

# Wisconsin TAX BULLETIN

[www.dor.state.wi.us](http://www.dor.state.wi.us)

Number 139

July 2004

## Kenosha and Racine Offices Consolidated, Relocated

The Department of Revenue has consolidated its Kenosha and Racine branch offices and moved them to a new location in Kenosha, effective June 21, 2004. The address, telephone number and taxpayer assistance hours for the new office are as follows:

### Address

4911 88th Avenue, Suite B  
Kenosha, WI 53144-7439

### Telephone Number

(262) 653-7088

### Taxpayer Assistance Hours

January 1 through April 15: 7:45-4:30, Monday through Wednesday

April 16 through December 31: 7:45-1:00, Monday through Wednesday [☞](#)

## Any Suggestions for 2004 Tax Forms?

Do you have suggestions for improving Wisconsin's tax forms or instructions? Can you think of ways the forms or instructions could be made easier to understand? If so, the department would like to hear from you. In past years, many suggestions from taxpayers and tax professionals have been used in developing tax forms and instructions.

Please take a few moments to put your ideas in writing, and mail them to Wisconsin Department of Revenue, Administration Technical Services, Mail Stop 6-40, P.O. Box 8933, Madison, WI 53708-8933. If you prefer, you may fax your suggestions to (608) 261-6240, or e-mail them to [isetechnvc@dor.state.wi.us](mailto:isetechnvc@dor.state.wi.us). Your suggestions could help make "tax time" easier for taxpayers and practitioners. [☞](#)

## Free-File Continues as an On-Line Hit!

In its second season, the Department of Revenue's Free-File program was once again a critical success. Over 80,000 taxpayers took advantage of the Wisconsin Free-File program to file their 2003 Wisconsin income tax returns on-line, on time, and completely free of charge.

Taxpayers who are familiar with paper Forms 1, 1A, and WI-Z will find Free-File a comfortable way to update to the on-line world. Many users have told the department they didn't even need the easy-to-understand on-line instructions to complete Free-File's on-screen fill-in forms.

In addition to being easy to use, Free-File uses the latest computer file encryption technology to ensure confidentiality.

Free-File is available through the state government e-portal at [www.Wisconsin.gov](http://www.Wisconsin.gov) or more directly at [www.dor.state.wi.us](http://www.dor.state.wi.us). Taxpayers had asked for an income tax form they can file on-line. Free-File also accepts homestead credit claims.

Unlike more full-featured commercial tax preparation software or professional tax preparers, Free-File does not offer tax preparation assistance or planning advice. Free-File is for taxpayers who do not file federal schedules C, C-EZ, D, E, F, or 4797.

The free Internet income tax filing service is one of the ways the department is meeting its budget reduction targets, while maintaining and improving its quality of service to the taxpayers of Wisconsin.

This year, one out of every two personal income taxpayers filed electronically – whether through Free-File, TeleFile, commercial on-line filing programs, or through practitioners who e-file. That's up 36 percent from last year, when two of every five filed electronically.

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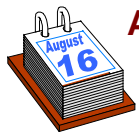
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Electronically filed tax returns help the Department of Revenue save resources because e-filed returns capture the taxpayer's keystrokes. There's no need for the department to manually enter or scan e-filed returns into its computers. Electronic filing remains the only method to receive your refund electronically within three to five days. [✎](#)

## Use Sufficient Postage

Every day, mail is sent to the Department of Revenue without sufficient postage affixed. Mailing an envelope with insufficient postage may result in the department not receiving it. The U. S. Post Office will return envelopes that do not have sufficient postage (for this reason, it is important to include your complete return address, so the envelope won't end up in the "dead-letter office").

Envelopes that will need additional postage include those that weigh more than one ounce. This may occur if the envelope contains more than five pages or is oversized (for example, more than 1/4 inch thick). [✎](#)



## Automatic 4-Month Extension Expires August 16

If your 2003 Wisconsin and federal individual income tax returns were due April 15, 2004, but you filed an application for an automatic 4-month extension for filing your federal return with the Internal Revenue Service ("IRS"), both your federal and Wisconsin returns are due August 16, 2004 (August 15 is a Sunday). When you file your Wisconsin return, be sure to attach a copy of the federal extension application, Form 4868.

Any filing extension available under federal law may be used for Wisconsin purposes, even if you are not using that extension to file your federal return. If you did not file a federal extension application but needed a 4-month extension for Wisconsin only, your 2003

Wisconsin return, ordinarily due April 15, 2004, must be filed by August 16, 2004.

If you are extending the time to file your Wisconsin return only, attach one of the following items to the 2003 Wisconsin return you file:

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

**Note:** You were not required to pay your 2003 taxes by April 15, 2004, as a condition for receiving an extension of time to file your Wisconsin tax return. However, an extension of time to file your return does not extend the time to pay your tax; taxes paid after April 15 are subject to 12% per year interest during the extension period and 18% per year interest after the extension period. [✎](#)

### Wisconsin Tax Bulletin

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Mail Stop 6-40  
P.O. Box 8933  
Madison, WI 53708-8933

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Wisconsin Department of Administration  
Document Sales  
P.O. Box 7840  
Madison, WI 53707-7840

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## Use Tax Calculator Available

Do you buy items over the Internet, from mail-order companies, or while traveling in other states? If so, you may owe Wisconsin use tax. The Wisconsin Department of Revenue has a free **Use Tax Calculator** (in an Excel spreadsheet) to help individuals track and calculate use tax owed to Wisconsin.

If you purchase taxable items but do not pay Wisconsin sales tax to the seller, and you store, use, or consume these items in Wisconsin, Wisconsin use tax is due.

All merchandise that is taxable under Wisconsin's sales tax law is subject to Wisconsin use tax, if no sales tax was paid. Examples of taxable merchandise include antiques, artwork, books, cameras, carpeting, chinaware, computers, furniture, furs, clothing, jewelry, precious metals, gemstones, stereo equipment, tapes, and compact discs. Use tax applies to the total purchase price you pay to the seller for taxable items, including shipping and handling charges.

The Use Tax Calculator can be used by persons who have some type of spreadsheet software on their computers, such as Excel, Lotus, or QuatroPro. If you don't have spreadsheet software, you can download a **free** Excel viewer that will enable you to **only** view and print the spreadsheet.

The Use Tax Calculator can be downloaded onto your computer from the department's web site at [www.dor.state.wi.us](http://www.dor.state.wi.us). Click on "Forms," scroll down to

and click on "Sales and Use Tax," and click on "Form SU-102."

Throughout the year, you can add your purchases to the Use Tax Calculator and save the information. The spreadsheet calculates the appropriate tax due that can be reported annually on your Wisconsin income tax return.

### Any questions?

For additional information about Wisconsin use tax, you may refer to Wisconsin Publication 205, *Use Tax Information for Individuals*, available at [www.dor.state.wi.us/pubs/03pb205.pdf](http://www.dor.state.wi.us/pubs/03pb205.pdf), or you may contact the Department of Revenue in Madison, call or visit your nearest Department of Revenue office, or visit the department's web site.

Write: Wisconsin Department of Revenue  
Mail Stop 5-77  
P.O. Box 8902  
Madison, WI 53708-8902

Telephone: (608) 266-2776

TTY: (608) 267-1049

Fax: (608) 267-1030

E-mail: [sales10@dor.state.wi.us](mailto:sales10@dor.state.wi.us)

Web site: [www.dor.state.wi.us](http://www.dor.state.wi.us)




## Take Advantage of the Speakers Bureau

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

Department representatives are available to speak on a variety of topics that can be targeted to 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.
- Homestead credit.

- Audit and appeal procedures.
- Common errors discovered in audits.
- Recordkeeping requirements.
- Tax delinquencies and petitions for compromise.
- Manufacturing property assessment.
- Electronic filing of individual income tax returns.

To arrange for a speaker, you may write to Wisconsin Department of Revenue, Speakers Bureau, Mail Stop 5-77, P.O. Box 8949, Madison, WI 53708-8949; fax your request to (608) 266-9829; call (608) 266-1911; or fill out the online request form at the department's web site, [www.dor.state.wi.us](http://www.dor.state.wi.us); click on "Training." 



## Wisconsin Use Tax on Motor Vehicles

A person or business that buys a motor vehicle from a non-dealer must report the purchase price when registering the vehicle with the State of Wisconsin and pay the use tax owed. The Department of Revenue reviews 100 percent of the registrations for motor vehicles to determine if the buyer paid the correct amount of tax at the time the vehicle was registered. Approximately 20 percent of all vehicle registrations are selected for further audit. The two most common reasons for audit selection are:

1. The purchase price reported by the buyer at the time of registration is less than the average retail value for a vehicle of that make, model, year and mileage, and
2. The validity of the exemption claimed is questionable.

For those registrations selected for audit, the Department of Revenue will send a letter (and a follow-up letter, if necessary) to the seller of a vehicle in cases where there is a possible purchase price discrepancy. A letter may also be sent to the buyer requesting verification of the purchase price. If the buyer does not respond, an assessment will be issued to the buyer based on the average retail value for a vehicle of that make, model, year and mileage. The Department of Revenue will contact the buyer to question the validity of an exemption claimed by the buyer if this is the issue of the audit.

If the information furnished by the seller or buyer indicates that the buyer did not report the full purchase price of the vehicle or claimed an invalid exemption, the Department of Revenue will issue an assessment notice to the buyer. This notice will include additional tax and interest at 12% per year, computed to the due date of the assessment notice. **In addition, a 50% negligence (incorrect return) penalty may be assessed based on the additional tax due.** The annual revenue collected/assessed through this program each year is approximately \$1.2 million.

Common mistakes made when a vehicle is registered are:

- Subtracting the selling price of a vehicle sold through a separate transaction from the purchase

price of the replacement vehicle. For example, if a vehicle is purchased from Party A and you sell your old vehicle to Party B, no trade-in subtraction is allowed for the sale to Party B when you register the vehicle purchased from Party A.

