



# Wisconsin TAX BULLETIN

[www.revenue.wi.gov](http://www.revenue.wi.gov)

Number 171

April 2011

## New Tax Laws Summarized

Since the last issue of the Wisconsin Tax Bulletin, the Wisconsin Legislature has enacted a number of changes to the Wisconsin tax laws. See page 3 for details.

## Emergency Rules Adopted to Administer Job Creation Incentives

The department has adopted emergency rules that, effective April 7, 2011, administer newly created incentives for job creation in Wisconsin. In addition, proposed permanent rules that will administer these incentives are in process.

[Tax 2.957](#) provides for the administration of income and franchise tax credits and deductions for businesses that relocate to Wisconsin. [Tax 3.05](#) provides for the administration of income and franchise tax deductions for job creation. These credits and deductions were created by 2011 Wisconsin Acts 3 and 5, see pages 3 to 5 for summaries of the statutory provisions.

Information concerning all administrative rules of the Department of Revenue, as well as other state agencies, is available at the State of Wisconsin Administrative Rules [Home Page](#). At this web site you can search for rules, view the status of current rulemaking, view documents associated with rulemaking, submit and view comments on rules, and subscribe to receive notification of rulemaking. [↗](#)

## Recent Sales and Use Tax Guidance

The department recently published two articles on its practitioner web page providing guidance on credit for taxes paid to other states. One article is specific to tax on repair labor, and the other to transactions of construction contractors. For a complete, up-to-date list of topics, see [News for Tax Practitioners](#). [↗](#)

## Electronic Filing Mandate Letters to Corporations and Partnerships

The Wisconsin Department of Revenue (DOR) will be mailing letters to corporations and partnerships this summer, informing them of their requirement to file tax returns and make payments electronically. The Wisconsin Administrative Code provides that DOR may require any corporation franchise or income tax or partnership tax return be filed electronically. Electronic funds transfer may be required for:

- corporate income and franchise estimated tax payments and tax due with the return when the net tax less refundable credits on the prior year's return was \$1,000 or more; and
- any amount due for pass-through entities required to make withholding payments.

The department's web site provides a [list](#) of software vendors who support corporation and partnership e-file and e-pay. Also, to e-pay, you can use the department's [My Tax Account](#). If the requirement to e-file or e-pay causes an undue hardship, an [Electronic Filing or Electronic Payment Waiver Request](#) may be submitted. [↗](#)

## New Online Applications for Delinquent Tax

An Installment Agreement Request (Form A-771) or Wage Assignment Reduction Request (Form A-772) may now be completed and submitted [online](#). These new applications also feature online help with completion of the form; immediate confirmation that the request has been received by the department; and the ability to update an existing installment agreement to change a monthly payment amount, request electronic payments, change bank account information, or cease electronic payments. [↗](#)

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***Sales and Use Tax Report Available***

The latest issue of the [Sales and Use Tax Report](#) became available on the Department of Revenue's web site in March. The *Sales and Use Tax Report* provides information concerning recent sales and use tax law changes and other pertinent sales and use tax information. Listed below are the articles in the March 2011 *Sales and Use Tax Report* (1-11). Links provided are to articles in [News for Tax Professionals](#) concerning the same subject matter.

- New Search Function for Sales and Use Tax Reports
- [Sales and Use Tax Exemption Certificate Requirements](#)
- [Do I Need a "Wisconsin Sales and Use Tax Exemption Certificate" For Every Residential Customer to Sell Them Propane Without Wisconsin Sales Tax?](#)
- [Registration of Snowmobiles and ATVs in Wisconsin by Nonresidents](#)
- Discount/Membership Cards
- [Tax Treatment of Online Seminars](#)
- Questions and Answers (explain that the service of removing snow and clearing ice dams from roofs is not taxable and swimming pool cleaning and maintenance services are subject to tax) [✎](#)

**Reminder: No Estate Tax for 2011 and 2012**

The Wisconsin estate tax is based on the federal credit for state death taxes after December 31, 2007. Since as a result of the federal Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (Public Law 111-312, enacted December 17, 2010) there is no federal credit for state death taxes for deaths occurring in 2011 and 2012, there is no Wisconsin estate tax for deaths occurring between January 1, 2011, and December 31, 2012.

