACH credit transfers shall be initiated in time for the payer's financial institution to settle the funds transfer on or before the due date of the payment.

(8) **COSTS TO INITIATE EFT.** (a) ACH debit transfers shall occur at no cost to the payer.

(b) Payers using ACH credit transfers are liable for any fees charged by the payer's financial institution.

(9) **EVIDENCE OF EFT PAYMENT.** A payer receives a trace number for each EFT transaction. The trace number given to the payer during the EFT transaction and included as part of the ACH entry is the payer's confirmation of payment or deposit and shall provide proof of the date and amount of the payment or deposit.

(10) **DUE DATE OF EFT PAYMENT.** (a) In order for EFT payments and deposits to be considered received on or before the prescribed due date, EFT payments or deposits shall have a settlement date on or before the prescribed due date, or the revised due date as provided in par. (c), of the payment or deposit.

(b) Payments or deposits made by EFT with a settlement date later than the prescribed due date or revised due date of the payment or deposit shall be considered late and shall be subject to all applicable late fees, penalties and interest.

(c) When the prescribed due date falls on a weekend or legal holiday, the payment due date is revised to be the first business day immediately following the weekend or holiday.

Example: If the prescribed due date falls on a Monday which is also memorial day, an ACH debit transfer must be initiated on or before the preceding Friday so that it has a settlement date on or before the following Tuesday, when the payment is due. A payer using an ACH credit transfer must work with the financial institution to initiate the transfer in time to settle on or before the revised payment due date.

(11) **EXCEPTION TO EFT REQUIREMENT.** (a) The secretary of revenue may waive the requirement to use the EFT payment method when the secretary determines that the require-

ment causes an undue hardship, if the person otherwise required to use EFT does all of the following:

1. Requests the waiver in writing.

Note: Written waiver requests should be addressed to Electronic Funds Transfer, Wisconsin Department of Revenue, P.O. Box 8912, Madison, WI 53708-8912.

2. Clearly indicates why the requirement causes an undue hardship.

3. Is current in all return and report filings and tax payments.

(b) In determining whether the EFT requirement causes an undue hardship, the secretary of revenue may consider the following factors:

1. Unusual circumstances which may prevent the payer from using the EFT method.

Examples: Examples of unusual circumstances include:

1) The person does not have access to a touch tone telephone.

2) The person is physically unable to use a touch tone telephone.

3) The telephone system available to the person is incompatible with the department's telephone system used for EFT registration or payments, or both.

2. Any other factor which the secretary determines is pertinent.

Note: Section Tax 1.12 interprets ss. 71.01(8r), 71.42(3m), 71.63(1m) and (5m), 71.65(3)(a), 73.029, 77.58(1m), 77.61(14), 77.96(5m), 78.12(5), 78.55(5m), 139.01(5m), 139.30(8m) and 139.75(5m), Stats.

Tax 11.14 Exemption certificates.

The title, subs. (1), (2)(a) and (c), (3)(a) and (b), (5)(b), (6)(title), (a)(title) and 2., and (b)(title), (intro.), and 3., and (7) to (12), the example following sub. (6), and the second note at the end of the rule are revised, to reflect a policy to replace various exemption certificates with Form S-211, a multipurpose exemption certificate.

Subsection (1) is further revised and the first note at the end of the rule is revised, to reference all of the subsections of secs. 77.52 and 77.53, Wis. Stats., which relate to exemption certificates.

Subsection (3)(b) is further revised, to place a nonsubstantive statement in a note rather than in the text of the rule.

Subsection (5)(b) is further revised, to clarify that a seller is not liable for tax on transactions covered by a valid exemption certificate.

Subsection (6)(b)4.c. is created, to reflect department policy that a person who makes exempt sales only may use a certificate of exemption (Form S-211) to claim exemption on tangible personal property or taxable services the person resells.

Subsection (15) is renumbered (13) and revised, to place it in a more logical order and to add references to the stadium tax. Consequently, subs. (13) and (14) are renumbered (14) and (15).

Subsection (16) is created and the second note at the end of the rule is further revised, to reflect a change in exemption certificate requirements for sales of certain commodities, as a result of amendments to secs. 77.52(13) and 77.53(10), Wis. Stats., by 1997 Wisconsin Acts 27 and 237.

The text of Tax 11.14 (title), (2)(a), (6)(b)4.c., and (16) is as follows:

Tax 11.14(title) Exemption certificates, including resale certificates.

(2)(a) Exemption certificates are signed by purchasers or lessees and are given to sellers or lessors to verify that a transaction is exempt. Sellers and lessors shall exclude from taxable gross receipts transactions for which they have accepted a valid exemption certificate in good faith from a purchaser. The department has provided retailers with ~~7 types of the following 2 sales and use tax exemption certificates, each of which is designed for use in specific types of transactions.~~ These certificates, discussed individually in this section, are the following:

1. Wisconsin sales and use tax exemption certificate, form S-211. This is

a multipurpose form which may be used for any sales and use tax exemption provided by law, except as provided in sub. (14). For direct pay, form S-211 may be used as the document described in s. Tax 11.13(5)(a)2. if all of the required information is included on the form S-211.

2. Construction contract entered into before the effective date of county/stadium tax, form S-207CT-1. This is a certificate which may be used by a contractor to purchase building materials without a county or stadium tax under the circumstances described in sub. (13).

(6)(b)4.c. A person who makes exempt sales only in the regular course of business may insert the words “exempt sales only” in the space for a seller’s permit number.

(16) **CERTAIN COMMODITIES.** No exemption certificate is required for sales of commodities, as defined in 7 USC 2, that are consigned for sale in a warehouse in or from which the commodity is deliverable on a contract for future delivery subject to the rules of a commodity market regulated by the U.S. commodity futures trading commission if upon the sale the commodity is not removed from the warehouse.

Tax 11.26 Other taxes in taxable gross receipts and sales price. Subsection (2)(c) is amended and sub. (3)(c) is created, to reflect the amendment to sec. 77.51(4)(a)4. and (15)(a)4., Wis. Stats., by 1997 Wisconsin Act 27, which excludes from gross receipts and sales price motor fuel taxes refunded.

Subsection (2)(d) is amended, to reflect current terminology relating to alternate fuels tax.

Subsection (2)(h) is created, to add the federal gas guzzler tax not previously listed as being included as part of gross receipts and sales price.

Tax 11.32 “Gross receipts” and “sales price.” Subsection (9) is created, to provide the tax treatment of sales of manufactured buildings, as a result of amendments to sec.

77.51(4)(b)3. and (15)(b)4., Wis. Stats., and the creation of sec. 77.51(4)(b)7. and (15)(b)6., Wis. Stats., by 1997 Wisconsin Act 27. The text of Tax 11.32(9) is as follows:

Tax 11.32(9) MANUFACTURED BUILDINGS. (a) Gross receipts and sales price from the sale of a “manufactured building,” as defined in s. 101.71(6), Stats., that is tangible personal property when sold, may be reduced by one of the following:

1. 35% of the sales price.

2. An amount equal to the sales price minus the cost of the materials that become an ingredient or component part of the manufactured building.

(b) No credit is allowed for trade-ins if gross receipts or sales price are reduced under par. (a).

(c) Once a retailer reduces gross receipts or sales price by the amount in par. (a)1. or 2., the retailer shall continue to use that method of reduction for all sales of manufactured buildings, that are tangible personal property when sold, until such time as the department approves in writing the use of the other method.

Tax 11.33 Occasional sales. Subsection (4)(a) is amended, to include the condition that an auction sale must be held at other than regular intervals to qualify for exemption as an occasional sale.

Subsection (4)(g) is amended, to exclude nonprofit organizations from the provisions of that paragraph.

Tax 11.41 Exemption of property consumed or destroyed in manufacturing. Subsection (1)(b)2.b. is amended, to clarify that the property manufactured must be destined for sale as tangible personal property to qualify for the manufacturing exemption in sec. 77.54(2), Wis. Stats.

Subsections (3)(b) and (3)(h) are amended, to reflect proper punctuation per Legislative Council Rules Clearinghouse standards.

Tax 11.53 Temporary events. Subsections (1)(a), (1)(b), and (1)(e) are repealed, subs. (2) to (5) are revised, and a note is added at the end of sub. (3), to reflect a change in department policy, to no longer issue temporary seller's permits and concessionaire permits. As a result of the repeal of subs. (1)(a) and (1)(b), subs. (1)(c) and (1)(d) are renumbered (a) and (b). Subsection (1)(a) as renumbered is amended, to reflect a new policy to permit the use of a mobile seller's permit simultaneously at multiple locations.

Subsection (6) is amended, to clarify the conditions under which the permit violation provisions apply.

The text of Tax 11.53(1)(a) as renumbered, (2), (4), (5), and (6) is as follows:

Tax 11.53(1)(a) "Mobile seller's permit" means a permit issued under s. 77.52(7) and (19), Stats., which is valid at any temporary event conducted by the permittee within Wisconsin ~~but which is valid at only one event at a time.~~ A mobile seller's permit may be used simultaneously at multiple locations that are not the retailer's fixed business locations. Except for its use at more than one place of operations, all provisions of ~~s. ss.73.03(50) and 77.52(7), (8), (9), (10), (11) and (12), Stats., apply to it.~~

(2) PERMITS FOR TEMPORARY EVENTS. Except as provided in sub. (3), a person conducting business as a retailer at a temporary event shall hold one of the following permits:

(a) A mobile seller's permit, if the event is not held at the retailer's fixed business location.

(b) A seller's permit, if the event is held at the retailer's fixed business location.

(4) SECURITY. Application for ~~permits referred to in this section a seller's permit or mobile seller's permit shall be on forms as a form prescribed by the department.~~ The applicant shall be subject to security requirements of s. 77.61(2), Stats., ~~except that for events of 7 consecutive days or less retailers holding concessionaire permits shall de-~~

~~posit security of \$25 per concession for each event and deposits for events which exceed 7 consecutive days shall be \$50 per concession for each event and may be required to deposit security in an amount determined by the department, but not in excess of \$15,000.~~

(5) RETURNS. Sales and use tax returns due from persons holding seller's permits and mobile seller's permits are subject to the provisions of s. 77.58, Stats. The returns shall report the tax due for the period of time or event covered by the returns and shall be due quarterly, on the last day of the next month following a calendar quarter unless notified by the department to file on some other basis under s. 77.52(19) or 77.58(1) and (2), Stats., and shall include on the return gross receipts from all temporary events and other taxable transactions of the permittee during the reporting period.

(6) VIOLATION. Under s. 77.52(12), Stats., any person required to hold a seller's permit who operates without a permit is guilty of a misdemeanor and shall immediately cease selling when requested by a department representative.

Tax 11.83 Motor vehicles. Subsection (1) is renumbered (1)(b) and amended, and sub. (1)(title), (intro.), and (a) are created; subs. (8)(b)1., (8)(c)(intro.) and 2., and (8)(d) are amended, subs. (8)(b)2. and (8)(b)3. are renumbered 3. and 4., and new (8)(b)2. is created. These changes are made to reflect the amendment to sec. 77.53(1m)(a), Wis. Stats., by 1997 Wisconsin Act 27, allowing the use of an amount per plate per month as the measure of use tax for vehicles assigned to owners of a dealership, and to reflect the increase from \$96 to \$104 per plate per month as the measure of use tax. The text of Tax 11.83(1)(title), (intro.), and (a), (8)(b)1., (8)(b)2., (8)(b)3.(intro.) as renumbered, (8)(c)(intro.), and (8)(d) is as follows:

Tax 11.83(1)(title) DEFINITIONS.
(intro.) In this section:

(a) "Actively participates" means the person performs services for the dealership, including selling, accounting, managing and consulting, for more than 500 hours in a taxable year for which the person receives compensation. "Actively participates" does not include services performed only in the capacity of an investor, including studying and reviewing financial statements or reports on the operation of the business, preparing or compiling summaries or analyses of the finances of the business for the investor's own use or monitoring the finances or operations of the activity in a nonmanagerial capacity.