- Not getting a bill of sale from the seller at the time of purchase. You should request a bill of sale (above and beyond the title) from the seller and keep it for at least 5 years from the date of registration, even if you sell the vehicle.
- An incorrect purchase price is listed on the registration form when the vehicle is registered. Make sure you know and enter the correct purchase price before you register your vehicle.
- County and/or stadium tax is not reported and paid when due. Make sure you know if the county in which the vehicle will customarily be kept has imposed a local tax.
- Math errors when calculating the tax. State tax is calculated by multiplying the purchase price by 5% (.05). County tax is calculated by multiplying the purchase price by 0.5% (.005). Baseball stadium tax is calculated by multiplying the purchase price by 0.1% (.001). Football stadium tax is calculated by multiplying the purchase price by 0.5% (.005). Remember, even if someone else completes the form for you, once you sign it, you are responsible.
- Registrant fails to enter their Social Security Number ("SSN") or Federal Employee Identification Number ("FEIN") and telephone number on the registration form. The SSN/FEIN are used to ensure the transaction and tax paid is posted to the correct account at the Department of Revenue. The telephone number can be valuable if a question arises during the processing of the registration form.
- An incorrect credit for tax paid to another state or the District of Columbia is taken. You may offset the tax owed to Wisconsin by tax properly paid to another state or the District of Columbia. However, you may only offset state tax against state tax and local tax against local tax.

**Example:** You purchase a vehicle for \$10,000 in Michigan and pay 6% Michigan state sales tax of \$600 at the time of purchase. You register the vehicle in Wisconsin and will customarily keep the vehicle in Milwaukee County. You owe \$560 Wisconsin state, county and stadium tax (\$500 state tax, \$50 Milwaukee county tax and \$10 baseball stadium tax). However, you are allowed to offset the \$500 of Wisconsin state tax owed by the amount of Michigan state tax paid. The amount allowed, however, cannot exceed the amount of Wisconsin state sales tax. In this case you are able to offset your state tax by \$500. Since no local tax was paid to Michigan, you are not allowed to offset the local tax owed to Wisconsin. Thus, when this vehicle is registered in Wisconsin, you owe \$60 of county and stadium tax.

- An exemption is claimed using someone else's common or contract carrier (LC/MC/IC) exemption

number. These numbers may not be used by an entity other than the one it was issued to.

- A farming exemption is claimed for a vehicle that is registered for highway use or when the buyer's activity does not qualify as a farming activity for sales and use tax purposes.

Many of the errors listed above are also commonly found on ATV, boat, snowmobile and aircraft registration forms.

If you have additional questions regarding Wisconsin sales or use taxes you may contact the Department of Revenue at: (608) 266-2776, e-mail - [sales10@dor.state.wi.us](mailto:sales10@dor.state.wi.us) or mail - Wisconsin Department of Revenue, Mail Stop 5-77, P.O. Box 8949, Madison, WI 53708-8949. [☞](#)

## Credit Card Payment Options Expanded

The Department of Revenue, in cooperation with Official Payments Corporation ("OPC"), recently expanded its credit card payment option to include 14 new tax types. The credit card payment option is available to both electronic and paper filers, and credit card payments may be made by telephone or by the Internet.

Also, OPC has a new payment feature called *Payment Reminders* that will give state taxpayers added convenience. This feature allows taxpayers to receive an e-mail reminder of upcoming payment due dates. All the taxpayer needs to do is use the *My Account* feature on the OPC web site, [www.officialpayments.com](http://www.officialpayments.com), to set up a profile and let OPC know what payment types they wish to be reminded of. A taxpayer can create Payment Reminders for all state and local payment types that OPC supports.

### Credit cards are now accepted for:

#### Individual Income Tax

- Balance due on tax returns
- Extension payments
- Estimated tax payments
- Amounts due on Notices of Adjustment
- Income Office Audit bills \*

#### Business Taxes

- Sales & use tax returns and bills \*
- Dry cleaning facility fee returns and bills \*
- Premier resort tax returns and bills \*
- Withholding tax returns and bills \*
- Expo tax bills \*
- Rental vehicle tax bills \*
- Business Tax Registration payments (both for registration and renewal) \*
- Consumers Occasional Use \*

#### Delinquent Taxes

- All tax types
- Full or partial payments

\* denotes a new tax type for which credit card payments may be made

#### Participating credit card companies are:

- American Express®
- Discover®
- MasterCard®
- Visa®



OPC charges the taxpayer a convenience fee of 2.5% of the payment amount, with a minimum fee of \$1.00 on tax payments less than \$40.00. The Department of Revenue does not receive any portion of the fee. The fee appears as a separate charge on the taxpayer's credit card statement. You can find more information about OPC on their web site at [www.officialpayments.com](http://www.officialpayments.com).

Materials designed exclusively for tax professionals and their clients are available on the OPC web site.

Additional information on the credit card payment option is available on the department's web site at [www.dor.state.wi.us](http://www.dor.state.wi.us). Click on "FAQs" (frequently asked questions), then "Payment," and then "Pay by Credit Card." [↗](#)



### Wisconsin/Minnesota Sales Tax Seminars

The Wisconsin and Minnesota Departments of Revenue will again present a series of joint sales and use tax seminars in October. The seminars will include information on similarities and differences in the two states' sales and use tax laws. All of the seminars are for general businesses.

You are invited to attend any of the following seminars, free of charge. All seminars are from 9:00 a.m. to 12:30 p.m., at the locations indicated. To register or for more information, call the Minnesota Department of Revenue at (651) 297-4213.

October 12, 2004 – Duluth, Minnesota  
Minnesota Department of Revenue Office  
2711 West Superior Street

\*\*\*\*\*

October 19, 2004 – Hudson, Wisconsin  
Hudson House  
1616 Crestview Drive

\*\*\*\*\*

October 26, 2004 – Onalaska, Wisconsin  
Onalaska Omni Center  
225 Rider Club Street [↗](#)



### Index of Reference Material Available

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, Wisconsin tax publications, *Sales and Use Tax*

*Reports*, Attorney General opinions, and *Wisconsin Tax Bulletin* articles.

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

The *Wisconsin Topical and Court Case Index* is available by subscription for \$18 per year, plus sales tax. This includes a volume published in January and an addendum published in June. To order your copy, complete the order blank on page 28 of this Bulletin. The Index is also on the department's Internet web site at [www.dor.state.wi.us](http://www.dor.state.wi.us). Just click on "Publications." [↗](#)

### Undeliverable Income Tax Refunds

The number of undeliverable refund checks and direct deposit bank rejects resulting from incorrect, incomplete, or illegible addresses and/or bank information increased again this tax season.

Taxpayers who request electronic deposits but have incorrect bank numbers are issued paper checks instead. This adds approximately one month to the time for a

taxpayer to receive his or her refund. For taxpayers who request paper checks, checks that are returned by the Post Office are held until the taxpayer contacts Customer Service, (608-266-2772), and provides a new address.

To ensure the fastest possible refunds, please use extra care when filling in address and bank information on income tax returns. [↗](#)

## Tax Publications Available

Listed below are 74 publications that are available, free of charge, from the Department of Revenue. Copies are available at any department office, or by mail, e-mail, fax, or the Internet.

### *By Mail*

Write to Wisconsin Department of Revenue, Forms Request Office, Mail Stop 1-151, P.O. Box 8949, Madison, WI 53708-8949; call (608) 266-1961; or fax a request to (608) 264-7776.

### *By E-Mail*

You may e-mail your request to [forms@dor.state.wi.us](mailto:forms@dor.state.wi.us).

### *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](http://www.dor.state.wi.us), and click on "Publications" and then "Tax Publications."

**Note:** The numbers of some publications may be followed by an asterisk (\*). These are publications that are new or have been revised since the last issue of the *Wisconsin Tax Bulletin*.

### Income and Franchise Taxes

- |  |   |
|--|---|
| <p>102 Wisconsin Tax Treatment of Tax-Option (S) Corporations and Their Shareholders (12/03)</p> <p>103 Reporting Capital Gains and Losses for Wisconsin by Individuals, Estates, and Trusts (11/03)</p> <p>104* Wisconsin Taxation of Military Personnel (5/04)</p> <p>106 Wisconsin Tax Information for Retirees (11/03)</p> <p>109 Tax Information for Married Persons Filing Separate Returns and Persons Divorced in 2003 (11/03)</p> <p>112 Wisconsin Estimated Tax and Estimated Surcharge for Individuals, Estates, Trusts, Corporations, Partnerships (11/02)</p> <p>113 Federal and Wisconsin Income Tax Reporting Under the Marital Property Act (10/03)</p> <p>116 Income Tax Payments are Due Throughout the Year (11/02)</p> | <p>119 Limited Liability Companies (LLCs) (12/02)</p> <p>120 Net Operating Losses for Individuals, Estates, and Trusts (11/03)</p> <p>121 Reciprocity (11/03)</p> <p>122 Tax Information for Part-Year Residents and Nonresidents of Wisconsin for 2003 (11/03)</p> <p>123 Business Tax Credits for 2003 (12/03)</p> <p>125 Credit for Tax Paid to Another State (11/03)</p> <p>126 How Your Retirement Benefits Are Taxed (11/03)</p> <p>600 Wisconsin Taxation of Lottery Winnings (12/03)</p> <p>601 Wisconsin Taxation of Pari-Mutuel Wager Winnings (1/02)</p> |
|--|---|
- 
- | Sales and Use Taxes   |  |
|---|--|
| <p>200 Electrical Contractors – How Do Wisconsin Sales and Use Taxes Affect Your Business? (11/02)</p> <p>201 Wisconsin Sales and Use Tax Information (11/02)</p> <p>202 Sales and Use Tax Information for Motor Vehicle Sales, Leases, and Repairs (11/00)</p> <p>203 Sales and Use Tax Information for Manufacturers (7/00)</p> <p>204 Sales and Use Tax Information for Colleges, Universities and Technical Colleges (3/01)</p> <p>205 Use Tax Information for Individuals (4/03)</p> <p>206 Sales Tax Exemption for Nonprofit Organizations (6/00)</p> <p>207 Sales and Use Tax Information for Contractors (10/00)</p> <p>210 Sales and Use Tax Treatment of Landscaping (11/03)</p> <p>211 Cemetery Monument Dealers – How Do Wisconsin Sales and Use Taxes Affect You? (6/00)</p> <p>212 Businesses: Do You Owe Use Tax on Imported Goods? (4/03)</p> <p>213 Travelers: Don't Forget About Use Tax (4/03)</p> <p>214 Businesses: Do You Owe Use Tax? (4/03)</p> <p>216 Filing Claims for Refund of Sales or Use Tax (2/03)</p> <p>217 Auctioneers – How Do Wisconsin Sales and Use Taxes Affect Your Operations? (1/00)</p> |  |