Under current law, the federal credit for state death taxes will return in 2013 as a result of the "sunset" of the provisions of, and amendments made by, The Economic Growth and Tax Relief Reconciliation Act of 2001. Since there will be a federal credit for state death taxes for deaths occurring in 2013, there will be a Wisconsin estate tax for deaths occurring on or after January 1, 2013.

At this time it is not known if the Wisconsin Legislature will enact further legislation regarding the estate tax. Any such legislation will be reported in [News for Tax Professionals](#) and the *Wisconsin Tax Bulletin*. [✎](#)

**Wisconsin Tax Bulletin**

*Published quarterly by:*

Wisconsin Department of Revenue  
Income, Sales, and Excise Tax Division  
Mail Stop 6-40  
P.O. Box 8933  
Madison, WI 53708-8933

## New Tax Laws

The Wisconsin Legislature has enacted a number of changes to the Wisconsin tax laws. Following are brief descriptions of the major individual and fiduciary income tax, corporation franchise or income tax, and sales and use tax provisions. These provisions are contained in 2011 Acts 1, 3, 5, 7, and 15.

The description for each provision indicates the sections of the statutes affected and the effective date of the new provision.

### *Individual Income Taxes (also see “Individual and Fiduciary Income Taxes”)*

**Health Savings Accounts Allowed** (2011 Act 1, create subchapter XVI of chapter 71, sec. 71.83(1)(ce), and nonstatutory provision, effective for taxable years beginning on or after January 1, 2011.)

Effective for taxable years beginning on or after January 1, 2011, sections 106(d), 220(f)(5)(A), 223, and 408(d)(9) of the Internal Revenue Code, as amended to December 31, 2010, relating to health savings accounts have been adopted for Wisconsin tax purposes. The federal law treatment of health savings accounts applies for Wisconsin.

For distributions after December 31, 2010, for federal tax purposes the additional tax on distributions from a health savings account that are not used for qualified medical expenses is 20 percent of the amount of distribution that is includible in gross income. For Wisconsin tax purposes, the penalty for distributions not used for qualified medical expenses is 33 percent of the federal penalty.

### *Individual and Fiduciary Income Taxes*

**Relocation of a Business—Subtraction From Income** (2011 Act 3, create sec. 71.05(6)(b)47., effective for taxable years beginning on or after January 1, 2011.)

For two consecutive taxable years beginning with the taxable year in which the claimant's business locates to this state from another state or another country and begins doing business in this state, a subtraction is provided for income earned by the relocated business.

“Locates to this state” means moving either 51 percent or more of the workforce payroll of the business or at least \$200,000 of wages, as defined in sec. 3121 of the Internal Revenue Code, paid to such workforce to Wisconsin during the first taxable year to which this subtraction applies.

“Doing business in this state” includes, except as prohibited under P.L. 86-272, issuing credit, debit, or travel and entertainment cards to customers in this state; regularly selling products or services of any kind or nature to customers in this state that receive the product or service in this state; regularly soliciting business from potential customers in this state; regularly performing services outside this state for which the benefits are received in this state; regularly engaging in transactions with customers in this state that involve intangible property and result in receipts flowing to the taxpayer from within this state; holding loans secured by real or tangible personal property located in this state; owning, directly or indirectly, a general or limited partnership interest in a partnership that does business in this state, regardless of the percentage of ownership; and owning, directly or indirectly, an interest in a limited liability company that does business in this state, regardless of the percentage of ownership, if the limited liability company is treated as a partnership for federal income tax purposes. A taxpayer doing business in this state for any part of the taxable year is considered to be doing business in this state for the entire taxable year.

The subtraction is equal to the profit or loss from a trade or business as reported on federal income tax return Schedules C and F or their equivalents, plus ordinary gain or loss on the sale of business assets, as determined under the Internal Revenue Code that applies for Wisconsin, but not less than zero, multiplied by the apportionment fraction under sec. 71.04(4) and (7), Wis. Stats., which determines income as derived from business transacted and property located in Wisconsin.