(8)(b)1. Motor vehicles held for sale which are assigned to and used by a specific dealer employee subject to withholding from federal income tax on wages are subject to Wisconsin use tax on ~~\$96~~ \$104 per motor vehicle registration plate per month. The \$104 amount is effective January 1, 1999 and is subject to change annually as explained in the notes following sub. (8)(b).

Note to Revisor: Remove the note at the end of Tax 11.83(8)(b)1.

(8)(b)2. Motor vehicles held for sale which are assigned to and used by persons holding an ownership interest in Wisconsin licensed motor vehicle dealerships who are not subject to withholding for federal income tax purposes, but who actively participate in the day-to-day operation of the dealership, are subject to Wisconsin use tax on \$104 per motor vehicle registration plate per month. The \$104 amount is effective January 1, 1999 and is subject to change annually as explained in the notes below.

Note: As provided in s. 77.53(1m), Stats., the department will annually adjust the amount per plate to the nearest whole dollar to reflect the annual percentage change in the U.S. consumer price index for all urban customers, U.S. city average, as determined by the United States department of labor, for the 12 months ending on June 30 of the year before the change. The department will publicize any rate change in an issue of the *Wisconsin Tax Bulletin* prior to the January 1, that the change becomes effective.

Note: The amount per plate subject to use tax under par. (b)1. and 2. was \$96 for the period September 1, 1995

through December 31, 1996, \$99 for the period January 1, 1997 through December 31, 1997, and \$102 for the period January 1, 1998 through December 31, 1998.

(8)(b)3.(intro.) Motor vehicles held for sale and not assigned to and used by a specific dealer employee subject to federal withholding on wages are subject to Wisconsin use tax on the lease value of the motor vehicle computed on a calendar month basis. If a motor vehicle is used by the dealer for a period of less than one calendar month, the amount subject to use tax is the daily lease value calculated by multiplying the applicable monthly lease value by a fraction, the numerator of which is the number of days used by the dealer for a purpose in

addition to retention, demonstration or display and the denominator of which is the number of days in the calendar month. Lease value is computed using the internal revenue service lease value table contained in ~~internal revenue service regulation s. 26 CFR 1.61-21(d)(2)~~. In the lease value table, the “automobile fair market value” is one of the following:

(8)(c)(intro.) It is presumed that all dealer plates issued by the department of transportation to a licensed motor vehicle dealer are used each month on motor vehicles assigned to employees subject to withholding for federal income tax purposes or owners who actively participate in the day-to-day operations of the dealership for a pur-

pose in addition to retention, demonstration or display and are subject to use tax as provided in par. (b)1. and 2., unless one of the following applies:

(8)(d) Transitional provision. For motor vehicles, not assigned to employees or salespersons subject to federal withholding on wages or owners who actively participate in the day-to-day operations of the dealership, that are used by the dealer for a purpose in addition to retention, demonstration and display both prior to September 1, 1995, and on and after September 1, 1995, upon which a sales or use tax was paid on the purchase price of the motor vehicle by the dealer, the imposition of use tax as described in par.(b)2.3. does not apply. □



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

Allocation of income - compensation for services

Kenneth H. Paker (p. 17)

Appeals - frivolous

Timothy Van Groll (p. 17)

Assessments - correctness

Appeal procedure - disclosure under oath

Appeals - frivolous

Derick J. Norskog (p. 17)

Claim for refund - statute of limitations

Keith and Ellen Bower (p. 18)

Claim for refund - timely filed

Claim for refund - proper filing

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INDIVIDUAL INCOME TAXES

Allocation of income – compensation for services.

Kenneth H. Paker and Marianne Flood Paker vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, June 23, 1999). The issue in this case is whether income to which the taxpayer acquired rights in Illinois in 1995 and received from his former employers in 1996 after becoming a Wisconsin resident is taxable under Wisconsin income tax law.

The taxpayers filed a joint 1996 Wisconsin income tax return as part-year residents from January 20, 1996 to December 31, 1996. Two wage statements for Kenneth H. Paker (“the taxpayer”), both showing Wisconsin income tax withheld, were attached to the return.

The taxpayers did not report all of the income shown on the wage statements because they felt the unreported income is not subject to Wisconsin income tax. The department adjusted the tax return to include all of the wage income shown on the wage statements, stating that the income was taxable to Wisconsin because it was received while the taxpayers were Wisconsin residents.

The Commission concluded that the income which the taxpayer received from his former employer, to which he acquired rights in 1995 while an Illinois resident, and which he received in 1996 after he established residence in Wisconsin, is taxable as Wisconsin income pursuant to secs. 71.02 and 71.04, Wis. Stats. Income received while a Wisconsin resident is subject to Wisconsin income tax no matter where it was earned.

The taxpayers have not appealed this decision. ☐

Appeals – frivolous.

Timothy Van Groll vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, June 16, 1999). The issue in this case is whether the department properly denied the taxpayer’s claim for refund of income taxes paid.

In April 1998 the taxpayer filed amended Wisconsin income tax returns for 1994, 1995, and 1996. On each amended return he indicated that he was “unvolunteering in the income tax system,” and that Wisconsin has no jurisdiction over him to impose or collect income tax.

The department denied the taxpayer’s claims for refund, and he filed a petition for redetermination. The department denied that petition, and the taxpayer filed a timely petition for review with the Commission. In the petition for review he stated that “I’ve decided not to volunteer to pay Income tax. Income tax is voluntary...”

The Commission concluded that the taxpayer failed to allege or demonstrate any justiciable error of law by the department in its denial of the claims for refund, and it dismissed the petition for review. The Commission also concluded that the taxpayer’s position is frivolous and groundless, thereby subjecting him to an additional assessment under sec. 73.01(4)(am), Wis. Stats., and assessed him an additional \$500.

In its ruling the Commission held that the taxpayer’s “gobbledygook and the additional worthless ramblings in his communications and ‘brief’ have no merit in the real world.... It is unfortunate that his (and everyone’s) tax dollars must be wasted in dealing with them.”

The taxpayer has not appealed this decision. ☐

Assessments – correctness; Appeal procedure – disclosure under oath; Appeals – frivolous.

Derick J. Norskog vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, May 17, 1999). The issues in this case are:

- A. Whether the assessment against the taxpayer was incorrect because he was not a Wisconsin resident.
- B. Whether the taxpayer should be sanctioned for failing to answer questions under oath at trial as required by sec. 71.89(2), Wis. Stats.
- C. Whether the taxpayer should be sanctioned because his position is frivolous and groundless.

The taxpayer did not file a proper Wisconsin income tax return for any of the years 1993 through 1996. The department estimated the taxpayer’s income for those years and in December 1997 assessed him additional taxes for those years, as well as interest and a 25% negligence penalty. The taxpayer filed a petition for redetermination, arguing that he was not a Wisconsin resident during that period, except for the last four months of 1996. The department denied the petition, and the taxpayer appealed to the Commission.

At trial the taxpayer failed to answer questions asked of him by the department and by the Commission. He presented absolutely no evidence to support his position and refused to reveal the state to which he allegedly changed his residency.

The Commission concluded as follows:


- A. The taxpayer failed to establish that the assessment was incor-

rect or that he abandoned his Wisconsin residency and established a domicile in another state.

- B. The taxpayer is subject to sanction because he failed to make a full disclosure under oath before the Commission as required by sec. 71.89(2), Wis. Stats.
- C. The taxpayer is subject to sanction because his position in the proceeding is frivolous and groundless.

The Commission further concluded that the appropriate sanction under sec. 73.01(4)(am), Wis. Stats., is \$750 and assessed the taxpayer that amount.

The taxpayer has not appealed this decision. ☐


 **Claim for refund – statute of limitations.** *Keith and Ellen Bower vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, May 11, 1999). The issue in this case is whether the taxpayers' claim for refund should be allowed, even though it was filed after the statutory deadline for filing, because of "mitigating" circumstances.

The taxpayers filed amended 1990, 1991, and 1992 Wisconsin income tax returns, each claiming a refund, more than four years after the unextended due dates of the returns, the statutory time for filing provided in sec. 71.75(2), Wis. Stats. They argued that the statute should not be applied in this situation, because the four-year period is "arbitrary" and "could be interpreted as a guideline where there are mitigating circumstances." Keith Bower also argued that the statute should not be applied because no governmental agency ever informed him that his teacher pension income was not taxable, that

physical and mental impairment contributed to his filing incorrect returns, and that there is no public or societal interest served in the application of that statute in these circumstances.

The Commission concluded that the taxpayers' claim for refund should not be allowed. Section 71.75(1), Wis. Stats., states that the refund provisions in sec. 71.75, Wis. Stats., "shall be the only method" for filing claims for refund. The language is clear and unambiguous, and the taxpayers do not meet any of the statutory exceptions to the four-year claim for refund provision.

The taxpayers have not appealed this decision. ☐

 **Claim for refund – timely filed; Claim for refund – proper filing.** *Ronald H. and Mary Ann Hummitzsch vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, May 26, 1999). The issues in this case are:

- A. Whether the taxpayers properly filed a timely claim for refund with respect to their 1984 income taxes.
- B. What is the status of the taxpayers' claim for refund regarding their 1982 and 1983 taxes?

Ronald Hummitzsch ("the taxpayer") served in the United States armed forces and during the years at issue collected a military pension. On or about March 19, 1990, the taxpayers filed what purported to be amended tax returns for 1982 to 1984. The basis of the refund claim was apparently that since the taxpayer was a member of the military retirement system as of December 31, 1963, they are entitled to a refund on taxes they paid, based on the holding in the U.S. Supreme Court decision in *Davis v. Michigan Dep't*

of Treasury, 489 U.S. 803 (1989), on March 28, 1989. The taxpayers failed to sign each of the purported amended returns for 1982 to 1984.

In October 1990, the department denied the claim for refund for 1982 to 1984, based on its position that the *Davis* decision did not apply to years prior to 1989. The taxpayers filed a petition for redetermination, and the time to act on it was extended per a written agreement on January 25, 1991.

The taxpayers subsequently became members of a class-action suit against the department. In late 1993 or early 1994, the department and the class members' representative entered into a stipulation under which members could receive installment payments on their "timely individual refund claims." The stipulation apparently dealt with claims for refund for 1984 to 1988 (the taxpayers had earlier filed a claim for refund for 1985 to 1988, and the time to act on that claim had also been extended). The taxpayers agreed to the stipulation in February 1994 and returned a release to the department, indicating their consent.

On May 15, 1994, the department issued a letter to the taxpayers setting forth the terms of the refund and indicating that the department considered their 1984 claim for refund not timely. The letter made no reference to the claims for 1982 and 1983.

The Commission concluded as follows:


- A. The department properly denied the claim for refund for 1984 because the claim was not filed in a timely manner as required by sec. 71.75(2), Wis. Stats. In addition, the claim was not signed by the taxpayers as re-

quired by sec. 71.75(6), Wis. Stats.

- B. The Commission lacks the subject matter authority to consider the claims for refund for 1982 and 1983. It does not appear that the department acted on the taxpayers' petition for redetermination with respect to these claims, and the taxpayers never appealed the denial of these claims to the Commission.