- 219 Hotels, Motels, and Other Lodging Providers – How Do Wisconsin Sales and Use Taxes Affect Your Operations? (2/03)
- 220 Grocers – How Do Wisconsin Sales and Use Taxes Affect Your Operations? (10/01)
- 221 Farm Suppliers and Farmers – How Do Wisconsin Sales and Use Taxes Affect Sales to Farmers? (3/02)
- 222 Motor Vehicle Fuel Users: Do You Owe Use Tax? (3/00)
- 223 Bakeries – How Do Wisconsin Sales and Use Taxes Affect Your Operations? (1/03)
- 224 Veterinarians – How Do Wisconsin Sales and Use Taxes Affect Your Business? (6/99)
- 225 Barber and Beauty Shops – How Do Wisconsin Sales and Use Taxes Affect Your Operations? (12/02)
- 226 Golf Courses – How Do Wisconsin Sales and Use Taxes Affect Your Operations? (4/04)
- 227 E-file Sales Tax returns with S.I.P. (3/01)
- 229 Brackets for Collecting Wisconsin Sales or Use Tax on Retail Sales (11/01)
- 230 Sales and Use Tax Information for Sellers of Antiques, Crafts, and Artwork (12/02)

#### Excise Tax

- AB-103 Alcohol Beverage Tax Information (3/03)
- MF-106 Alternate Fuel Tax Information (4/04)
- MF-107 Motor Vehicle Fuel Tax Information (4/04)
- MF-108 General Aviation Fuel Tax Information (4/04)
- 302 Wisconsin Alcohol Beverage and Tobacco Laws for Retailers (4/03)

#### Other Taxes and Credits

- 127 Wisconsin Homestead Credit Situations and Solutions (11/03)
- 400 Wisconsin's Recycling Surcharge (12/03)
- 403 Premier Resort Area Tax (2/03)
- 410 Local Exposition Taxes (2/03)
- 503 Wisconsin Farmland Preservation Credit (11/03)

- 508 Wisconsin Tax Requirements Relating to Nonresident Entertainers (2/03)

- W-166 Wisconsin Employer's Withholding Tax Guide (2/04)

#### Audits and Appeals

- 501 Field Audit of Wisconsin Tax Returns (2/04)
- 505 Taxpayers' Appeal Rights of Office Audit Adjustments (2/02)
- 506 Taxpayers' Appeal Rights of Field Audit Adjustments (10/03)
- 507 How to Appeal to the Tax Appeals Commission (6/03)
- 515 Non-Statistical Sampling (1/01)

#### Other Topics

- 111 How to Get a Private Letter Ruling From the Wisconsin Department of Revenue (2/01)
- 114 Your Wisconsin Taxpayer Bill of Rights (10/01)
- 115 2004 Handbook for Federal/State Electronic Filing (11/03)
- 117 Guide to Wisconsin Information Returns (11/03)
- 124 Petition for Compromise of Delinquent Taxes (11/03)
- 130 Fax A Form (12/03)
- 140 A Tax Practitioner's Guide to Electronic Filing (6/03)
- 401 Extensions of Time to File (12/03)
- 405 Wisconsin Taxation of Native Americans (12/01)
- 500 Tax Guide for Wisconsin Political Organizations and Candidates (12/03)
- 502 Directory of Wisconsin Tax Publications (11/03)
- 504 Directory for Wisconsin Department of Revenue (5/03)
- 509 Filing Wage Statements and Information Returns on Magnetic Media or by Electronic Transmission (11/03)
- 700 Speakers Bureau presenting . . . (6/00) [🔗](#)



## 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 and the Processing and Customer Services Division. A comprehensive listing of telephone numbers and addresses appears in *Wisconsin Tax Bulletin 138* (April 2004), pages 34 to 37.

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

Appeals .....	266-0185
Audit of Returns: Corporation, Individual, Homestead .....	266-2772
Beverage Tax .....	266-6702
Cigarette, Tobacco Products Taxes .....	266-8970
Copies of Returns .....	266-2890
Corporation Franchise and Income Taxes .....	266-2772
Delinquent Taxes .....	266-7879
Electronic Filing:	
Individual Income Tax .....	264-6886
Sales Tax .....	266-2776
Electronic Funds Transfer (“EFT”) .....	264-9918
Estimated Taxes .....	266-2772
Fiduciary, Estate Taxes .....	266-2772
Forms Request:	
By mail .....	266-1961
Fax-A-Form .....	261-6229
Homestead Credit .....	266-8641
Individual Income Tax .....	266-2772
Motor Vehicle Fuel Tax .....	266-3223
Refunds .....	266-8100
Sales, Use, Withholding Taxes .....	266-2776
Sales Internet Process (“SIP”) .....	261-6261
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



## Question and Answer




**Caution:** The answers in this article reflect interpretations by the Wisconsin Department of Revenue, of laws enacted by the Wisconsin Legislature as of the date of this Bulletin. Laws enacted after that date, new administrative rules, and court decisions may change the interpretations.

### (Sales and Use Tax)

**Q** I purchased some books from an out-of-state Internet company several weeks ago and the company did not charge me sales or use tax. This week, I purchased some clothing from another out-of-state Internet company and they **did** charge me Wisconsin sales or use tax. Should the out-of-state clothing company have charged me tax?

**A** Internet companies that have a physical presence in Wisconsin, such as a store, salesperson, warehouse, etc., are required to register and collect Wisconsin sales or use tax on sales of tangible personal property and taxable services in Wisconsin. This physical presence is referred to as “nexus.” You can assume that the clothing company has “nexus” with Wisconsin and is properly collecting and remitting Wisconsin sales or use tax on its sales to you. The book company did not charge you Wisconsin sales or use tax because it does not have “nexus” with Wisconsin. However, you are subject to Wisconsin use tax on your purchase of the books. The use tax you owe can be reported on the Wisconsin income tax return you file.

**Q** When does a “continuous exemption certificate” expire?

**A** Continuous exemption certificates do not expire and do not need to be renewed at any prescribed interval. However, they should be renewed at reasonable intervals in case of a business change, registration number change, or discontinuance of the specific business claiming the exemption. The seller should periodically review exemption certificates on file to ascertain that the person claiming the exemption is the person who furnished the certificate. 

## Treasury Offset Program Pays Big Dividends

The Department of Revenue has collected over \$12.6 million in delinquent income taxes through the Treasury Offset Program (“TOP”), a federal offset program implemented in Wisconsin in February 2001.

Since the program’s inception, the department has certified more than \$347 million of unpaid income taxes to Financial Management Services, the branch of the U.S. Treasury that disperses federal payments, including

federal income tax refunds. More than 17,500 delinquent taxpayers in Wisconsin have had their federal refunds intercepted, either in whole or in part, as a result of the program.

The Treasury Offset Program, an off-shoot of a larger program that offsets most types of federal payments on behalf of federal agencies, was first opened to state revenue departments in January 2000. To date, the thirty-six states participating in the program have collected more than \$502 million in delinquent income taxes. [!\[\]\(a870788d6ed9b8fd294b7654a8c8526b\_img.jpg\)](#)



## 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 index will help you locate reference materials including articles, court case

summaries, tax releases, and private letter rulings, to research questions about Wisconsin taxes.

The latest *Wisconsin Tax Bulletin* index available appears in *Wisconsin Tax Bulletin* 137 (January 2004), pages 39 to 72. It includes information for issues 1 to 136 (through October 2003). [!\[\]\(6a9b39b98eb945faa14c645ec99e4eaa\_img.jpg\)](#)

## Man Sentenced for Failure to Remit Withholding Taxes

A Washington County businessman pled guilty in March 2004 to a criminal charge of failing to submit taxes withheld from employee wages to the Wisconsin Department of Revenue. Washington County Circuit Court Judge Andrew Gonring placed Markus Meinhardt, 39, of Jackson, on probation for two years and ordered him to serve 60 days in the Washington County Jail for the tax crime. As part of a plea agreement, Meinhardt made a \$100,000 down payment towards restitution to the Wisconsin Department of Revenue for the back taxes, interest and penalties.

According to the criminal complaint, Meinhardt, along with his father Adolf, operated a machine shop under the name of A&M Tooling, Inc. in Hartford starting in about 1986. In September 1998, the Meinhardts merged A&M Tooling, Inc. into another business they operated under the name of Elmass North America, Inc. After the merger, Meinhardt ceased filing state withholding tax reports for A&M, but never applied for a withholding tax number or permit for Elmass.

From September 1998 until the business ceased in May 2002, Meinhardt deducted state income taxes from his employees’ wages but never remitted the funds to the Wisconsin Department of Revenue. According to the complaint, Meinhardt’s accountant continued to prepare state withholding tax reports, but Meinhardt never filed them. He further concealed these taxes from the state by

not sending the employer portion of the annual W-2 forms to the Wisconsin Department of Revenue, which would have alerted the state to the fact that he was withholding.

State income taxes deducted and withheld from employees’ wages are trust funds, money belonging to the state. An employer who willfully fails or refuses to remit these taxes can be charged with a crime, in addition to the civil penalties that are imposed.

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In March 2004, the Wisconsin Alcohol and Tobacco Enforcement Unit, in conjunction with the Sheboygan County Sheriff’s Department and Sheboygan Police Department, executed a search warrant at a residence in the Town of Sheboygan. The warrant was issued as a result of an investigation into the trafficking and sale of untaxed cigarettes that had been ordered via the Internet.

A Town of Sheboygan woman is suspected of ordering large quantities of untaxed cigarettes, both for personal use and to sell for profit. During the search of her home, state agents seized more than 18,000 untaxed cigarettes that appear to have been shipped from Russia, Switzerland, and the Philippines. The suspect may face criminal charges for tax evasion, for possessing untaxed cigarettes and for providing cigarettes to minors. The case will be referred to the Sheboygan County District Attorney’s Office for potential criminal charges. The

Wisconsin Department of Revenue will be assessing for the unpaid cigarette tax liability.

A spokesperson for the Alcohol and Tobacco Enforcement Unit indicated that ordering cigarettes over the Internet has become more prevalent as the prices for legal cigarettes have increased. They also indicated that in addition to ordering illegal cigarettes over the Internet, in this case an individual was making a profit dealing in the black-market cigarettes. "Internet cigarettes not only are untaxed and cause the State of Wisconsin to lose millions of dollars in tax revenue, they often are available to minors and are of a lesser quality than domestic cigarettes."

The Wisconsin Alcohol and Tobacco Enforcement Unit, located within the Criminal Investigation Section of the Wisconsin Department of Revenue, is responsible for enforcing the state's alcohol and tobacco product laws. Special Agents in the Unit are located in field offices throughout the state.

