

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 employe 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. □