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. □

 **Dependent credit.** *Cynthia M. de Werff vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, June 2, 1999). The issue in this case is whether the taxpayer is entitled to claim the dependent credit for her children Christina and Sean for 1992 to 1995.

Cynthia M. de Werff ("the taxpayer") and her former husband, Timothy C. de Werff, were divorced by order of the Waukesha County Circuit Court (the "Court") as of April 7, 1989. However, the judgment of divorce was not entered until January 31, 1992. At the time of the judgment, there were four minor children of the marriage: Christina, Sean, Michele, and Cassandra.

In an order dated September 4, 1991, the Court found that Mr. de Werff was current on his child support obligation and awarded him dependent credits associated with Christina and Sean. In the judgment of divorce, the Court determined that as of Novem-

ber 16, 1989, there was no child support arrearage and that it was fair to split the tax exemptions between the parties. The Court awarded Mr. de Werff dependent credits associated with Christina and Sean, and the taxpayer was awarded sole custody and primary physical placement of the four minor children of the marriage.

On June 23, 1992, the Court entered an amended judgment of divorce which added the proviso that Mr. de Werff could claim the dependent credits only if all child support payments were paid on time in that year. Following a hearing on July 28, 1992, however, the Court held that he was entitled to the dependent credits even if he was not current on his child support obligations.

Mr. de Werff may have been delinquent on his child support obligations during 1992 to 1995. During each of those years he never provided less than \$600 of support for each of the four children of the marriage. He claimed dependent credits associated with Christina and Sean for 1993, and he and his current wife ("Mr. and Mrs. de Werff") claimed the credits for 1992, 1994, and 1995.

The taxpayer claimed dependent credits for all four children for each of the years 1992 to 1995. She apparently refused each year to execute an IRS Form 8332 releasing the dependent exemptions for Christina and Sean to Mr. de Werff.

The department issued assessments in the alternative against the taxpayer and against Mr. and Mrs. de Werff with respect to the dependent credits associated with Christina and Sean. The taxpayer failed to appeal the assessment, and it went delinquent. She filed a timely claim for refund that was denied, and her pe-


tition for redetermination was also denied by the department.

Mr. and Mrs. de Werff filed a petition for redetermination with respect to their assessment, which was denied by the department. The Commission reversed the department's assessment on May 20, 1998, before the taxpayer filed her claim for refund.

The Commission concluded that the taxpayer is entitled to claim the dependent credit for 1992 to 1995 for Christina and Sean, because the record fails to show that she ever executed a Form 8332 releasing the dependency exemption with respect to these children to Mr. de Werff. For divorces after December 31, 1984, sec 152(e) of the Internal Revenue Code provides that a non-custodial parent may not claim a dependent exemption unless the custodial parent releases the dependent exemption to the noncustodial parent, the terms of the divorce judgment notwithstanding. In the prior matter involving Mr. and Mrs. de Werff, both parties argued the law that was in effect prior to that, when the release by the custodial parent was not required. The Commission is not compelled in a small claims case such as this, to correct the department's misunderstanding of the law.

The department has not appealed this decision.

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 **Earned income credit.** *Deana M. Siemik, n/k/a Deana Casarez vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, July 1, 1999).

The issue in this case is whether the taxpayer is entitled to claim earned income credits for 1994 and 1995 for a qualifying child of both herself and another individual.

During 1994 and 1995 the taxpayer and Rodney Casarez (“Casarez”) resided in the same household with the taxpayer’s three children. Two of the children were “qualifying children” (with respect to the earned income credit) of the taxpayer, and a third child, Austin, was the qualifying child of both the taxpayer and Casarez. In 1994 and 1995 respectively, Casarez’s Wisconsin income was \$28,011 and \$33,997 and the taxpayer’s Wisconsin income was \$6,183 and \$6,161.


The department issued an income tax assessment against the taxpayer, in which it disallowed the earned income credits with respect to Austin for 1994 and 1995. The basis of the assessment was that she was not entitled to those credits because Casarez was eligible to claim the credit for Austin, and he had a higher modified adjusted gross income than the taxpayer.

The Commission concluded that the taxpayer is not entitled to claim the earned income credit for Austin for 1995, because Casarez had a higher modified adjusted gross income. Internal Revenue Code (IRC) sec. 32(c)1(C). She is entitled to the earned income credit for Austin for 1994, however, because in that year the earned income credit was a function of state law, which contained no provision similar to IRC sec. 32(c)1(C). Section 71.07(9e)(ap)-(at), Wis. Stats. (1995-96).

Neither the department nor the taxpayer has appealed this decision.

CAUTION: This is a small claims decision of the Wisconsin Tax Ap-

peals Commission and may not be used as a precedent. The decision is provided for informational purposes only. □

 **Earned income credit; Head of household; Personal exemptions; School property tax credit – renters.** *Sheila Edwards vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, July 1, 1999). The issues in this case are:

- A. Whether Sheila Edwards (“the taxpayer”) is entitled to claim earned income credits for 1992 to 1995.
- B. Whether the taxpayer is entitled to claim the “head of household” filing status for 1994 and 1995.
- C. Whether the taxpayer is entitled to claim personal exemption credits for her three children for 1992 to 1995.
- D. Whether the taxpayer is entitled to claim the renter’s school property tax credit for 1993 to 1995.

In September 1996 the department issued assessments in the alternative to the taxpayer and to Leroy Bentley, Jr. (“Bentley”) for 1992 to 1995. During the years at issue the taxpayer and Bentley lived together in a home owned by him.

The assessment against Bentley largely mirrored the assessment against the taxpayer. Bentley filed a petition for redetermination, which the department denied, and he then filed a petition for review with the Commission. The Commission dismissed the petition on May 18, 1999, on the grounds that Bentley failed to prosecute his appeal. He did not file an appeal of the Ruling and Order, and thus the assessment is now final and conclusive.

With respect to the assessment against the taxpayer, the department’s denial of her earned income credits was based on the fact that Bentley had a higher modified adjusted gross income than her. The disallowance of the head of household filing status was based on the department’s belief that Bentley provided more than one-half of the cost of maintaining the household in 1994 and 1995. The denial of the personal exemption credits was based on the department’s assertion that Bentley provided most of the support for the three children. The denial of the renter’s school property tax credit was based on the department’s assertion that the taxpayer did not pay rent to Bentley for the years at issue.

The taxpayer’s Wisconsin income was \$1,133 in 1992, \$2,764 in 1993, \$6,495 in 1994, and \$7,393 in 1995. She also received Aid to Families with Dependent Children of between \$200 and \$300 per month during 1992, 1993, 1994, and the first several months of 1995. In 1994 and 1995 she provided more than one-half of the support for each of her three children out of her earned income.

The taxpayer paid rent to Bentley in the amounts of \$4,500 in 1993, \$5,100 in 1994, and \$5,088 in 1995. These amounts were equal to one-half of the mortgage payments paid by Bentley. In addition, the taxpayer paid for the bulk of her children’s food and clothing during each of the years at issue, as well as most of the utility bills for the household.

The Commission concluded as follows:

- A. The taxpayer is not entitled to claim the earned income credit for 1992, 1993, or 1995, because Bentley had a higher modified adjusted gross income in each of

those years. Internal Revenue Code ("IRC") sec. 32(c)(1)(C). She is entitled to the earned income credit for 1994, however, because in that year the earned income credit was a function of state law, which contained no provision similar to IRC sec. 32(c)(1)(C). Section 71.07(9e)(ap)-(at), Wis. Stats. (1995-96).

- B. The taxpayer is not entitled to head of household filing status for 1994 or 1995, because she did not show that she paid for more than one-half of the cost of maintaining the household.
- C. The taxpayer is not entitled to claim personal exemption credits for 1992 or 1993 but is entitled to the credits for 1994 and 1995. She failed to prove that she provided more than one-half of the support for her children in 1992 or 1993, since her AFDC benefits for those years exceeded her earned income, and she had the benefit of medical assistance and food stamps. However, since her income was higher in 1994 and 1995, it is likely she provided more than one-half of the support for those years.
- D. The taxpayer is entitled to claim the renter's school property tax credits for 1993 to 1995 because she paid rent to Bentley during those years.

Neither the department nor the taxpayer has appealed this decision.

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

Farm loss – limitation. *Thomas W. and Marilynne*

A. Maciejczak vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, July 19, 1999). The issue in this case is whether the department properly limited the taxpayers' farm losses for 1991, 1993, and 1994.

During the years at issue, the taxpayers operated a farm. Mrs. Maciejczak was employed full-time off the farm during this period. Mr. Maciejczak was employed full-time off the farm in 1991 and 1993 and part-time off the farm in 1994.

In 1993, a barn on the taxpayers' farm was destroyed by fire. Due to financial hardship caused in part by the loss of the barn, Mr. Maciejczak withdrew \$40,000 from a 401(k) plan that he was in the process of converting to an IRA. The 401(k) account was from his previous non-farm employment. Later in 1994 he withdrew an additional \$5,000 from his IRA. Had it not been for the withdrawal of the \$45,000, the taxpayers would not have faced a farm loss limitation in 1994.


The taxpayers make the following arguments:

- The \$45,000 withdrawn in 1994 should not be considered "non-farm Wisconsin adjusted gross income" in determining the farm loss limitation that year.
- The Commission should consider the Legislature's intent of the law, which the taxpayers assert was to limit investors and other high-income people from using farms as tax shelters.
- The department did not audit the taxpayers' returns and inform them in a timely manner so as to minimize the amount of interest.

- The farm loss limitation is unconstitutional because it discriminates against farmers who have nonfarm income.
- The farm loss limitation violates the uniformity clause of the Wisconsin Constitution, Article VIII, section 1.

The Commission concluded that the department properly limited the taxpayers' farm losses for 1991, 1993, and 1994. The withdrawal from retirement savings constitutes "nonfarm Wisconsin adjusted gross income" in sec. 71.05(6)(a)10, Wis. Stats., and the Commission may not modify the assessment based on legislative intent, because the term's meaning as used here is clear and unambiguous. The assessment was properly issued within the time periods specified in sec. 71.77(2) and (4), Wis. Stats. Finally, the farm loss limitation does not unconstitutionally discriminate against farmers with nonfarm income in excess of \$55,000 or violate the uniformity clause of the Wisconsin Constitution.

The taxpayers have not appealed this decision. □

 **Issue preclusion.** *Arthur A. and Betty L. Van Aman vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, May 5, 1999). The issue in this case is whether the taxpayers are prevented, under the doctrine of issue preclusion, from relitigating issues that had been decided in an earlier Commission decision involving them. See *Wisconsin Tax Bulletin* 98 (July 1996), page 18, for a summary of the earlier Commission decision, which involved the years 1990 through 1993.

The taxpayers have been Wisconsin residents since February 1990. Prior

to their retirement and their move to Wisconsin, both taxpayers were school teachers in Illinois, and both were members of the Illinois Teachers Retirement System ("ITRS") on December 31, 1963.

The taxpayers received annuity payments from ITRS during 1990 through 1993 and included the income on their Wisconsin tax returns for those years. In November 1994 they filed a claim for refund for those years, asserting that the annuity payments were exempt under sec. 71.05(1)(a), Wis. Stats. The department denied their claim for refund as well as their petition for redetermination, and the taxpayers appealed to the Commission. In a March 13, 1996, decision, the Commission affirmed the department's action, and the taxpayers did not appeal that decision.

The taxpayers continued to receive annuity payments from ITRS during 1994 through 1996, the years at issue in this case. They reported the income on their tax returns, but in December 1997 they filed a claim for refund. The department denied their claim for refund as well as their petition for redetermination, and the taxpayers appealed to the Commission.