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*Note: The information in the following section of this article was obtained from a story in the March 17, 2004, issue of the Milwaukee Journal Sentinel.*

A pair of search warrants filed in March 2004 allege that Joseph A. and Leslie West Balestrieri, operators of the Milwaukee concert venue The Rave and Eagles Ballroom, failed to turn over at least \$183,791 in sales and income taxes owed to the state between 1999 and 2003.

Investigators seized 49 boxes of financial records from offices at The Rave and Eagles Ballroom on West Wisconsin Avenue in Milwaukee and another batch of records from the offices of the Balestrieris' corporate accountants, the Neal Group, on West Layton Avenue in Greenfield.

Affidavits written in support of the search warrant requests indicate that the Balestrieris control two corporations, Eagles Entertainment, Inc. and TSI Concerts, Inc., that ran the concert business of The Rave and Eagles Ballroom. At least 32 touring acts from out of state performed at the Eagles Ballroom in 1999, but the affidavits suggest that the Balestrieris didn't withhold the required Wisconsin taxes from the performers' fees. Officials say the Balestrieris owe about \$24,000 in taxes from those 32 performers' fees.

The affidavits also allege that 6 months of sales tax returns filed by TSI Concerts, Inc. in 2001 and 2002

were turned in without the amount due for sales tax on ticket sales, creating a tax debt of \$84,589. The same thing was found in a check of sales tax returns in late 2003, after Eagles Entertainment, Inc. took over as the venue's ticketing company. The records say tax returns for September through November 2003 were turned in without the \$75,232 amount due.

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In April 2004, a Madison, Wisconsin business was charged with four counts of cigarette and tobacco tax violations. The criminal complaint and summons were issued by the Dane County District Attorney's Office as a result of a criminal investigation by the Department of Revenue's Alcohol and Tobacco Enforcement Unit. The investigation involved the sale of tribal cigarettes and tobacco products at a non-tribal store and attempting to evade payment of cigarette and tobacco taxes to the State of Wisconsin.

The complaint alleges that Hunza, Inc., doing business as "Open Pantry Food Mart," unlawfully possessed more than 36,000 cigarettes without properly affixed tax stamps, a felony in the State of Wisconsin. The complaint also states that the business purchased cigarette and tobacco products from sources other than licensed Wisconsin distributors in addition to attempting to evade paying cigarette and tobacco taxes to the state. The charges carry penalties of up to 5 years and 3 months in prison and up to \$31,000 in fines.

On July 30, 2003, Special Agents seized over 37,000 cigarettes and various cans of chewing tobacco that had been purchased from either tribal lands or unauthorized sources. Agents also seized business records and cash register receipts from the retail location, indicating that the illegal sales had been taking place since January 2002. The Department of Revenue determined that Hunza, Inc. owes the State of Wisconsin \$13,360.25 in unpaid taxes, including interest and penalties.

A spokesperson for the Alcohol and Tobacco Enforcement Unit indicated that illegal activity involving cigarette and tobacco products has become more prevalent around the state. In this instance, a retail location was attempting to evade state taxes by purchasing tribal cigarettes at a much cheaper price, and then reselling them to the public. They also indicated that Special Agents are seeing more organized criminal activity involving cigarette and tobacco product smuggling and diversion around the state. Cigarettes have become a very sought after black-market commodity, according to the spokesperson.

The Wisconsin Alcohol and Tobacco Enforcement Unit is located within the Criminal Investigation Section of the Wisconsin Department of Revenue and is responsible for enforcing the state's alcohol and tobacco product laws. Special Agents are located in field offices throughout the state.

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**Note:** The information in the following section of this article was obtained from a story in the April 13, 2004, issue of the Wisconsin State Journal.

In April 2004, Amy E. Mitchell, 25, of Madison, plead no contest before Dane County Circuit Judge Diane Nicks to two counts of theft in a business setting and one count of filing a false income tax return. Nine other

felony charges were dismissed, but can be considered by Nicks when she sentences Mitchell.

According to the criminal complaint, Mitchell took more than \$180,000 during one year of employment with Walgenmeyer's Carpet and Tile from 2001 to 2002. The thefts were reported to owner Robert Walgenbach by Mitchell's ex-boyfriend. Mitchell later admitted to police that she inserted blank checks into stacks of checks for the store manager to sign, then wrote her own name in as payee.

Also according to the complaint, Mitchell has returned \$32,000 in cash, a 17-foot Bayliner boat, a 2000 Chrysler Concorde, a Ford Explorer, a 65-inch high definition television and a 55-inch television. [Ⓜ](#)

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## Administrative Rules in Process

Listed below are administrative rules that are currently in the rule promulgation process. The rules are shown at their stage in the process as of July 1, 2004 and at each step where action occurred during the period from April 2, 2004, through July 1, 2004.

The listing includes rule numbers and names, and whether a rule is amended (A), repealed and recreated (R&R), or a new rule (NR).

To order up-to-date administrative rules of the Department of Revenue, you can use the order blank on page 28 of this Bulletin to order the Tax section of the Wisconsin Administrative Code.

## Sent to Legislative Council Rules Clearing House

1.12 Electronic funds transfer – A

## Reviewed by Legislative Council Rules Clearing House

1.12 Electronic funds transfer – A

2.49 Apportionment of net business incomes of interstate finance companies – R&R

2.495 Apportionment of net business incomes of interstate brokers-dealers, investment advisers, investment companies, and underwriters – NR

[Ⓜ](#)



## 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

#### Appeals - timeliness

#### Exemptions from income - application of tax treaties

*Alexei R. Faustov* ..... 13

#### Assessments - timeliness

#### Earned income credit - responsibility to be aware of qualifications

*Angela C. Elliott* ..... 14

#### Imposition of tax - covenant not to compete

*Frank D. and Billie J. Leach* ..... 15

#### Retirement funds exempt

*Paul and Barbara Weprinsky* ..... 17

### Sales and Use Tax

#### Admissions - hunting fees

*Granite Ridge Ranch, LLC* ..... 18

#### Appeals - attorney fees and costs

*Plaza Publications, Inc.* ..... 18

#### Services subject to tax - pet cremation services

*Thompson Animal Medical Center, Ltd.* ..... 19

Milwaukee”) as a Ph.D. candidate in physics. He entered into and continues to reside in this country under an F-1 student visa.

During the spring semester of 2000, the taxpayer was employed by UW-Milwaukee as a teaching assistant. His duties as a teaching assistant included instructing undergraduate students during discussion sections and lab sessions, and grading examinations under the direction and guidance of a UW-Milwaukee physics professor. During the fall semester of 2000, the taxpayer was employed by UW-Milwaukee as a research assistant. His duties as a research assistant included research with lasers, under the direction and guidance of a UW-Milwaukee physics professor. When the taxpayer filed his Wisconsin income tax returns for 2000 and 2001, he did not report any income from UW-Milwaukee for his services as a research assistant and teaching assistant.

Under the date of March 18, 2002, the department issued an income tax assessment against the taxpayer in the total amount of \$148.74 for 2001. The taxpayer filed a timely petition for redetermination with the department. Under the date of September 30, 2002, the department denied the petition for redetermination. The taxpayer physically received the department’s action on the petition for redetermination no later than October 30, 2002. On October 30, 2002, the taxpayer paid the department the amount due under the assessment for 2001.

## INDIVIDUAL INCOME TAXES



### Appeals - timeliness; Exemptions from income - application of tax treaties.

*Alexei R. Faustov vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, February 25, 2004). The issues in this case are:

- A. Whether the Commission has jurisdiction over the taxpayer’s petition for review with respect to the department’s assessment for the year 2001.
- B. Whether the income received by the taxpayer as a teaching assistant is exempt under the Income Tax Convention with the Russian Federation.

The taxpayer is a citizen of the Russian Federation who attends the University of Wisconsin-Milwaukee (“UW-

Under the date of November 11, 2002, the department issued an income tax assessment against the taxpayer in the total amount of \$733.12 for 2000. The assessment imposed the income tax against the taxpayer’s earnings as both a research assistant and a teaching assistant. The taxpayer filed a timely petition for redetermination with the department. Under the date of June 2, 2003, the department issued its notice of action letter, granting in part and denying in part the petition for redetermination. The department determined that the income the taxpayer received as a research assistant was exempt, but that the income he received as a teaching assistant was not exempt. The taxpayer physically received the department’s action on the petition for redetermination no later than June 4, 2003.

On July 21, 2003, the Commission received from the taxpayer a single petition for review seeking review of



the department's action on the petitions for redetermination with respect to both the assessment for 2000 and the assessment for 2001. The petition was sent by certified mail date stamped July 18, 2003, and was considered filed on that date.

At trial, the department moved the Commission to dismiss the petition for review with respect to the assessment for 2001. The taxpayer raised the argument that the income received by him as a teaching assistant is exempt under the Income Tax Convention with the Russian Federation.

The Commission concluded as follows:

- A. The petition for review with respect to the assessment for 2001 was not filed within the 60-day period required by sec. 73.01(5)(a), Wis. Stats., and, therefore, the Commission lacks jurisdiction over the petition for review with respect to 2001.
- B. The taxpayer's teaching assistant position did not compensate the taxpayer for studying or for research and, therefore, is not exempt under the Income Tax Convention with the Russian Federation. Article 18 of this treaty provides that the taxpayer is not liable for income tax "with respect to the grant, allowance, or other similar payments." This language appears in the last of the eligible purposes stated in article 18:

c) studying or doing research as a recipient of a *grant, allowance, or other similar payments* from a governmental, religious, charitable, scientific, literary, or educational organization (emphasis supplied).

Internal Revenue Service ("IRS") Publication 515 at Table 2, note 41, provides:

Applies to grants, allowances, and other similar payments received for studying or doing research.

Article 18 of the treaty and the guidance from the IRS clearly provide that payments for studying and research are exempt from the income tax.


The language of the treaty and the guidance offered by the IRS do not unambiguously encompass income for teaching. Because the treaty is in the nature of a tax exemption, it is a matter of legislative grace and is to be given a strict but reasonable construction against a taxpayer who claims it, and a taxpayer who claims the exemption must show that the terms thereof clearly apply to him. The taxpayer has not met this burden. He has not shown that the plain language of the treaty applies to his income from his teaching assistant position.

The taxpayer argues that the teaching assistant position is tantamount to financial aid that he needed to stay in school, especially considering the limitations in his visa on outside income. That may be. But the payments made to the taxpayer for his teaching assistant position were for teaching, not compensation for studying or research. The payments may have facilitated the taxpayer's study; they were not, however, in exchange for his study.