The department filed with the Commission a motion for summary judgment, on the basis that the petition for review must be dismissed under the doctrine of issue preclusion. The department argued that the holdings in the March 13, 1996, decision precludes relitigating the same issues.

The Commission concluded that the doctrine of issue preclusion does prevent the taxpayers from relitigating the validity of sec. 71.05(1)(a), Wis. Stats. The taxpayers could have appealed the earlier decision but did not. The issues are

identical in both cases, and there has been no law change that would dictate a change in the earlier decision. The Commission granted the motion for summary judgment and dismissed the petition for review.

The taxpayers have not appealed this decision. □



Trade or business – engaged in for profit.

Ivan Kevo vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, August 10, 1999). The issue in this case is whether, during 1995 and 1996 (the years at issue), the taxpayer operated his machine shop as a trade or business under sec. 162, Internal Revenue Code ("IRC").

The taxpayer began operating a machine shop in Chicago, Illinois in 1980. He had a business partner until 1986, when he bought out his partner, and he then began operating the shop as a sole proprietor.

In October 1994 the taxpayer moved to Wisconsin and began working full time as an employee in Wisconsin. He also continued operating his machine shop in Chicago, travelling there on weekends and days off. His work in the machine shop included industrial and equipment repairs, welding, and light construction.

The taxpayer reported net losses from his machine shop on his federal tax return each year from 1990 to 1996. The losses ranged from about \$12,000 to about \$25,600 during 1990 to 1994, \$13,763 in 1995, and \$8,447 in 1996. The taxpayer contended that prior to moving to Wisconsin in October 1994 he "made a living" from the machine shop. His full-time job in Wisconsin did not allow him to spend much time at the machine shop, but he stated he retained the machine shop to make a profit, not merely to retain

his investment in the property. However, he did terminate the business in either 1998 or 1999 because he believed he would not make a profit.

In December 1997, the department issued an assessment to the taxpayer for tax years 1995 and 1996. The taxpayer filed a petition for redetermination with the department, which it denied.

The Commission concluded that the department properly determined that the taxpayer did not operate his machine shop as a trade or business in 1995 and 1996 within the meaning of sec. 162, IRC. Section 162, IRC, allows deductions for ordinary and necessary expenses paid or incurred in carrying on a trade or business. Section 183, IRC, provides that deductions are not allowable if an activity is not engaged in for profit. Treasury Regulation sec. 1.183 describes several factors relevant to this determination, including:

- Time and effort expended by the taxpayer in carrying on an activity;
- Taxpayer's history of income or losses with respect to the activity;
- Amount of occasional profits, if any; and
- Financial status of the taxpayer.

Each of the relevant factors tends to show that the machine shop was not operated for a profit and, therefore, was not a trade or business within the meaning of sec. 162, IRC. The machine shop does not qualify for the "engaged in for profit" presumption in sec. 183, IRC, because it experienced losses in all five of the years 1992 to 1996.

The taxpayer has not appealed this decision. □

CORPORATION FRANCHISE AND INCOME TAXES

Accounting – change in method. *Babcock and Wilcox Company (The) vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, April 6, 1999 and June 16, 1999). The issue in this case is whether \$600 million in deferred income should have been realized by the predecessor corporation at the time of a merger in 1978 and not by the taxpayer.

The taxpayer is a Delaware corporation and a subsidiary of McDermott Incorporated (“McDermott”). In 1977 McDermott began to acquire the stock of The Babcock & Wilcox Company (“Old B&W”), a New Jersey corporation.

Subsequently, McDermott created a wholly owned subsidiary, McDermott Energy, Inc., organized as a Delaware corporation. Effective March 31, 1978, Old B&W was merged into McDermott Energy, Inc., and the name was changed to “The Babcock and Wilcox Company,” which is the taxpayer. Effective the same date, the taxpayer acquired all of the assets and liabilities of Old B&W and carried on the same business, with the same management.

During the years at issue (April 1, 1978 to March 31, 1984), in nearly every instance the taxpayer’s products were constructed in specific and unique customer specifications, under competitively bid contracts. The duration of these contracts typically covered several years.

The taxpayer and Old B&W used two different methods of accounting with respect to these long-term contracts. They used the completed contract method for state and federal tax reporting purposes and the per-

centage of completion method for financial reporting purposes.

Under the completed contract method, income and expenses associated with a particular contract are not reported until the year the contract is completed, and thus tax liabilities are not incurred until then. Under the percentage of completion method, income and costs are reported in each year of the contract. In each year, costs actually incurred in that year are reported, and the income to be reported is a portion of the total income expected under the contract.

At the time of the 1978 merger, Old B&W had deferred approximately \$600 million of income by use of the completed contract method of accounting. This income had been earned by Old B&W through the performance of its long-term contracts but was not reported on its final return for the year ending March 31, 1978. The \$600 million was gradually reported by the taxpayer as these contracts were completed.

At the time of the merger, Old B&W had unused manufacturers sales tax credits, as well as an available business loss carryover. The credit and loss carryovers were claimed by the taxpayer on its returns in the years following the merger.

In February 1986 the department disallowed the taxpayer’s unused sales tax credits and the net business loss carried forward from Old B&W. The taxpayer filed a petition for redetermination in April 1986, arguing that it was entitled to deduct the credits and the loss carryover. As an alternative, the taxpayer argued that effective with the merger the \$600 million in deferred income was properly taxable to Old B&W and should not have been reported by the taxpayer. Under this theory, the tax-

payer claimed it would have no taxable income for tax years ending March 31, 1979 to 1981, and it was entitled to refunds for tax years ending March 31, 1982 and 1983.

In June 1986 the taxpayer filed amended 1982 and 1983 tax returns, claiming the refunds that it argued it was entitled to in its April 1986 petition for redetermination. The department denied the claims for refund, and in July 1986 the taxpayers filed a petition for redetermination with respect to this denial. In July 1997 the department denied both the April 1986 and the July 1986 petitions for redetermination.


On appeal, the department argues that in order to obtain the relief it is seeking, the taxpayer would need to change its method of accounting. During the period covered by the amended returns, administrative rules required the department’s permission to change the method of accounting, and neither the taxpayer nor Old B&W obtained this permission. The taxpayer is thus not entitled to the refund or offset it seeks.

The Commission concluded that the taxpayer is not entitled to a refund or offset concerning the taxpayer’s proposed treatment of the \$600 million of income deferred from Old B&W because (1) Wisconsin law does not mandate this treatment, (2) neither the taxpayer nor Old B&W obtained permission to change its method of accounting, and (3) the taxpayer is not entitled to cast its treatment of long-term contracts in a manner different from the manner it and Old B&W reported to the department.

The Commission awarded summary judgment to the department with respect to the treatment of the \$600 million of deferred income but noted in its April 6, 1999 ruling and order

that an issue still to be resolved relates to certain depreciation expenses for property located outside Wisconsin. However, that issue was previously resolved by the department's allowance of the disputed depreciation. The taxpayer withdrew that portion of its petition for review, and in its order of June 16, 1999, the Commission concluded that the only issues to be decided were those addressed in the April 6, 1999 ruling and order.

The taxpayer has appealed the decision of April 6, 1999, to the Circuit Court. □

 **Deductions – taxes – single business taxes.** *Delco Electronics Corporation vs. Wisconsin Department of Revenue* (Court of Appeals, District IV, May 13, 1999). This is an appeal of a decision of the Circuit Court for Dane County dated March 20, 1998. See *Wisconsin Tax Bulletin* 110 (July 1998), page 18, for a summary of the Circuit Court decision. The issue is whether the taxpayer may deduct the Michigan Single Business Tax (MSBT) from the calculation of its Wisconsin franchise taxes.


The taxpayer ("Delco"), a subsidiary of General Motors, is an automotive electronics manufacturer that 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 liability for the MSBT, due to its business activities conducted in Michigan. For the period under review, Delco deducted the MSBT on its federal corporate income tax returns.

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

appeal, the Tax Appeals Commission ("Commission") upheld the department's disallowance of the deduction, on the grounds that the MSBT is a tax "on or measured by all or a portion of" either Delco's net income or its gross receipts. The Circuit Court reversed the Commission decision.

The Court of Appeals concluded that Delco may not deduct the MSBT in calculating its Wisconsin franchise tax liability. It reversed the decision of the Circuit Court and affirmed the Commission's determination that the MSBT is a tax "on or measured by all or a portion of" gross receipts, thus precluding the deduction under sec. 71.04(3), Wis. Stats. (1985-86) and 71.26(3)(g), Wis. Stats. (1987-88).

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

 **Dividends received deduction.** *Firstar Bank Wausau, N.A. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, August 18, 1999). The issue in this case is whether the department properly disallowed, pursuant to sec. 71.26(3)(j), Wis. Stats., the taxpayer's deduction of dividends it received from the Federal Reserve Bank.

The taxpayer is a national bank. On its 1991 Wisconsin franchise tax return it claimed a deduction for dividends received on Federal Reserve Bank ("FRB") stock it owned. The distributions it received from the FRB constitute dividends under federal and state law.

The taxpayer maintains that sec. 71.04(4), Wis. Stats. (1983-86), the dividend deduction statute which was substantially succeeded by sec. 71.26(3)(j), Wis. Stats. (1987-92), was invalidated in its entirety by the

decision in *NCR Corp. v. Dep't. of Revenue* (Dane County Circuit Court, April 30, 1993) (the "NCR decision"). The department maintains that some of the dividend deduction statute is severable from the language held unconstitutional in the NCR decision, and the dividends at issue are not deductible because the FRB does not meet the surviving requirements for deductibility.

The taxpayer also maintains that the department's disallowance of the dividends received deduction is barred by the constitutional doctrine of intergovernmental tax immunity. It further contends that the denial of the dividends received deduction amounts to state taxation of a federal obligation, which is prohibited under 31 U.S.C. sec. 3124(a).

The Commission concluded that the department properly denied the taxpayer's deduction for FRB dividends received, because the FRB does not meet all of the valid requirements of sec. 71.26(3)(j), Wis. Stats. (1991-92). The FRB was not subject to tax under ch. 71, Wis. Stats., and did not file a return or deduct dividends under ch. 71.


Sections 71.04(4), Wis. Stats. (1983-86) and 71.26(3)(j), Wis. Stats. (1987-92) were not entirely invalidated by the NCR decision. Those statutes are severable pursuant to sec. 990.001(11), Wis. Stats.

The department's action under sec. 71.26(3)(j), Wis. Stats. (1991-92) is not barred by the doctrine of intergovernmental tax immunity or by 31 U.S.C. sec. 3124(a). The statute's effect is to uniformly alleviate what would otherwise be double taxation, at both the corporate level and at the corporate shareholder level. The deduction is not available to the taxpayer as a FRB shareholder because the FRB is not taxed at the state level and therefore there is no

double taxation to alleviate. The statute does not place a burden on the taxpayer greater than on other corporations that receive dividends from corporations that are not taxed by the state. For these same reasons, the denial of the deduction for dividends received from the FRB does not amount to state taxation of a federal obligation, which is prohibited under 31 U.S.C. sec. 3124(a).

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

SALES AND USE TAXES

 **Common or contract carriers.** *J&M Transportation Specialists, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, April 28, 1999). The issue in this case is whether the taxpayer's purchase of a vehicle qualifies for exemption as a common or contract carrier under sec. 77.54(5)(b), Wis. Stats.


The taxpayer purchased a *Winnebago* motor home in 1995. Upon registration, the taxpayer claimed the sales tax exemption for common or contract carriers using its LC authority number on the application. The taxpayer subsequently changed the application to indicate that the vehicle was a 1994 Ford truck. It was registered as such, without payment of any sales tax.

In order to qualify for exemption under sec. 77.54(5)(b), Wis. Stats., the following qualifications must be met: 1) the vehicle must be a motor truck, truck tractor, road tractor, bus, trailer, or semitrailer; 2) the taxpayer must be a common or contract carrier; and 3) the taxpayer must "use" the vehicle exclusively as a common or contract carrier. The taxpayer stated that the vehicle's purpose was to move "time sensitive freight requiring team drivers" and that it "felt

that this vehicle has nicer accommodations for team drivers."

The Commission concluded that the vehicle, as used, did not fit the statutory definition of motor truck, truck tractor, road tractor, bus, trailer, or semitrailer. The vehicle was not used in common motor carriage, and the taxpayer did not "use" its vehicle "exclusively as a common or contract carrier."

The taxpayer has not appealed this decision. ☐

 **Containers, packaging, and shipping materials - delivery of newspapers.** *Madison Newspapers, Inc. vs. Wisconsin Department of Revenue* (Court of Appeals, District IV, June 10, 1999). On September 1, 1998, the Circuit Court for Dane County affirmed the Wisconsin Tax Appeals Commission's January 28, 1998 decision. See *Wisconsin Tax Bulletin* 112 (January 1999), page 24 and *Wisconsin Tax Bulletin* 107 (April 1998), page 16, for summaries of the Circuit Court and Commission decisions. The issue is whether the taxpayer's carriers are its "customers" for purposes of the exemption from sales tax for packaging materials in sec. 77.54(6)(b), Wis. Stats.

The taxpayer produces and distributes two newspapers. For the period in question, when the taxpayer distributed the newspapers to its carriers, it bundled them using string, strap, and other wrapping and packaging materials. After receiving the newspaper bundles, the carriers would remove and discard the packaging materials before delivering the newspapers to subscribers.


Section 77.54(6)(b), Wis. Stats., provides an exemption for the gross receipts from the sale of and the storage, use or consumption of

"Containers, labels, sacks, cans, boxes, drums, bags or other packaging and shipping materials for use in packing, packaging or shipping tangible personal property, *if such items are used by the purchaser to transfer merchandise to customers...*" (Emphasis added.)

The department assessed the taxpayer for sales and use tax on the packaging and shipping materials that the taxpayer used when it distributed newspapers. The Commission and the Court both held that the materials were not exempt because the carriers did not qualify as "customers" under sec. 77.54(6)(b), Wis. Stats. The taxpayer argues that, because carriers entered into an agreement to purchase newspapers from the taxpayer to resell to subscribers, the carriers qualified as the taxpayer's customers.

The Court of Appeals concluded that the totality of the evidence demonstrated more of an agency type relationship because the taxpayer retained a substantial amount of control over the carriers and the taxpayer bore a significant amount of the expense and risk associated with the sale of the newspapers. These characteristics are uncommon in a vendor-customer relationship. The Court gave due weight to the Commission's conclusions and was satisfied that the Commission's findings were both reasonable and consistent with the law's mandate to interpret and apply the exemption strictly.

The taxpayer has not appealed this decision. ☐

 **Manufacturing.** *Parkview Sand & Gravel, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, June 22, 1999). The issues in this case are:

- A. Whether the taxpayer's 1991 purchase of a backhoe (and safety attachments and repair or replacement parts), which it used in its gravel business, was exempt from use tax under sec. 77.54(6)(a), Wis. Stats.
- B. Whether the taxpayer was negligent in failing to report use tax and filing incorrect use tax returns during the period under review, and if so, whether the taxpayer filed an incorrect return for "good cause."

The taxpayer is a Wisconsin corporation that operates a sand and gravel pit involving manufacturing operations. The taxpayer purchased a backhoe in 1991. No sales or use tax was paid. The backhoe was used for:

- Developing new settling ponds (30.8%),
- Excavating silt from settling ponds (35.2%),
- Stripping and restoration (33.0%), and
- Loading customers' trucks (1.0%).

The department assessed the taxpayer use tax on its purchase of the backhoe and parts. The department also imposed the 25% negligence penalty under sec. 77.60(3), Wis. Stats.

The Commission concluded as follows:

- A. The taxpayer's purchase of a backhoe and safety attachments and repair or replacement parts is not exempt from use tax under sec. 77.54(6)(a), Wis. Stats.
- B. The taxpayer is liable for penalty under sec. 77.60(3), Wis. Stats., because it negligently filed incorrect returns for the

four fiscal years in the period under review, and the errors on the returns were not due to "good cause."

For the taxpayer's backhoe and parts to be exempt under sec. 77.54(6)(a), the backhoe must be: 1) a machine or specific processing equipment; 2) used by a manufacturer; 3) used "exclusively" in manufacturing tangible personal property; *and* 4) used "directly" in manufacturing tangible personal property. The taxpayer used its backhoe in activities that the Commission concluded *are not* covered in the definition of "manufacturing" and, therefore, are not exempt from use tax under sec. 77.54(6)(a), Wis. Stats. These activities include stripping and restoration of land before and after extracting stone (33%), excavation of earth and materials to create new settling ponds (30.8%), and loading silt onto customers' trucks (1%).

The taxpayer had previously been audited and assessed use tax. The taxpayer also had no system of recording or reporting use tax. It relied on its suppliers to collect sales tax on its purchases. A taxpayer has the duty of complying with the sales and use tax laws, and the Commission concluded that the taxpayer should have known of its statutory obligation.

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



Printing - advertising materials sent out-of-state.

Sax Arts & Crafts, Inc. vs. Wisconsin Department of Revenue (Circuit Court for Dane County, May 24, 1999). The Wisconsin Tax Appeals Commission issued a decision on August 12, 1998, which was appealed to the Circuit Court. See *Wisconsin Tax Bulletin* 112 (January 1999), page 25, for a summary of

the Commission's decision. The issue in this case is whether the Commission was correct in its decision that the department properly imposed sales and use tax on certain purchases and services relating to the taxpayer's catalog printing and distribution.

The taxpayer is a Delaware corporation whose principal place of business is in New Berlin, Wisconsin. The taxpayer is a direct seller of arts and crafts supplies and of school supplies. It sells by direct mail through catalogs distributed nationwide. The taxpayer did not charge its institutional customers, which were the overwhelming majority of its customers, for its catalogs.

The taxpayer's catalogs were printed in Wisconsin by Wisconsin printers. The taxpayer purchased the paper to be used in the printing from both a Wisconsin and an out-of-state supplier. The paper was shipped directly to the Wisconsin printers. The taxpayer retained title to the paper. The catalogs were shipped, at the direction of the taxpayer, directly to the taxpayer's customers.

The Circuit Court concluded that the Commission had correctly determined that:


- 1) A sales tax was properly imposed upon the taxpayer for its purchase in Wisconsin of unprinted paper stock to be used by third party Wisconsin printers for the printing and producing of the taxpayer's catalogs for distribution out-of-state, when catalogs were distributed without charge and thus not "destined for sale;"
- 2) A use tax was properly imposed on the taxpayer for its storage, use, or other consumption in Wisconsin of unprinted paper

stock when it purchased the paper out-of-state for catalogs which were printed in Wisconsin and then distributed without charge in Wisconsin; and

- 3) A sales tax was properly imposed upon the taxpayer for its purchase in Wisconsin of “finished art” which were used or consumed in the printing and production of the taxpayer’s advertising catalogs, by independent Wisconsin printers, and subsequently distributed without charge to customers and potential customers throughout the country.

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

WITHHOLDING OF TAXES

 **Officer liability.** *Irvin L. Hougom vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, April 28, 1999). The issue in this case is whether the taxpayer is a responsible person under sec. 71.83(1)(b)2, Wis. Stats., liable for the unpaid withholding taxes of Scenic Trailways, Inc. (“the corporation”).

The taxpayer was an officer of the corporation since 1971, when the corporation first applied for a withholding tax employer identification number from the department. During 1991-1995 the taxpayer held the office of president and was personally involved with the day-to-day operations of the corporation. The taxpayer was a signer on the corporate checking account and personally

issued checks on that account. The taxpayer also entered into agreements with the department agreeing to pay delinquent withholding taxes. Prior to the personal liability issue at question, the taxpayer received and paid three personal liability assessments for prior periods.

The Commission concluded the taxpayer was a responsible person under sec. 71.83(1)(b)2, Wis. Stats., and was personally liable for the unpaid withholding taxes. The taxpayer had the corporate **authority** to direct the payment of taxes and did not do so; he had a **duty** to direct payment and did not do so; and he **intentionally breached that duty**.

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 is included:

1 Purchases of Building Materials by Exempt Entities for Use by Contractor in Real Property Construction

Note: This tax release replaces the tax release by the same title that appeared in *Wisconsin Tax Bulletin 74* (October 1991), pages 22 to 30. This tax release applies prospectively and retroactively to all periods open to adjustment under the statute of limitations. Revisions from the previous tax release include the addition of exempt entities in the section titled “Background” as a result of laws enacted, and changing Answer B in Facts and Questions 1 and 2 and the rationale for Answer B in Facts and Questions 3, 4, and 5.

Statutes: Sections 77.51(2) and (14), 77.54(9a), and 77.55(1), Wis. Stats. (1997-98)

Sales and Use Taxes

1. Purchases of Building Materials by Exempt Entities for Use by Contractor in Real Property Construction (p. 27)

SALES AND USE TAXES

Note: The following tax release interprets the Wisconsin sales and use tax law as it applies to the 5% state sales and use tax. The 0.5% county and 0.1% stadium sales and use taxes may also apply. For informa-

tion 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*.

Wis. Adm. Code: Section Tax 11.04 (January 1979 Register)

Background: “Exempt entity,” for purposes of this tax release, means any one of the following entities listed in secs. 77.54(9a) and 77.55(1), Wis. Stats. (1997-98).

- A. United States, its unincorporated agencies and instrumentalities, and any incorporated agency or instrumentality of the United States wholly owned by the United States or by a corporation wholly owned by the United States.
- B. State of Wisconsin or any agency thereof.
- C. The University of Wisconsin Hospitals and Clinics Authority.
- D. Any county, city, village, town, or school district in Wisconsin.
- E. A county-city hospital established under sec. 66.47, Wis. Stats. (1997-98).
- F. A sewerage commission organized under sec. 281.43(4), Wis. Stats. (1997-98), or a metropolitan sewerage district organized under secs. 66.20 to 66.26 or 66.88 to 66.918, Wis. Stats. (1997-98).
- G. Any other unit of government in Wisconsin or any agency or instrumentality of one or more units of government in Wisconsin.
- H. Any joint local water authority created under sec. 66.0735, Wis. Stats. (1997-98).
- I. A local exposition district under subch. II of ch. 229.
- J. Any corporation, community chest fund, foundation, or asso-

ciation organized and operated exclusively for religious, charitable, scientific, or educational purposes, or for the prevention of cruelty to children or animals, except hospital service corporations under sec. 613.80(2), Wis. Stats. (1997-98), no part of the net income of which inures to the benefit of any private stockholder, shareholder, member, or corporation.

A contractor is a consumer of tangible personal property when engaged in real property construction activities, such as improving, altering, installing, repairing, or otherwise servicing real property, and Wisconsin sales or use tax applies to the sale of tangible personal property to the contractor.