At this time it is not known whether the taxpayer will appeal 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. [!\[\]\(95b425611cbd2b8716a140cf67c81822\_img.jpg\)](#)

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 **Assessments - timeliness; Earned income credit - responsibility to be aware of qualifications.** *Angela C. Elliott vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, January 22, 2004). The issues in this case are:

- A. Whether the department's assessment was made in a timely manner.
- B. Whether the taxpayer's failure to be apprised of the qualifications for the earned income credit ("EIC")

prevented the department from assessing her for the amounts she erroneously claimed under this credit.

For each of the years 1998 through 2001, the taxpayer claimed head-of-household filing status and the EIC. During each of these years, she resided with her mother, and her mother's income exceeded her income.

Page 73 of the Internal Revenue Service ("IRS") publication *Reference Copies of Federal Tax Forms and Instructions* (Package X, Vol. 1) for 1998 contains the following example with respect to the EIC:

**Example.** You and your 5-year-old daughter moved in with your mother in April 1998. You are not a qualifying child of your mother. Your daughter meets the conditions to be a qualifying child for both you and your mother. Your modified AGI for 1998 was \$8,000 and your mother's was \$14,000. Because your mother's modified AGI was higher, your daughter is your mother's qualifying child. You **cannot** take any EIC, even if your mother does not claim the credit. [Emphasis in original.]

Substantially the same example is found in the corresponding IRS publications for 1999 and 2000.

Under the date of August 12, 2002, the department issued an income tax assessment against the taxpayer for each of the years 1998 through 2001 in the principal amount of \$6,439 and interest in the amount of \$1,510.29. In its assessment, the department determined that the taxpayer was ineligible for head-of-household filing status because she did not pay more than half the cost of keeping up the cost of her home. The department also determined that the taxpayer was not eligible for the EIC because her mother's adjusted gross income was higher than hers.

The taxpayer filed a timely petition for redetermination with the department. Under the date of December 9, 2002, the department denied the petition for redetermination. The taxpayer filed a timely petition for review with the Commission.

The taxpayer challenged only the adjustment denying her the EIC for each of the years 1998 through 2001. She argued that it was the obligation of the IRS and/or the department to do a better job in providing notice to her that she was not eligible for the EIC. She also

claimed that the department should have issued its assessment sooner so that she would not have continued to erroneously claim the EIC.

The Commission concluded as follows:

- A. Section 71.77(2), Wis. Stats., authorizes the department to issue assessments up to four years after an income tax return is filed. The assessment was issued on August 12, 2002, well within the four-year statute of limitations for 1998, the first year at issue.
- B. The taxpayer's failure to be apprised of the qualifications for the EIC does not prevent the department from assessing her for amounts she erroneously claimed under this credit.

It is as true in tax law as it is in other areas of the law: ignorance of the law is no excuse. While changes in the tax statutes and regulations are published in various official and unofficial media, neither the IRS nor the department are responsible to list every possible permutation or situation in the booklets and forms that it provides to taxpayers. The taxpayer has the obligation to understand the tax laws as they apply to her situation or find someone, e.g. a tax preparer, who does.

The taxpayer is not without resources. The department and the IRS offer publications, telephone hotlines and web sites. In fact, IRS instructions for 1998 through 2000 provided an example containing facts very similar to the taxpayer's situation. In this example, it is clear that a person in the taxpayer's situation was not eligible for the EIC.

The taxpayer has not appealed this decision. [!\[\]\(9c2e8d1b5bd77cb5c9f83b7a9cff79fd\_img.jpg\)](#)



### **Imposition of tax - covenant not to compete.**

*Frank D. and Billie J. Leach vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 29, 2004). The issue in this case is whether sec. 71.02(1), Wis. Stats., imposes tax on the income paid to a nonresident from a covenant not to compete.

The taxpayers were residents of Wisconsin prior to September 1998, and filed Wisconsin full-year resident income tax returns for each year through and including 1997. They have been residents of the state of Florida since September 15, 1998, and filed a 1998 Wisconsin

Form 1NPR as part-year residents of Wisconsin from January 1, 1998 to September 11, 1998.

Frank D. Leach individually, Greenbriar Products, Inc., a Wisconsin manufacturing company located in Spring Green, Wisconsin ("Greenbriar"), and N.G.P., Inc. ("N.G.P."), entered into an asset purchase agreement dated April 16, 1999. Under the agreement, Greenbriar sold the business and substantially all of its assets to N.G.P. N.G.P. also purchased from Mr. Leach certain real property which was part of the facilities used by Greenbriar, but which was owned individually by Mr. Leach. Also under the agreement, Mr. Leach entered into a covenant not to compete with N.G.P. for five years for

the sum of \$1 million in cash paid to him at closing, which occurred on April 16, 1999. The covenant not to compete applied to the entire United States and all foreign nations.

The taxpayers filed a 1999 Wisconsin Form 1NPR, indicating that they were nonresidents of Wisconsin and residents of Florida for calendar year 1999, and on which they did not report the \$1 million payment for the covenant not to compete.

Under the date of December 24, 2001, the department issued an income tax assessment against the taxpayers in the amount of \$82,338.73. The assessment adjusted the 1999 return to include the \$1 million payment pursuant to the covenant not to compete. The taxpayers filed a timely petition for redetermination of the department's assessment. The petition for redetermination was denied, in part, by the department's notice of action dated August 12, 2002.

In its notice of action, the department adjusted the taxpayers' taxable income by prorating the income from the covenant not to compete based on the use of a three-factor formula. The proration generated a percentage of 39.31 percent, which was applied to the payment under the covenant not to compete, generating additional net income of \$339,100 beyond the amount that was originally reported. The notice of action adjusted the assessment to \$26,445.81 in tax and \$7,929.40 in interest.

The three-factor formula used by the department was based upon sales, payroll, and property from Greenbriar. Amounts for the sales factor were double-weighted and included Greenbriar's sales in Wisconsin in the numerator and their gross receipts for sales everywhere in the denominator. Since all of Greenbriar's payroll and property are located in Wisconsin, the ratio for these two factors was each 100 percent. The data for the sales and property factors applied to Greenbriar's fiscal year ending August 31, 1999.

The parties stipulated that the sole issue for the Commission to decide was whether the taxpayers met their burden of proof that the department's notice of action incorrectly apportioned to Wisconsin a part of their 1999


income from the \$1 million paid under the covenant not to compete. The taxpayers did not challenge the methodology of the apportionment, but rather the department's right in the first place to consider any portion of the \$1 million payment Wisconsin income.

The department argued that Mr. Leach's right to compete, which he forfeited by signing the covenant not to compete, was a "property right with situs where the competition would occur in the absence of the covenant." They relied on a case decided by the California State Board of Equalization (*In re Appeals of Milhous*), in which it was concluded that a right to compete is an intangible right, with situs in any location where such competition would occur in the absence of such a covenant.

The Commission concluded that the Wisconsin income tax is not imposed on the \$1 million payment received under the covenant not to compete. Section 71.02(1), Wis. Stats., imposes the income tax on "income...derived from property located" in Wisconsin. "Property" in sec. 71.02(1), Wis. Stats., is construed as not including intangible property rights, for two reasons:

- When an imposition statute is ambiguous, all doubts are resolved against taxability. Limiting "property" to tangible property certainly augurs against taxability in all cases.
- Context mandates the conclusion that "property" in sec. 71.02(1), Wis. Stats., does not include intangible property. In order for income to be taxable to nonresidents, it must be "derived from property located" in Wisconsin. [Emphasis supplied.] By its very nature, intangible property cannot be *located* anywhere. It is clear from this context that the legislature intended "property" to be limited to tangible property located within Wisconsin.

The department has not appealed but has adopted a position of nonacquiescence in regard to this decision. The effect of this action is that, although the decision is binding on the parties in this case, the Commission's conclusions of law, the rationale and construction of statutes in this case are not binding upon or required to be followed by the department in other cases. [§](#)

 **Retirement funds exempt.** *Paul and Barbara Weprinsky vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, April 6, 2004). The issue in this case is whether retirement benefits paid to Paul Weprinsky (“the taxpayer”) are exempt from Wisconsin’s income tax under sec. 71.05(1)(a), Wis. Stats.

**Note:** The Commission’s decision in this case pertained to four dockets that were at issue (Docket Nos. 94-I-257, 95-I-04, 02-I-231-SC, and 02-I-232-SC). This summary pertains only to the Commission’s decision regarding Docket No. 94-I-257.

The taxpayer commenced his military service with the federal government in 1955. His military service included active service. The department’s action does not involve the taxpayer’s income from his military pension, and it is not at issue here.

The taxpayer became a National Guard technician no earlier than September 14, 1965. His service as a National Guard technician ended on October 31, 1987. Upon his retirement, he began to collect a federal Civil Service Retirement System (“CSRS”) pension based on his service as a National Guard technician.

The taxpayers reported the income from the CSRS pension on their 1987 and 1988 Wisconsin income tax returns. At some point prior to August 8, 1994, they filed a claim for refund of income tax they paid in 1987 and 1988 on the CSRS pension income. The department denied the claim for refund, and under the date of March 13, 1990, the taxpayers filed a petition for redetermination objecting to the denial. Under the date of August 8, 1994, the department denied the petition for redetermination. The taxpayers filed a petition for review with the Commission on August 15, 1994.

The taxpayer’s assertion appeared to be that the CSRS gives him credit in its benefits calculation for service in the military or under the military retirement program, and, therefore, this makes him a constructive member of the CSRS on December 31, 1963. In support of this argument, he provided one page from the Commission’s decision in *Hafner vs. Dep’t of Revenue*. That portion of *Hafner* recounted the procedural history of *Department of Revenue v. Hogan* (*Hogan II*). As the Commission noted in *Hafner*, the Commission in *Hogan II* adopted the notion that sec. 71.05(1)(a), Wis. Stats., applied to members who had a “constructive” date of employment or service on December 31, 1963. The taxpayer’s argu-

ment appeared to be that because he may be able to enhance his CSRS pension based on his military service, and because he was in the military on December 31, 1963, that this gives him a constructive membership in the CSRS on December 31, 1963.

The Commission concluded that the taxpayer’s CSRS payments are not exempt from Wisconsin’s income tax under sec. 71.05(1)(a), Wis. Stats., because he was not a member of the CSRS as a matter of historical fact on December 31, 1963.

Section 71.05(1)(a), Wis. Stats., provides that payments “which are paid on the account of any person who was a member of [an eligible retirement] system or fund as of December 31, 1963” are exempt from Wisconsin’s income tax. Pension payments to the taxpayer based on his military service are exempt from Wisconsin’s income tax. However, because the taxpayer did not become a member of the CSRS until 1965 at the earliest, his pension income from this system is not exempt under sec. 71.05(1)(a), Wis. Stats.

The taxpayer failed to note in his arguments that the Commission’s decision in *Hogan II* was reversed by the Court of Appeals. The Court of Appeals did not address the issue of constructive membership. However in *Hafner*, the Commission rejected the notion of constructive membership and held that in order to qualify for the exemption under sec. 71.05(1)(a), Wis. Stats., a retiree must be a member “as a historical fact.” This conclusion was explicitly affirmed by the Court of Appeals:

The commission concluded that the statutory language was unambiguous – that when it talks about “membership” in the CSRS on the stated date, it means “membership as a historical fact, not membership that is constructive or purchased at a later date.”


...We consider this interpretation of the statute to be reasonable – both on its face and in light of prior decisions of the commission. ...Indeed, ... we consider the commission’s interpretation to be not only the most reasonable, but quite possibly the *only* reasonable interpretation of WIS. STAT. § 71.05(1)(a).

*Hogan II*, 239 Wis. 2d at 224-26 (emphasis in original).

The taxpayers have not appealed this decision. 



## SALES AND USE TAXES

 **Admissions - hunting fees.** *Granite Ridge Ranch, LLC vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, April 7, 2004). The issues in this case are:

- A. Whether the trophy fees and wounded animal fees the taxpayer charged in relation to animal hunts conducted at its game ranch were subject to sales tax.
- B. Whether the department's assessment of sales tax is barred by the doctrine of "laches."

The taxpayer is a Wisconsin limited liability company that operates a game ranch in Wisconsin. During the period under review, the taxpayer held game hunts at its ranch, charging two types of fees. One type of fee charged was a "hunt fee," which, prior to 1997, was based on a daily rate of \$150 for a one-day hunt, \$175 for two days, and \$200 for three days. Also, until the fall of 1997, the taxpayer charged a "trophy fee," which, until the fall of 1996, was based on the number of animals taken and, from the fall of 1996 through the spring of 1997, was based on the weight of the animal taken. The trophy status of an animal is directly related to the weight of the animal. The primary motivation of hunters at the taxpayer's ranch is to obtain trophy animals. Trophy fees ranged from \$225 per animal in 1995 to \$275 per animal in 1996 and, from the fall of 1996 through the spring of 1997, \$240 for an animal weighing less than 200 pounds to \$550 for an animal weighing 400 pounds or more.

Beginning in the fall of 1997, hunt fees were based on a one-day or two-day hunt fee if no animal was taken, and a fee that varied based on the weight of an animal that was taken. Examples of the fees based on animal weight beginning in the fall of 1997 are \$350 for an animal weighing less than 200 pounds, and \$650 for an animal weighing 400 pounds or more. At times, the taxpayer charged more for animals that displayed enhanced trophy


status, beyond the animal's weight. For example, a nine-point buck would result in a fee of \$1,800. The hunt fees charged by the taxpayer included the hunt, meals and lodging during the hunt, field dressing animals taken, and the animals taken. The taxpayer also charged a fee if an animal was wounded, which charge was refunded if the animal survived.

Although the taxpayer paid sales tax on the "hunt fees," it contended the "trophy fees" and fees for wounded animals were not subject to tax because they were payments for food for human consumption. The taxpayer also contended that because the department possessed the taxpayer's income tax return but did not notify the taxpayer of its requirement to charge sales tax, the department's assessment of sales tax on the trophy and wounded animal fees was barred by the doctrine of "laches." Laches is a defense to an action based upon an unreasonable delay by a plaintiff, and an equitable remedy in which the party seeking the remedy must come to the court with clean hands, not seeking relief from a predicament of its own making.

The Commission concluded that the trophy and wounded animal fees were subject to sales tax. The trophy fees are actually fees for the trophy status of the animals taken. The animals are not food for human consumption because they are only field dressed, and the meat of some of the animals taken is available commercially for substantially less cost. The primary intention of hunters at the taxpayer's ranch is to obtain trophy animals rather than meat.

The Commission also concluded that the department's assessment of sales tax on the trophy and wounded animal fees was not barred by the doctrine of laches because the taxpayer had failed to comply with the sales tax law, and thus did not come to the Commission with clean hands. Also, the department's action was reasonable because it was within the statute of limitations.

The taxpayer has not appealed this decision. [!\[\]\(d3102649f02e825ddb76dc3de0190154\_img.jpg\)](#)

 **Appeals - attorney fees and costs.** *Plaza Publications, Inc., vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, April 6, 2004). The issues in this case is whether the taxpayer should be awarded attorney fees and costs related to the Commission's decision of January 31, 2003. See *Wisconsin Tax Bulletin* 134 (April 2003), page 25, for a summary of the Commission's decision.

On October 6, 2003, the Dane County Circuit Court issued a decision reversing the conclusion reached by the Commission in the January 31, 2003 decision. See *Wisconsin Tax Bulletin* 138 (April 2004), page 23, for a summary of the Circuit Court's decision. The taxpayer has not appealed the Circuit Court's decision.




Under sec. 227.485, Wis. Stats. (2001-02), attorney fees and costs may be awarded to a taxpayer litigating against the State if the taxpayer, along with other requirements, prevails in its appeal.

Because the taxpayer did not prevail in the Circuit Court decision, and has not appealed the Circuit Court's decision, the Commission concluded that the taxpayer's request for attorney fees and costs is denied.

The taxpayer has not appealed this decision. [!\[\]\(c3d993ca47bfe2a953c700506ce31fa0\_img.jpg\)](#)

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 **Services subject to tax - pet cremation service.** *Thompson Animal Medical Center, Ltd. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, February 27, 2004). The issue in this case is whether the animal cremation service provided by the taxpayer is subject to tax when the animal remains are returned to the customer.

The taxpayer is a Wisconsin corporation engaged in the business of providing veterinary services. During the period under review, the taxpayer offered animal cremation services to its customers for a fee. The taxpayer did not perform the cremations, but contracted with a third party to perform the actual cremations. In one-third of the cases, the remains of the cremated animal were returned to the customer by the taxpayer, and the department assessed the taxpayer sales tax on these cremations. In the other two-thirds of the cremations,

the remains were disposed of by the third party crematory.

The Commission concluded that the animal cremation service provided by the taxpayer that was assessed by the department is subject to tax. One of the facts agreed to by the taxpayer and the department is that "a cremation service is not classified as a veterinary service." Because of this stipulation, the cremation service is not an exempt service under sec. 77.52(2)(a)10, Wis. Stats., which provides in part that "'Service' does not include services performed by veterinarians." The alteration of tangible personal property is subject to sales tax under sec. 77.52(2)(a)10, Wis. Stats., and the cremation service in this case involves the alteration of tangible personal property (animals).

The taxpayer has not appealed this decision. [!\[\]\(faf942dc3e59ce8eb64b4ac481eca7e0\_img.jpg\)](#)



## 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 in a tax release, the answers may not apply. Unless otherwise indicated, tax releases apply for all periods open to adjustment, and all references to section numbers are to the Wisconsin Statutes. (Caution: Tax releases reflect interpretations by the Wisconsin Department of Revenue, of laws enacted by the Wisconsin Legislature as of the date published in this Bulletin. Laws enacted after that date, new administrative rules, and court decisions may change the interpretations in a tax release.)*

The following tax releases are included:

### Individual Income Taxes

1. Cranberry Grower's Claim for Farmland Tax Relief Credit.....20

### Corporation Franchise and Income Taxes

2. Carryforwards of Wisconsin Net Business Losses ...21

## INDIVIDUAL INCOME TAXES

### 1 Cranberry Grower's Claim for Farmland Tax Relief Credit

**Statutes:** Section 71.07(3m), Wis. Stats. (2001-02)

**Background:** The farmland tax relief credit is a credit based on a percentage of the property taxes accrued on farmland. In computing the credit, the amount of property taxes accrued on farmland may not exceed \$10,000. For tax year 2003, the credit equals 16% of the property taxes on farmland. Section 71.07 (3m)(a) 3., Wis. Stats. (2001-02), states in part that “ ‘Farmland’ means 35 or more acres of real property, exclusive of improvements, in this state, in agricultural use, as defined in s. 91.01(1), and owned by the claimant or any member of the claimant’s household during the taxable year for which a credit under this subsection is claimed...” The credit is limited by sec. 71.07(3m)(c)1., Wis. Stats. (2001-02), to a maximum claim of \$1,500.00.

For purposes of the use value assessment of agricultural property, beginning in 2001, some of a cranberry grower’s land (for example dikes, ditches and support

land) is classified as an “improvement,” rather than as “land.” The result of this classification causes that portion of the cranberry grower’s land to appear on the property tax bill in the “improvements” category. In years prior to 2001, this same part of the cranberry grower’s land was classified as “land” and appeared on the property tax bill in the “land” category. More information concerning the assessment of farmland can be found in the publication *Agricultural Assessment Guide For Wisconsin Property Owners*. This publication is available on the Department of Revenue’s web site at: [www.dor.state.wi.us/pubs/slf/pb061.pdf](http://www.dor.state.wi.us/pubs/slf/pb061.pdf).

**Facts and Question 1:** A cranberry grower owns a 40 acre cranberry marsh. The total agricultural land value of the parcel is assessed at \$8,497 for 27.41 acres of beds. The total assessed value of 12.59 acres of “other land” plus “improvements” after depreciation is \$163,218. Improvements in the case of a cranberry grower include the cost of construction, less depreciation, of structural improvements (such as dikes and bulkheads, but not buildings). Dikes, ditches and support land owned by other farmers continue to be classified as “land” and are listed on other farmers’ property tax bills in the “land” category. The total assessed value for the parcel including both land and improvements is \$171,715 (\$8,497 + \$163,218). The property tax on the 27.41 acres is \$177.93 and the property tax on the remaining 12.59 acres and improvements is \$3,417.78.

Given the above facts, how is the farmland tax relief credit computed?