When a contractor is a consumer, its gross receipts from labor and material related to real property construction activities are not subject to sales tax. In most instances, the contractor will pay a sales or use tax on its purchases of property consumed in real property construction activities.

Section Tax 11.04(3), Wis. Adm. Code, provides that when a contractor and an exempt entity enter into a construction contract to improve real property, which provides that the contractor is to furnish the building materials and equipment, it is presumed, until the contrary is established, that deliveries of building materials and equipment to the contractor are made pursuant to purchases made by the contractor.

A supplier's sales of building materials and equipment made **directly** to an exempt entity are not subject to Wisconsin sales or use tax, even though such tangible personal property is later used by a contractor in the erection of a building or structure, or in the alteration, repair, or im-

provement of real property for the exempt entity. Suppliers of building materials and equipment may presume that a sale is made **directly** to an exempt entity if the supplier receives a purchase order from the exempt entity, and payment for the building materials and equipment is received from the exempt entity.

Cautions:

- A contractor may be responsible for sales or use tax on materials used in real property construction for an exempt entity if the contractor is also the supplier of the materials to the exempt entity. See *Wisconsin Tax Bulletin 80* (January 1993), page 37 for more information.
- This tax release is not intended to address the sale and installation of tangible personal property that remains tangible personal property after installation, or taxable services, such as landscaping. Refer to Wisconsin Publications 207 and 210 for more information.

Summary: The following examples illustrate that if an exempt entity properly purchases materials directly from suppliers, the transfer of possession (but not ownership, title, or enjoyment) of those materials and equipment from the exempt entity to the contractor for use in real property construction for the exempt entity is not taxable, regardless of whether:

1. The contract specifies that the contractor is to provide all materials and equipment, the exempt entity purchases the materials and equipment directly from suppliers, and the exempt entity obtains a reduction in the contract price for the direct purchased materials and equipment (e.g., change order), or

2. The contract excludes those materials and equipment the exempt entity will purchase directly from suppliers, resulting in no need for a reduction in the contract price (e.g., change order).

Facts and Question 1: Contractor A enters into a contract to construct a building for Exempt Entity B. The contract states in part as follows [emphasis added]:

“Contractor A hereby proposes to furnish **all labor and materials** and perform all work for the New Building, in strict accordance with the specifications and drawings mentioned therein, as prepared by the Architect, for the following amount.”

“Exempt Entity B reserves the right to purchase or rent directly any materials and equipment for the work of construction, where the total cost of an item or of any aggregation of items to be ordered from one supplier is two thousand dollars (\$2,000) or more. At the end of this section is set forth a list of items or materials and equipment which are identified for consideration by Exempt Entity B for direct purchase or rent. For any item (or aggregate of items from one supplier) purchased or rented by Exempt Entity B, the gross price of such item (as computed by Contractor A hereinafter), plus sales or use tax that would have been applicable to such item if not purchased or rented by Exempt Entity B, shall be deducted from the contract sum to be paid to Contractor A pursuant to its agreement with Exempt Entity B.”

“The contract sum constitutes the maximum cost to Exempt Entity B of the work performed for the work of construction and includes all labor and services and the total cost, including applicable taxes, of all materials and equipment to be purchased and/or for the completion of the work of construction. Contractor

A is required to list its suppliers/vendors or recommended suppliers/vendors and value or cost of the item(s) set forth at the end of this section. Contractor A shall provide all services necessary to Exempt Entity B for Exempt Entity B to purchase the materials and equipment, including preparation of proposed purchase orders, recommendations of vendors and suppliers, and receipt, storage, and protection of materials and equipment. Exempt Entity B will purchase from the vendors and suppliers listed and/or recommended by Contractor A, unless Exempt Entity B is able to secure more advantageous prices. Any discounts, savings, and rebates from the costs and values given by Contractor A of the items identified at the end of this section will belong to Exempt Entity B. Contractor A will furnish any materials and equipment not provided in its listing or which Exempt Entity B is not able to obtain within the maximum cost provided to Exempt Entity B.”

“For any materials and equipment purchased by Exempt Entity B so as to utilize its tax exempt status, Exempt Entity B is and shall be responsible to ensure and arrange that all such materials and equipment are delivered to the job site or such other place as may be designated by Contractor A. Until such materials and equipment are delivered to the job site or such other place as designated by Contractor A, Exempt Entity B has sole and complete responsibility for such materials and equipment, including without limitation any loss or damage thereto. Upon delivery to the job site or such place as designated by Contractor A, Contractor A shall be responsible for examining or inspecting such materials and equipment to assure Exempt Entity B that they are acceptable and in conformance with the contract documents. Any defect or deficiency shall be called to the attention of Ex-

empt Entity B immediately upon delivery in order that Exempt Entity B may obtain any necessary adjustment or replacement of such materials and equipment. If any defect or deficiency is not called to Exempt Entity B’s attention immediately, and as a result Exempt Entity B is not able to obtain a proper adjustment and/or replacement of such materials, such defect or deficiency shall be the responsibility of Contractor A to remedy. Upon acceptance of such materials and equipment, Contractor A is responsible for the installation and incorporation of such materials and equipment into the work of construction in accordance with its agreement with Exempt Entity B and the contract documents generally.”

- A. Is the sale of materials and equipment to Exempt Entity B by suppliers subject to Wisconsin sales and use taxes?
- B. Is there any Wisconsin sales or use tax due as a result of Exempt Entity B’s transfer to Contractor A of materials and equipment used by Contractor A in the construction of the New Building, in accordance with the above contract?

Answer 1:

- A. No. Sales of materials and equipment to Exempt Entity B by suppliers, other than Contractor A, are exempt from Wisconsin sales or use tax under sec. 77.54(9a), Wis. Stats. (1997-98), provided the purchase orders to suppliers indicate that Exempt Entity B is the purchaser and Exempt Entity B pays for the materials and equipment with its own funds.
- B. No. Based on the information contained in the above contract, the transfer of possession of ma-

materials and equipment by Exempt Entity B to Contractor A is not a sale subject to Wisconsin sales or use tax.

A sale is defined in sec. 77.51(14)(intro.), Wis. Stats. (1997-98), to include any one or all of the following: the transfer of the ownership of, title to, possession of, or enjoyment of tangible personal property or services for use or consumption, but not for resale.

Since Exempt Entity B retains ownership of the materials and equipment, there is no transfer of ownership or title of the materials and equipment to Contractor A. Since Contractor A does not have the right to direct the disposition of the materials and equipment purchased by Exempt Entity B, it does not have enjoyment of the materials and equipment as the term is defined in sec. 77.51(22)(b), Wis. Stats. (1997-98). Although Contractor A takes possession of the materials and equipment for purposes of incorporating them into real property for Exempt Entity B, such possession is as a bailee and not an owner and, therefore, no sale has taken place.

Facts and Question 2: Contractor C enters into a contract to construct a building for Exempt Entity D. The contract provides in part as follows [emphasis added]:

“Contractor C hereby proposes to furnish all labor and materials and perform all work for the New Building, in strict accordance with the specification and drawings mentioned therein, as prepared by the Architect, for the following amount.”

“Exempt Entity D reserves the right to purchase or rent directly any mate-

rials and equipment for all construction where the total cost of an item or of any aggregation of items to be ordered from one supplier, is two thousand dollars (\$2,000) or more.”

“Each contract and each subcontract shall state a maximum cost to Exempt Entity D which maximum cost shall include all labor and services and the total cost of all materials and equipment to be purchased by Exempt Entity D and/or Contractor C and/or the subcontractor. Contractor C and each subcontractor shall provide all services necessary to Exempt Entity D for Exempt Entity D to purchase the materials and equipment, including preparation of proposed purchase orders, recommendations of vendors and suppliers, receipt, storage, and protection of materials and equipment. Contractor C or subcontractor shall provide Exempt Entity D with a list of all items to be furnished by Exempt Entity D, and the maximum cost to Exempt Entity D of all of such materials. Exempt Entity D will purchase from the vendors and suppliers recommended by Contractor C or subcontractor, unless Exempt Entity D is able to secure more advantageous prices. Any discounts, savings and rebates will belong to Exempt Entity D. Contractor C or subcontractor will furnish any materials and equipment not provided in the listing or which Exempt Entity D is not able to obtain within the maximum costs provided to Exempt Entity D.”

“Exempt Entity D shall cause all materials and equipment purchased by Exempt Entity D to be delivered to Contractor C or subcontractor. Contractor C or subcontractor shall be responsible to examine or inspect such materials and equipment to assure Exempt Entity D that they are acceptable and in conformance with the contract documents. Any defect or deficiency shall be called to the

attention of Exempt Entity D immediately upon delivery in order that Exempt Entity D may obtain any necessary adjustment. If any defect or deficiency is not called to Exempt Entity D’s attention immediately, and as a result Exempt Entity D is not able to obtain a proper adjustment, such defect or deficiency shall be the responsibility of Contractor C and of subcontractor.”

“Contractor C and subcontractor shall have the same responsibilities for the provision and the installation of materials and equipment provided by Exempt Entity D as he would have if purchased by Contractor C or subcontractor except as specifically amended by this Article.”

- A. Is the sale of materials and equipment to Exempt Entity D by suppliers subject to Wisconsin sales and use taxes?
- B. Is there any Wisconsin sales or use tax due as a result of Exempt Entity D’s transfer to Contractor C of materials and equipment used by Contractor C in the construction of the New Building, in accordance with the above contract?

Answer 2:

- A. No. Sales of materials and equipment to Exempt Entity D by suppliers, other than Contractor C, are exempt from Wisconsin sales or use tax under sec. 77.54(9a), Wis. Stats. (1997-98), provided the purchase orders to suppliers indicate that Exempt Entity D is the purchaser and Exempt Entity D pays for the materials and equipment with its own funds.
- B. No. Based on the information contained in the above contract, the transfer of possession of the materials and equipment by Ex-

empt Entity D to Contractor C is not a sale subject to Wisconsin sales or use tax.

A sale is defined in sec. 77.51(14)(intro.), Wis. Stats. (1997-98), to include any one or all of the following: the transfer of the ownership of, title to, possession of, or enjoyment of tangible personal property or services for use or consumption, but not for resale.

Since Exempt Entity D retains ownership of the materials and equipment, there is no transfer of ownership or title of the materials and equipment to Contractor C. Since Contractor C does not have the right to direct the disposition of the materials and equipment purchased by Exempt Entity D, it does not have enjoyment of the materials and equipment as the term is defined in sec. 77.51(22)(b), Wis. Stats. (1997-98). Although Contractor C takes possession of the materials and equipment for purposes of incorporating them into real property for Exempt Entity D, such possession is as a bailee and not an owner and, therefore, no sale has taken place.

Facts and Question 3: Contractor E enters into a contract to construct a building for Exempt Entity F. The contract includes a rider which states in part as follows:

“Exempt Entity F will make direct purchases and rentals in accordance with Exhibits I and II to this Rider. The rights and duties of the parties under these exhibits are incorporated by this reference.”

Exhibit I of the rider, entitled “Procedures for Direct Owner Purchases,” provides as follows:

“Exempt Entity F is exempt from Wisconsin Sales and Use Taxes on purchases made by it. To obtain such exemption, purchases must be made by Exempt Entity F directly, billed to Exempt Entity F directly, and paid by Exempt Entity F directly.”

“Exempt Entity F intends to purchase or rent directly any materials and equipment for general construction where the total cost of an item or any aggregation of items to be ordered from one supplier is One Thousand Dollars (\$1,000.00) or more, and where the other conditions of this procedure are satisfied.”

“Contractor E shall separately state the total cost (excluding sales and use taxes) of all materials and equipment that may be purchased or rented directly by Exempt Entity F. In addition, Contractor E shall submit a schedule of all such purchases that may be made by Exempt Entity F including vendor’s name, general description of item(s) to be purchased, and the price limit for each item.”

“Contractor E shall provide all services necessary to Exempt Entity F for Exempt Entity F to purchase the materials and equipment including preparation of proposed purchase orders, recommendations of suppliers and vendors, receipt, storage and protection of materials and equipment. Exempt Entity F will purchase from the vendors and suppliers recommended by the contractor, unless Exempt Entity F is able to secure more advantageous prices. Any discounts, savings and rebates will belong to Exempt Entity F. If Exempt Entity F is not able to obtain any materials or equipment within the price limit provided, the excess shall be subtracted from the Contract Sum. All purchases by Exempt Entity F shall be used for the sole benefit of Exempt Entity F.”

“Exempt Entity F shall cause all materials and equipment directly purchased by Exempt Entity F to be delivered to Contractor E, who shall accept delivery as Exempt Entity F’s agent and promptly notify the Owner thereof. When the materials are delivered to the job site, Contractor E shall promptly inspect them and bring to the attention of Exempt Entity F and its Architect, any defects therein. Contractor E shall assist in contacting the supplier in an effort to correct or adjust any defect.”

“Contractor E shall have the same responsibilities for installation of materials and equipment provided by Exempt Entity F as he would have if purchased by Contractor E except as specifically amended by this Exhibit.”

“For the purpose of this Exhibit the term “work” has the same meaning as set forth in the contract documents except for the furnishing of materials and equipment purchased directly by Exempt Entity F.”

“Exempt Entity F shall indemnify and hold Contractor E harmless from and against any and all claims asserted against Contractor E relating to the liability for Sales or Use Tax (including interest and penalties and, in the event of litigation, all reasonable expenses, including attorney’s fees and accountant’s fees incurred by Contractor E in connection therewith) on any materials or equipment purchased or rented directly by Exempt Entity F, provided that (a) Contractor E promptly tenders to Exempt Entity F the defense, negotiation, or other handling of such claim, (b) Exempt Entity F shall have the right, at its own expense, to assume the defense of the claim, and (c) Contractor E shall cooperate fully with Exempt Entity F in providing any and all information which Exempt Entity F reasonably requests in connection with the defense of the claim.”

“The procedures of this section shall not apply to any materials or equipment manufactured or fabricated by Contractor E, nor to any materials or equipment as to which Contractor E itself would be the vendor, nor as to any materials and equipment which would be supplied and installed by the same entity.”

“The supplier will invoice Exempt Entity F. The invoice shall name Exempt Entity F as the purchaser and reference the purchase order number.”

“Contractor E shall review the invoice and recommend approval, partial approval or rejection. He shall also recommend to Exempt Entity F what retention, if any, should be withheld from the supplier. He shall then forward the invoice to the Architect.”

“The Architect will then approve or disapprove Contractor E’s recommendation. If approval is given, the Architect will forward the invoice to Exempt Entity F for direct payment.”

“Exempt Entity F will write checks and remit directly to the supplier and transmit a copy of the payment form to the Architect.”

The contract and contract price do not include any of the materials and equipment sold directly to Exempt Entity F by suppliers.

- A. Is the sale of materials and equipment to Exempt Entity F by suppliers subject to Wisconsin sales and use taxes?
- B. Is there any Wisconsin sales or use tax due as a result of Exempt Entity F’s transfer to Contractor E of materials and equipment used by Contractor E in the construction of the New Building, in accordance with the above contract?

Answer 3:

A. No. Sales of materials and equipment to Exempt Entity F directly by suppliers, other than Contractor E, in conformance with the above contract are exempt from Wisconsin sales or use tax under sec. 77.54(9a), Wis. Stats. (1997-98), provided the purchase orders to suppliers indicate Exempt Entity F is the purchaser and Exempt Entity F pays the supplier with its own funds.

B. No. Based on the information contained in the above contract, the transfer of possession of the materials and equipment by Exempt Entity F to Contractor E is not a sale subject to Wisconsin sales or use tax.

A sale is defined in sec. 77.51(14)(intro.), Wis. Stats. (1997-98), to include any one or all of the following: the transfer of the ownership of, title to, possession of, or enjoyment of tangible personal property or services for use or consumption, but not for resale.

Since Exempt Entity F retains ownership of the materials and equipment, there is no transfer of ownership or title of the materials and equipment to Contractor E. Since Contractor E does not have the right to direct the disposition of the materials and equipment purchased by Exempt Entity F, it does not have enjoyment of the materials and equipment as the term is defined in sec. 77.51(22)(b), Wis. Stats. (1997-98). Although Contractor E takes possession of the materials and equipment for purposes of incorporating them into real property for Exempt Entity F, such possession is as a bailee

and not an owner and, therefore, no sale has taken place.

Facts and Question 4: Contractor G enters into a contract to construct a building for Exempt Entity H. The contract states in part as follows:

“Exempt Entity H reserves the right to purchase directly any equipment and materials for the work of construction, where the total cost of an item or of any aggregation of items to be ordered from one supplier is \$2,000 or more.”

“At the end of this section is set forth a list of items of materials and equipment which are identified for direct purchase by Exempt Entity H. For any item purchased by Exempt Entity H, the gross price of such item (as computed by Contractor G), plus sales or use tax that would have been applicable to such item if not purchased by Exempt Entity H, shall not be part of the contract sum to be paid to the contractor.”

“Contractor G will furnish any materials and equipment not provided in its listing. Contractor G will also furnish any materials and equipment which Exempt Entity H is not able to obtain within the maximum cost provided to Exempt Entity H, or which Exempt Entity H desires Contractor G to purchase and the contract shall be increased by the amount for such items originally provided in Contractor G’s bid.”

“For any materials and equipment purchased by Exempt Entity H so as to utilize its tax exempt status, Exempt Entity H shall receive, store and protect all materials and equipment until provided to Contractor G at the job site or such place as designated by Contractor G. Until such materials and equipment are delivered to the job site, Exempt Entity H has sole and complete responsibility for such materials and equipment, in-

cluding without limitation, any loss or damage thereto. Upon delivery to the job site or such place as designated by Contractor G, Contractor G shall be responsible for examining or inspecting such materials and equipment to assure Exempt Entity H that they are acceptable and in conformance with the contract. Any defect or deficiency shall be called to the attention of Exempt Entity H immediately upon delivery in order that Exempt Entity H may obtain any necessary adjustment or replacement of such materials and equipment. Upon acceptance of such materials and equipment, Contractor G is responsible for the installation and incorporation of such materials and equipment into the work of construction in accordance with its agreement with Exempt Entity H and the contract documents generally.”

“Exempt Entity H shall at all times have and possess all incidents of ownership with respect to materials and equipment purchased by it. Exempt Entity H shall insure its interest in such materials and equipment or shall arrange with Contractor G to be added as an additional insured to any insurance policy covering materials and equipment located at the project site.”

“As agent for Exempt Entity H, Contractor G shall, at the request of Exempt Entity H, negotiate and communicate with the suppliers of materials and equipment purchased by Exempt Entity H concerning scheduled deliveries, shortage, deficiencies, disputes and other such matters; provided, that Exempt Entity H shall remain responsible for any late delivery, shortage, deficiency dispute or other such manner, in order to permit Exempt Entity H to pursue and protect fully Exempt Entity H’s rights against suppliers, manufacturers and others.”

“Any discounts, savings and rebates on purchase of materials and equipment shall belong to Exempt Entity H.”

- A. Is the sale of materials and equipment to Exempt Entity H by suppliers subject to Wisconsin sales and use taxes?
- B. Is there any Wisconsin sales or use tax due as a result of Exempt Entity H’s transfer to Contractor G of materials and equipment used by Contractor G in the construction of the New Building, in accordance with the above contract?

Answer 4:

- A. No. Sales of materials and equipment to Exempt Entity H directly by suppliers, other than Contractor G, in conformance with the above contract are exempt from Wisconsin sales or use tax under sec. 77.54(9a), Wis. Stats. (1997-98), provided the purchase orders to suppliers indicate Exempt Entity H is the purchaser and Exempt Entity H pays the suppliers with its own funds.
- B. No. Based on the information contained in the above contract, the transfer of possession of the materials and equipment by Exempt Entity H to Contractor G is not a sale subject to Wisconsin sales or use tax.

A sale is defined in sec. 77.51(14)(intro.), Wis. Stats. (1997-98), to include any one or all of the following: the transfer of the ownership of, title to, possession of, or enjoyment of tangible personal property or services for use or consumption, but not for resale.

Since Exempt Entity H retains ownership of the materials and equipment, there is no transfer of ownership or title of the materials and equipment to Contractor G. Since Contractor G does not have the right to direct the disposition of the materials and equipment purchased by Exempt Entity H, it does not have enjoyment of the materials and equipment as the term is defined in sec. 77.51(22)(b), Wis. Stats. (1997-98). Although Contractor G takes possession of the materials and equipment for purposes of incorporating them into real property for Exempt Entity H, such possession is as a bailee and not an owner and, therefore, no sale has taken place.

Facts and Question 5: Contractor I enters into a contract to construct a building for Exempt Entity J. The contract states in part as follows:

“Exempt Entity J will purchase certain materials and equipment directly, for receipt and incorporation into the work by Contractor I.”

“Exempt Entity J will purchase directly property, as listed in the Contractor I bid form, for incorporation into the work by Contractor I.”

“Contractor I shall solicit from suppliers or manufacturers competitive costs of items listed in the contract. Contractor I shall incorporate into the Exempt Entity J Purchase Listing, the tax exempt dollar amount of each item.”

“The cost of materials and equipment purchased directly by Exempt Entity J as used in the bid form shall be excluded from the contract sum to be paid to Contractor I.”

The contract and contract price do not include any materials and equip-

ment sold directly to Exempt Entity J by suppliers.

- A. Is the sale of materials and equipment to Exempt Entity J by suppliers subject to Wisconsin sales and use taxes?
- B. Is there any Wisconsin sales or use tax due as a result of Exempt Entity J's transfer to Contractor I of materials and equipment used by Contractor I in the construction of the New Building, in accordance with the above contract?

Answer 5:

- A. No. Sale of materials and equipment to Exempt Entity J directly by suppliers, other than Contractor I, in conformance with the above contract are exempt from Wisconsin sales or use tax under sec. 77.54(9a), Wis. Stats. (1997-98), provided the purchase orders to suppliers indicate Exempt Entity J is the purchaser and Exempt Entity J

pays the suppliers with its own funds.

- B. No. Based on the information contained in the above contract, the transfer of possession of the materials and equipment by Exempt Entity J to Contractor I is not deemed to be a taxable sale.

A sale is defined in sec. 77.51(14)(intro.), Wis. Stats. (1997-98), to include any one or all of the following: the transfer of the ownership of, title to, possession of, or enjoyment of tangible personal property or services for use or consumption, but not for resale.

Since Exempt Entity J retains ownership of the materials and equipment, there is no transfer of ownership or title of the materials and equipment to Contractor I. Since Contractor I does not have the right to direct the disposition of the materials and equipment purchased by Exempt Entity J, it does not

have enjoyment of the materials and equipment as the term is defined in sec. 77.51(22)(b), Wis. Stats. (1997-98). Although Contractor I takes possession of the materials and equipment for purposes of incorporating them into real property for Exempt Entity J, such possession is as a bailee and not an owner and, therefore, no sale has taken place.