**Answer 1:** The farmland tax relief credit is a credit against 16% of the property taxes accrued against farmland, which is defined to be exclusive of improvements. However, the property tax bill that the cranberry grower receives lists some of the structural land improvements, such as dikes and bulkheads, in the “improvements” category. In order to properly determine the value of farmland to be used in the computation of the credit, a copy of the current property assessment record card and the agricultural insert provided with the record card should be included with the tax return. This information, prepared by the local assessor, should enable the Department of Revenue and the landowner to properly allocate the property taxes shown on the property tax bill for that year between farmland, structural improve

ments, and other improvements not eligible for the credit. For purposes of computing the credit, the property tax on the \$8,497 assessed as agricultural land should be combined with the property tax on the 12.59 acres of “other land” plus structural improvements (dikes and bulkheads), assessed at \$163,218. The value of the credit in this example would equal \$575.31. The credit equals 16% of the property taxes accrued against farmland. The property tax on the land assessed at \$8,497 is \$177.93 and the property tax on the 12.59 acres and improvements assessed at \$163,218 is \$3,417.78. The credit is \$575.31 ( $\$177.93 + \$3,417.78 = \$3,595.71$  multiplied by 16% = \$575.31.)

**Facts and Question 2:** A 40 acre cranberry farm has a 2003 assessed value of \$308,400. The cranberry farm includes 28 acres of beds. The assessed value is comprised of the value of the 28 acres of “agricultural land” (i.e., the beds under the vines), “other” land, and the assessed value of improvements. The total assessed value of land (“agricultural” plus “other” land) is \$39,300. The improvements, assessed at \$269,100, include dikes, ditches, bulkheads, and farm buildings. For purposes of use value assessment, dikes, ditches and bulkheads, assessed at \$234,300, are classified as improvements rather than land. The property tax bill on this parcel is \$5,378.98. The assessed value of the farmland is \$273,600 (\$39,300 plus \$234,300).

Given the above facts, what amount of property tax may be used in computing the farmland tax relief credit?

**Answer 2:** For 2003, the credit is calculated as 16% of the property tax bill of \$5,378.98 accrued against farmland. Use the following formula to determine the portion of property taxes attributable only to land.

Assessed value of farmland	X	2003 property taxes levied in 2003
Total assessed value of land and improvements		before lottery and gaming credit

The assessed value of the land is \$273,600. Divide \$273,600 by the total assessed value (\$308,400). Multiply the result (.8871595) by the property taxes levied (\$5,378.98) to equal \$4,722.01, which is the portion of property taxes to be used in determining the farmland tax relief credit in this example. [✎](#)

## CORPORATION FRANCHISE AND INCOME TAXES

### 2 Carryforwards of Wisconsin Net Business Losses

**Statutes:** Sections 71.26(4), 71.45(4), 71.75, 71.76, and 71.77, Wis. Stats. (2001-02)

**Note:** Also see the tax release titled “Years in Which a Wisconsin Net Business Loss Carryforward May Be Used” published in *Wisconsin Tax Bulletin* 110 (July 1998), page 29.

**Background:** Section 71.26(4), Wis. Stats. (2001-02), provides in part:

(4) NET BUSINESS LOSS CARRY-FORWARD. A corporation, except a tax-option corporation or an insurer to which s. 71.45(4) applies, *may* offset against its Wisconsin net business income any Wisconsin net business loss sustained in any of the next 15 preceding taxable years, if the corporation was subject to taxation under this chapter in the taxable year in which the loss was sustained, to the extent not offset by other items of Wisconsin income in the loss year and by Wisconsin net business income of any year between the loss year and the taxable year for which an offset is claimed. ... [Emphasis added.]

With respect to insurers, sec. 71.45(4), Wis. Stats., (2001-02), states in part:

(4) NET BUSINESS LOSS CARRY-FORWARD. Insurers computing tax under this subchapter *may* subtract from Wisconsin net income any Wisconsin net business loss sustained in any of the next 15 preceding taxable years to the extent not offset by Wisconsin net business income of any year between the loss year and the taxable year for which an offset is claimed and computed ... [Emphasis added.]

**Facts and Question 1:** Corporation A computed a Wisconsin net business loss of \$300,000 on its Wisconsin franchise or income tax return for the 2002 calendar year.

For 2003, Corporation A has Wisconsin net income of \$25,000 before subtracting its 2002 Wisconsin net business loss carryforward. The income is derived from

business activities in a Wisconsin development zone. Corporation A has a \$2,000 development zone investment credit carryforward from its 1997 taxable year. It has no other 2003 tax credits or credit carryforwards.

May Corporation A choose not to deduct any part of its 2002 Wisconsin net business loss carryforward on its 2003 Wisconsin return so that it may use its development zone investment credit carryforward?

**Answer 1:** Yes, Corporation A may choose not to deduct any part of its 2002 Wisconsin net business loss carryforward on its 2003 Wisconsin return. Corporation A may claim the net business loss carryforward in any year between the loss year and the next 15 succeeding years.

Section 71.26(4), Wis. Stats. (2001-02), provides that a corporation “may” offset against its Wisconsin net business income any Wisconsin net business loss sustained in any of the next preceding 15 years. In statutes, the word “may” denotes an optional or permissive privilege, right, or grant of discretionary authority. Thus, the Legislature’s use of the word “may” for the net business loss carryforward indicates that taxpayers have the option to offset the loss against income in any future year during the 15-year carryforward period.

**Facts and Question 2:** Corporation B timely filed its 1997 Wisconsin franchise or income tax return and paid Wisconsin franchise tax of \$25,000. After the statute of limitations had expired, Corporation B determines that it made an error in computing its deductions and actually incurred a \$100,000 net business loss for the taxable year.

May Corporation B carry forward and claim any portion of the 1997 net business loss in open years?

**Answer 2:** No, Corporation B cannot go back to a closed year and compute a net business loss where one had not previously been claimed. Therefore, Corporation B does not have any unused net business loss from 1997 to carry forward to years that are open under the statute of limitations.

**Facts and Question 3:** On July 1, 2003, Corporation C files a late Wisconsin franchise or income tax return for the 1996 calendar year. The return reports a net business loss of \$500,000.

May Corporation C carry forward the \$500,000 net business loss to receive a refund of taxes paid in open years?

**Answer 3:** No, since Corporation C filed its Wisconsin return after the statute of limitations had expired, it cannot carry forward the \$500,000 of net business loss shown on its 1996 return.

**Facts and Question 4:** Corporation D claimed a \$750,000 net business loss on its timely filed, calendar-year 1996 Wisconsin franchise or income tax return. The corporation carried forward the loss to offset the net business income reported on its 1997, 1998, and 1999 Wisconsin returns of \$100,000, \$150,000, and \$275,000, respectively. Thus, Corporation D reported an unused net business loss carryforward of \$225,000 on its 1999 return. The Department of Revenue conducts an audit of Corporation D’s 1996 through 1999 Wisconsin franchise or income tax returns. At the time of the audit, only the 1999 return is open to assessment by the department. The department determines that Corporation D overstated its net business loss on its 1996 return by \$75,000 and understated its income on its 1997, 1998, and 1999 returns by \$50,000, \$75,000, and \$125,000, respectively.

May the department adjust Corporation D’s 1996 net business loss and its net business income reported on its 1997, 1998, and 1999 returns?

**Answer 4:** Yes, the department can adjust Corporation D’s 1996 net business loss and the net business income reported on its 1997, 1998, and 1999 returns. The statute of limitations relates only to assessments and does not prevent income from being recomputed in order to determine the correct net business loss to carry forward to future years. The department determines that Corporation D’s 1996 net business loss is \$675,000. Corporation D’s net business income before the deduction for its net business loss carryforward is \$150,000 for 1997, \$225,000 for 1998, and \$400,000 for 1999. As a result, \$150,000 of the net business loss is applied against the adjusted 1997 net business income and \$225,000 is applied against the adjusted 1998 net business income, leaving a balance of \$300,000 of net business loss to be carried forward to 1999. The department can issue an assessment to Corporation D for the \$100,000 increase in net income reportable on the corporation’s 1999 Wisconsin return.

**Facts and Question 5:** Corporation E claimed a \$550,000 net business loss on its timely filed, calendar-year 1996 Wisconsin franchise or income tax return. The corporation carried forward the loss to offset the \$200,000 of net business income reported on its 1997 Wisconsin return and \$350,000 of the \$400,000 of net business income reported on its 1998 return. The Department of Revenue conducts an audit of Corporation

E's 1996 through 1999 Wisconsin franchise or income tax returns. At the time of the audit, only the 1999 return is open to assessment by the department. The department determines that Corporation E understated its net business loss on its 1996 return by \$50,000. In addition, the department determines that the net business income before any net business loss offset that Corporation E reported on its 1997, 1998, and 1999 returns is correct.

May the department adjust Corporation E's 1996 net business loss and its net business income reported on its 1997, 1998, and 1999 returns?

**Answer 5:** The department can adjust Corporation E's 1996 net business loss and the net business income reported on its 1999 Wisconsin return. The department determines that Corporation E's 1996 net business loss is \$600,000. Since Corporation E's 1997 and 1998 returns are closed to refunds, the additional \$50,000 of net business loss is carried forward and applied against Corporation E's 1999 net business income. The department can issue a refund to Corporation E for the \$50,000 decrease in net income reportable on the corporation's 1999 Wisconsin return. [!\[\]\(e2376d476d06eb31946dc01a69a4403a\_img.jpg\)](#)





## 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 ruling is included:

### Sales and Use Taxes

Common and contract carrier exemption; Disregarded entities  
W 0420001 (p. 24)

✱ **W 0420001** ✱

**February 20, 2004**

**Type Tax:** Sales and Use Taxes

**Issue:** Common and contract carrier exemption; Disregarded entities

**Statutes:** Sections 77.51(10), 77.54(5)(b), and 77.58(3)(a), Wis. Stats. (2001-02)

This letter responds to your request for a private letter ruling regarding the Wisconsin sales and use tax consequences of corporate restructuring for Company A and its wholly-owned, single-member limited liability company, Company B.

**Facts, as stated in your request:**

### I. Background Information

#### A. Overview of Company A’s Operations

Company A is a wholesale distributor with several distribution centers in Wisconsin and other states. Prior to the contemplated restructuring, Company A operated a fleet of tractors and trucks (“Power Units”) that were based at the various distribution centers.

In addition, Company A owns and/or operates trailers that are proportionately based among the various distribution centers. The Power Units and trailers (collectively the “transportation equipment”) generally operate in the midwestern portions of the United States and haul product related to Company A’s distribution operations. Company A previously paid Wisconsin retail sales tax on the purchase of all of its Wisconsin-based transportation equipment.