Note: If a contractor or exempt entity remitted sales or use tax on a transfer described in the Facts and Questions 1 and 2 above based on the prior tax release that appeared in *Wisconsin Tax Bulletin 74* (October 1991), pages 22 to 30, it may file a claim for refund with the Wisconsin Department of Revenue for those periods open to adjustment under the statute of limitations. For information on filing claims for refund, refer to Wisconsin Publication 216, "Filing Claims for Refund of Wisconsin Sales or Use Tax." □



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

Nonresident trusts - situs
W9926002 (p. 34)

Wisconsin treatment of S corporations and their QSSSs
W9933003 (p. 36)

✱ **W9926002** ✱

April 6, 1999

Type Tax: Corporation Franchise and Income

Issue: Nonresident trusts - situs

Statutes: Section 71.14(3), Wis. Stats. (1997-98)

This letter is in response to your request for a private letter ruling as to the situs of income from certain trust accounts.

Facts

DEF Corporation (“DEF”) is a financial services company headquartered in City G, Wisconsin, which distributes banking, trust, and other financial services through offices in Wisconsin, State V, State W, State X, State Y, and State Z. DEF has publicly announced its plan to merge five of its regional banks and its bank chartered trust company into one single bank charter. These five banks (the Regional Banks) are DEF Bank State V, N.A. (“DEF V”), DEF Bank of State W, N.A. (“DEF W”), DEF Bank State X (“DEF X”), DEF Bank of Wisconsin (“DEF Wisconsin”) and DEF Bank City G, N.A. (“DEF G”). DEF Trust Company (“DEF Trust”), which is a state chartered bank, will also be merged into the single bank charter. DEF G will be the survivor of these mergers and will emerge as the sole active bank charter of DEF operating in the Midwest. DEF will also cause a number of its non-bank subsidiaries to merge into DEF G.

By creating one single bank charter, DEF Corporation will operate more efficiently and will realize less overhead and operating costs compared to operating five separate bank charters. The conversion to the single bank charter is intended to have no effect on the banks’ customers. The creation of the single bank charter should be nearly invisible to the customers. The ability to operate a single bank charter, with bank branches that cross state lines, is a result of the Riegle-Neal Interstate Banking and Branching Efficiency Act which allowed interstate

branching for national banks beginning after June 1, 1997. DEF Corporation anticipates that DEF G, as the surviving bank, will be domiciled in Wisconsin and will have its headquarters in City G, Wisconsin.

Each of the five Regional Banks and DEF Trust currently administer inter-vivos trust accounts (the Trust Accounts) for customers in the regions which they serve. The Regional Banks and DEF Trust also serve as trustee for these Trust Accounts. Each Trust Account has a local “Relationship Manager” assigned to the account. The Relationship Manager serves as the primary contact person from the bank to the Trust Account. As such, the Relationship Manager is responsible for making sure the Trust Account remains with the bank and that the affairs of the trust are handled properly. In this role, the Relationship Manager is responsible for overseeing the daily affairs of the Trust Account. These duties include such things as meeting with the Trust Account customers to determine their needs and goals; determining the amount and timing of distributions to be made from the Trust Account; and helping to determine whether the trust should continue or terminate. Because the Trust Accounts are subject to the laws of the particular state in which they are formed, local attorneys are often obtained to represent the Trust Accounts in any legal matters that might arise. The Relationship Manager will often help obtain local legal counsel.

Investment decisions for the Trust Accounts are made at the local bank level with the help of the Relationship Manager. Most of the money under trust is invested in Common Trust Funds which are managed by DEF Management Company, LLC (“DEF M”). DEF M is a Wisconsin limited liability company wholly

owned by DEF Corporation. The Relationship Manager can choose from a number of Common Trust Funds to invest in based on the risk profile of the Trust Account. On large Trust Accounts the Relationship Manager is aided in the investment decisions by a local representative from DEF M. The investment decisions are therefore made at the local level by the Relationship Manager and/or the local DEF M representative.

After the mergers of all of the Regional Banks, DEF G, as the surviving bank, will be named successor fiduciary of all the Trust Accounts previously administered by the five Regional Banks and DEF Trust. DEF G will also serve as successor trustee for the Trust Accounts. The Relationship Managers of the Trust Accounts will continue to perform their duties in the normal course of business, although they will now be employees of DEF G. Therefore, DEF G will have Relationship Managers and other employees located in the states of V, W, X, and Wisconsin who will be responsible for administering the Trust Accounts previously administered by the Regional Banks. These Relationship Managers will have been the previous employees of the Regional Banks and will continue to administer the Trust Accounts from their respective offices in State V, State W, State X, and Wisconsin. None of these employees will relocate to Wisconsin, nor will their administrative duties be transferred to Wisconsin unless they already reside in Wisconsin. They will continue to administer the Trust Accounts under their management in the same manner as prior to the mergers and will have no added contact with the state of Wisconsin. Investment decisions for the Trust Accounts will continue to be made by the Relationship Managers, some of which will reside outside of Wis-

consin, and the local DEF M representative.

Request

You have requested that the Department rule that the Trust Accounts that continue to be administered in the states of V, W, and X will not have Wisconsin situs under sec. 71.14(3), Wis. Stats., and therefore will not be subject to Wisconsin taxation. This ruling is requested even though the Trust Accounts will be administered by a corporate trustee (DEF G) domiciled in Wisconsin, but with officers and employees in other states.

Ruling

Since the Trust Accounts, which had previously been administered by the Regional Banks in the states of V, W, and X, will be administered by a corporate trustee (DEF G) domiciled in Wisconsin, the Trusts will have Wisconsin situs under sec. 71.14(3), Wis. Stats. (1997-98). Therefore, the Trusts will be subject to Wisconsin income taxation. This is the case even though the corporate trustee's will perform some services outside Wisconsin.

Analysis

Section 71.14, Wis. Stats. (1997-98), establishes residency for estates and trusts. Section 71.14(3), Wis. Stats. (1997-98), provides that, with certain exceptions, trusts created by contract, declaration of trust, or implication of law shall be considered resident at the place where the trust is being administered. The following trusts shall be considered to be administered in the state of domicile of the corporate trustee of the trust at any time that the grantor of the trust is not a Wisconsin resident: (a) trusts that have any assets in a common trust fund maintained by a bank or trust company domiciled in Wisconsin

that is a member of the same affiliated group as the corporate trustee; and (b) trusts the assets of which in whole or in part are managed, or about which investment decisions are made, by a corporation domiciled in Wisconsin if that corporation and the corporate trustee are members of the same affiliated group.

In *Pabst v. Department of Taxation*, 19 Wis. 2d 313 (1963), the Wisconsin Supreme Court concluded that the statutory word "administered" means simply conducting the business of the trust. The trust is being administered in Wisconsin within the meaning of the statute if the major portion of the trust business is conducted in Wisconsin. □

✱ **W9933003** ✱

May 24, 1999

Type Tax: Corporation Franchise and Income

Issue: Wisconsin treatment of S corporations and their QSSSs

Statutes: Sections 71.34(2), 71.36(1m), and 71.365 (4)(a) and (7), Wis. Stats. (1997-98)

This letter is in response to your request for a private letter ruling regarding the Wisconsin franchise or income tax treatment of ABC, Inc. ("ABC"), a federal S corporation, and its planned acquisition of "XYZ" which it intends to treat as a qualified subchapter S subsidiary (QSSS).

Facts

ABC is a Delaware corporation with its headquarters in another state. ABC is owned entirely by the ABC Employees' Stock Ownership Plan (the "ABC ESOP"), which is exempt

from federal income tax under sec. 501(a) of the Internal Revenue Code (IRC) of 1986, as amended, as a trust described in IRC sec. 401(a).

ABC is an industrial manufacturer with several divisions. One of those divisions is D Company, which manufactures Product S. D Company's headquarters is in City E, Wisconsin, where it also has a manufacturing plant. ABC employs 220 persons at the City E facilities of its D Company division.

ABC has filed an election to be taxed as an S corporation for federal income tax purposes effective October 1, 1998. ABC currently intends to acquire a corporation doing business in Wisconsin ("XYZ"). When the acquisition is completed, ABC intends to make an election to treat "XYZ" as a "qualified subchapter S subsidiary" (QSSS) pursuant to IRC sec. 1361(b)(3).

Request

Based on the preceding fact pattern, you requested a ruling determining the treatment of the federal S corporation (ABC) and its intended acquisition of "XYZ" assuming an election is made to treat "XYZ" as a QSSS. You have requested responses to the following questions:

1. Will ABC be entitled to a deduction under sec. 71.36(1m), Wis. Stats., in an amount equal to the ABC ESOP's pro rata share of ABC's Wisconsin net income?
2. Will "XYZ" be subject to Wisconsin corporate income tax if ABC makes a QSSS election with respect to "XYZ"? After the election is properly made, all of "XYZ's" assets, liabilities, and items of income, deduction, and credit will be treated as assets,

liabilities, and items of income, deduction, and credit of ABC.

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. ABC will be entitled to a deduction under sec. 71.36(1m), Wis. Stats., in an amount equal to ABC ESOP's pro rata share of ABC's Wisconsin net income.

2. "XYZ" will not be subject to Wisconsin corporate income tax if ABC makes a qualified subchapter S subsidiary election with respect to "XYZ." After the election is properly made, all of "XYZ's" assets, liabilities, and items of income, deduction, and credit will be treated as assets, liabilities, and items of income, deduction, and credit of ABC.

Analysis

"Net income or loss" of a tax-option (S) corporation means net income or loss computed under the Internal Revenue Code, with certain exceptions. Section 71.34(1), Wis. Stats., as amended by 1997 Wisconsin Act 237. For taxable years that begin on or after January 1, 1998, "Internal Revenue Code" means the federal Internal Revenue Code as amended to December 31, 1997, with certain exceptions. Section 71.34(1g)(m), Wis. Stats., as amended by 1997 Wisconsin Act 237.

An employee stock ownership plan ("ESOP") is generally exempt from federal income tax. IRC sec. 501(a). An ESOP is permitted to hold stock in an S Corporation. IRC sec. 1361(c)(6). An ESOP is subject to federal income tax on its "unrelated business taxable income" ("UBTI") as defined in IRC sec. 512. IRC secs. 501(a) and 511. In 1997, IRC sec. 512(e)(3) was enacted, which excludes an ESOP's pro rata share of income of an S corporation that employs the ESOP's beneficiaries.

In 1996, IRC sec. 1361(b)(3) was enacted, which provides that an S

corporation that owns 100 percent of the stock of another corporation may elect to treat that corporation as a QSSS. A QSSS is disregarded for federal income tax purposes and its assets, liabilities, and items of income, deduction, and credit are treated as those of the parent S corporation. Wisconsin adopted the provisions of IRC sec. 1361(b)(3) effective for taxable years beginning on or after January 1, 1997, pursuant to secs. 71.34(1)(i) and (1g)(L), and 71.365(7), Wis. Stats., as affected by 1997 Wisconsin Act 27.

Section 71.36(1), Wis. Stats., provides that "It is the intent of this section that shareholders of tax-option corporations include in their Wisconsin adjusted gross income their proportionate share of the corporation's tax-option items unless the corporation elects under s. 71.365(4)(a) not to be a tax-option corporation."

It would be consistent with the intent of the statute to allow the S corporation to deduct all items of income unless that statute specifically stated that certain items of income are not included in the shareholders' income.

Assuming the proposed acquisition of "XYZ" is closed and the proper elections are made, "XYZ's" assets, liabilities, and items of income, deduction, and credit will be treated as assets, liabilities, and items of income, deduction, and credit of ABC.

□