#### B. Company A’s Restructuring

On April 7, 2000, Company A formed Company B in Wisconsin as a single-member, wholly-owned limited liability company. Company B currently possesses for-hire interstate motor carrier operating authority issued by the Federal Highway Administration and Wisconsin intrastate motor carrier operating authority issued by the State of Wisconsin Department of Transportation (“WDOT”). Copies of those authorities are attached as Attachments A and B. Upon completion of the restructuring, Company B will operate, pursuant to its federal and state operating authorities, all of the transportation equipment formerly operated by Company A and will provide transportation services to, among others, Company A. In this regard, Company B has been granted authority to operate as an intrastate motor carrier not just in Wisconsin, but also in almost all states in which Company A has distribution facilities and in which Company B will base its transportation equipment. Company B has also registered as a foreign limited liability company in these states.

The Companies contemplate a complete transfer of ownership of Company A's Power Units to Company B in return for a membership interest in Company B. In other words, all of the Power Units will now be titled in Company B's name. For the time being, Company A's trailers will be leased to Company B under long-term leases pursuant to which Company B will be responsible for all supplies, repairs, and maintenance. In the future, Company B will purchase additional transportation equipment (both Power Units and trailers from third-party suppliers) for use in its for-hire transportation operations as the need arises.

Company B will maintain separate books and records, a separate bank account, and a distinct telephone number. It will also advertise transportation services to unrelated shippers and establish transportation service rates independent from Company A. When the restructuring is completed, Company B will begin to operate the Wisconsin-based transportation equipment and start to provide transportation services to Company A.

But for one fact, the Companies would not feel a need for a Private Letter Ruling, which, as indicated above, concerns Company B's desire to qualify as a for-hire motor carrier providing transportation services for purposes of Wisconsin sales and use tax. The fact at issue is the parties' intent to keep all truck drivers in Company A's employ and to lease those drivers to Company B for operational reasons discussed below.

## II. Business Reasons

A principal objective of this restructuring is the desire of Company A's management to separate the distribution business from the transportation operations. Company A has experienced significant growth with recent expansions into new jurisdictions. This growth has subjected Company A's distribution business to substantial federal and state transportation-related compliance regulations imposed in connection with the multi-state operation of the transportation equipment. Company A management believes that the restructuring of the operations is important to separate the distribution business from the burdens associated with the regulatory filings.

By segregating the distribution business from the transportation function, the centralization of the transportation activity in a separate legal entity should produce operational efficiencies that will permit Company B to focus its efforts on trucking in the multi-state network involved. For example, fuel tax reporting, titling, and registration of the transportation equipment is now done at each distribution center located in the various states. All of these tasks will be consolidated and performed in the name of Company B, upon completion of the restructuring, thereby resulting in efficiencies through streamlining and centralization. For example, Company B will now only be filing a single fuel tax report in its name, rather than each distribution facility filing its own individual reports.

Additional financial benefits are available as well. For example, with regulatory matters involving the Federal Motor Carrier Safety Administration (the "FMCSA"), a certain amount of flexibility is achieved when the FMCSA reviews the safety records of a transportation company operated in a separate legal entity. In this regard, safety audit assessments are based upon revenue of the company involved, which would put Company A at a competitive disadvantage if it were assessed based upon its total distribution revenues. By contrast, for-hire motor carriers generally end up being assessed based upon their transportation-related revenue, which seems logical since the transportation operations are the subject of a United States Department of Transportation ("DOT") audit. It is also anticipated that the overall liability risks associated with operations of the transportation equipment could be somewhat reduced as a result of the restructuring.

Another important benefit is that Company B's status as a separate, for-hire motor carrier will afford it the business opportunity to provide for-hire transportation services to a variety of shippers other than Company A. It would be impractical to maintain "dual operations" whereby Company A continues to operate as a private carrier in Wisconsin, yet uses the for-hire services of Company B in other states, especially when Company B has the opportunity to offer services to the general public in a streamlined, efficient fashion throughout all of the states involved and can coordinate those services cost-effectively with the services provided to Company A.

For similar reasons, it is impractical to transfer Company A's drivers to Company B in Wisconsin.

None of the other involved states requires the transfer of the drivers' employment in order to be considered a for-hire motor carrier, and so for administrative convenience they will be retained in Company A's employ to avoid the costly and cumbersome transfer of payroll, benefits administration, and associated human relations paperwork that is "second nature" to Company A, but would be a whole new endeavor for Company B over and above its numerous other regulatory compliance responsibilities. Maintaining an inconsistent dual system whereby the drivers are employed by Company B in Wisconsin, but by Company A in all other states could prove to be an administrative "nightmare" and would certainly reduce the operational efficiencies the companies hope to obtain by the proposed restructuring.

Finally, the restructuring will enable Company B to take advantage of savings that are not currently available to Company A Pursuant to Wis. Stat. § 77.54(5)(b) and similar laws in other states, Company B, as a for-hire motor carrier, will be entitled to make trucking-related purchases on a sales-tax exempt basis.

### III. The Relevant Contractual Agreements

Company A and Company B have executed various legal agreements to complete the restructuring and ensure Company B's status as a for-hire motor carrier. The relevant contracts include a Transportation Services Agreement, Administrative Services Agreement, and Driver Leasing Agreement. In addition, an Equipment Lease Agreement may be executed; however, this will only be applicable until the transfer of the transportation equipment is completed (Attachment F).

Pursuant to the Transportation Services Agreement, the terms and conditions of Company B's provision of for-hire motor carrier services to Company A are formally established. The price for transportation services is determined on a costs-plus-profit-margin basis.

The Driver Leasing Agreement sets forth the terms and conditions under which Company B leases the drivers who perform its driving services. Pursuant to provision 3 of the Driver Leasing Agreement, the drivers will remain employees of Company A for purposes of all applicable federal and state withholding taxes, social security, and unemployment insurance. However, Company B maintains com-

plete responsibility and control over the drivers with respect to requirements imposed by the DOT related to the drivers' services. This provision satisfies the Federal Motor Carrier Safety Regulations ("FMCSR") pertaining to leased drivers as well as applicable federal and Wisconsin state law. Provision 8 specifically requires Company B to compensate Company A for driver leasing services at costs related to the employment of the drivers plus a profit margin not to exceed 5% of such costs. Consequently, Company B fully reimburses Company A for the drivers' salaries, benefits, and other costs of employment.

Finally, the Administrative Services Agreement provides the terms and conditions under which Company A and its affiliates provide accounting, administrative, financial, legal, technology, human resources, insurance procurement and similar services to Company B. A fee for these services, which are commonly provided among related companies and corporate affiliates in almost all industries, is likewise set at costs plus a profit margin.

#### Request:

You requested that the department rule on the following issues:

1. As a result of the companies' restructuring, is Company B a for-hire motor carrier performing a non-taxable transportation service when it uses leased drivers?
2. As a result of the companies' restructuring, is Company B entitled to purchase its trucking-related acquisitions (i.e., trucks, tractors, trailers, accessories, parts, and supplies) exempt from retail sales tax under Wisconsin law?

#### Ruling:

1. Company B is a for-hire motor carrier performing a non-taxable transportation service when it uses leased drivers as described in the facts above.
2. Yes, assuming (1) the item it purchases is a motor truck, truck tractor, road tractor, bus, trailer or semitrailer or an accessory, attachment, part, supply, or material for such an item, and (2) Company B uses the items exclusively as described in the facts above.

**Analysis:**

1. Section 77.54(5)(b), Wis. Stats. (2001-02), provides a sales and use tax exemption, in part, for the gross receipts from the sale of and the storage, use, or other consumption of:

“Motor trucks, truck tractors, road tractors, buses, trailers and semitrailers, and accessories, attachments, parts, supplies and materials therefor, sold to common or contract carriers who use such motor trucks, truck tractors, road tractors, buses, trailers and semitrailers exclusively as common or contract carriers...”

For purposes of this exemption, “common carrier” has the same meaning as “common carrier” in sec. 194.01(1), Wis. Stats. (2001-02). “Contract carrier” has the same meaning as “contract motor carrier” in sec. 194.01(2), Wis. Stats. (2001-02).

“Common motor carrier” is defined in sec. 194.01(1), Wis. Stats. (2001-02), in part, as:

“any person who holds himself or herself out to the public as willing to undertake for hire to transport passengers by motor vehicle between fixed end points or over a regular route upon the public highways or property over regular or irregular routes upon the public highways...” (Emphasis added)

“Contract motor carrier” is defined in sec. 194.01(2), Wis. Stats. (2001-02), as:

“any person engaged in the transportation by motor vehicle over a regular or irregular route upon the public highways of property for hire”. (Emphasis added)

“For hire” as used in sec. 194.01(1) and (2), is defined in sec. 194.01(4), Wis. Stats. (2001-02), in part, as “for compensation, and includes compensation obtained by a motor carrier indirectly...”

Because Company B will receive compensation for hauling property of Company A and other shippers, it will be hauling property for hire. When using leased drivers for such activities, Company B will be a for-hire motor carrier performing a non-taxable transportation service. The fact that the drivers will be leased from a related entity does not change the for-hire motor carrier status of Company B.

2. Company B qualifies for the exemption provided in sec. 77.54(5)(b), Wis. Stats. (2001-02), on its purchases of motor trucks, truck tractors, road tractors, buses, trailers and semitrailers, and accessories, attachments, parts, supplies, and materials for such items, provided it uses these items exclusively to haul property of others for hire, as described in the facts.

Although Company B will be formed as a single-member, limited liability company, wholly-owned by Company A, and may be disregarded for federal and Wisconsin corporate income tax purposes, it is a separate entity from Company A for sales and use tax purposes relating to the transactions described in the facts.

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

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

- a. The definition of “person” in sec. 77.51(10), Wis. Stats., was amended to include single-owner entities disregarded as separate entities under ch. 71, Wis. Stats.
- b. Section 77.58(3)(a), Wis. Stats., was amended to provide that the owner of a QSSS or single-owner entity disregarded as a separate entity for Wisconsin income or franchise tax purposes must report taxable sales and purchases of the disregarded entity on the owner’s sales and use tax return.

No sales and use tax provisions, other than a. and b. above, were amended or created to state that a QSSS or single-owner entity that is disregarded as a separate entity for Wisconsin income and franchise tax purposes is also disregarded as a separate entity for Wisconsin for sales and use tax purposes. Therefore, for sales and use tax purposes other than reporting and collecting sales and use tax, Company B is an entity separate from Company A.