For a partnership or limited liability company that locates to Wisconsin from another state or country, the partners or members may subtract their distributive share of taxable income as calculated under sec. 703 of the Internal Revenue Code (IRC); plus the items of income and gain under sec. 702 of the IRC, including taxable state and municipal bond interest and excluding nontaxable interest income or dividend income from federal government obligations; minus the items of loss and deduction under sec. 702 of the IRC, except items that are not deductible under sec. 71.21, Wis. Stats.; plus guaranteed payments to partners under sec. 707(c) of the IRC; plus credits claimed under sec. 71.07, Wis. Stats.; and plus or minus, as appropriate, transitional adjustments, depreciation differences, and basis differences under sec. 71.05(13), (15), (16), (17), and (19), Wis. Stats., multiplied by the apportionment fraction determined in sec. 71.04(4) and (7), Wis. Stats., or by separate accounting. Amounts subtracted may not be included in the capital gain exclusion modification.

For a tax-option corporation that locates to Wisconsin from another state or country, the shareholders may subtract their distributive share of the entity's net income or loss, including interest income from federal, state, and municipal government obligations, multiplied by the apportionment fraction determined under sec. 71.25(6m) and (9), Wis. Stats., or by separate accounting. Amounts subtracted may not be included in the capital gain exclusion modification.

No subtraction may be made if the person, partnership, limited liability company, or tax-option corporation has done business in Wisconsin during any of the two taxable years preceding the first taxable year in which the subtraction would otherwise be allowed.

The department shall promulgate rules to administer the subtraction.

**Job Creation Tax Deduction** (2011 Act 5, create sec. 71.05(6)(b)47.m. and nonstatutory provision, effective for taxable years beginning on or after January 1, 2011.)

A subtraction from federal income is allowed for an amount equal to the increase in the number of full-time equivalent employees employed by the taxpayer in Wisconsin during the taxable year, multiplied by \$4,000 for a business with gross receipts of no greater than \$5,000,000 in the taxable year or \$2,000 for a business with gross receipts greater than \$5,000,000 in the taxable year.

The increase in the number of full-time equivalent employees employed by the taxpayer in Wisconsin during the taxable year is determined by subtracting from the number of full-time equivalent employees employed by the taxpayer in Wisconsin during the taxable year, the number of full-time equivalent employees employed by the taxpayer in Wisconsin during the immediately preceding taxable year.

The "number of full-time equivalent employees employed by the taxpayer in Wisconsin during the taxable year" is determined by computing the average employee count from the taxpayer's quarterly unemployment insurance reports or other information as required by the department for the taxable year.

The "number of full-time equivalent employees employed by the taxpayer in Wisconsin during the immediately preceding taxable year" is determined by computing the average employee count from the taxpayer's quarterly unemployment insurance reports or other information as required by the department for the immediately preceding taxable year.

No person may claim a deduction for job creation if the person may claim the deduction (or credit in the case of corporations) equal to the person's tax liability for relocating the person's business from another state to Wisconsin.

The department shall promulgate rules to administer the job creation tax deduction.

**Dairy and Livestock Farm Investment Credit Extended** (2011 Act 15, amend sec. 71.07(3n)(a)2.(intro.), 5.(intro.), and 6.b. and (b)1. and 2., effective for taxable years beginning after December 31, 2011, and before January 1, 2017.)

The availability of the dairy and livestock investment credit is extended to taxable years that begin before January 1, 2017. Under prior law, the credit was available for taxable years beginning before January 1, 2012.

*Corporation Franchise or Income Taxes*

**Relocation of a Business – Tax Credit** (2011 Act 3, amend secs. 71.26(2)(a)4. and 71.45(2)(a)10. and create secs. 71.26(2)(a)10., 71.28(9s), 71.30(3)(ex), 71.47(9s), and 71.49(1)(ex), effective for taxable years beginning on or after January 1, 2011.)

For two consecutive taxable years beginning with the taxable year in which the claimant's business locates to this state from another state or another country and begins doing business in this state, a credit is provided against the income or franchise taxes of the relocated business.

"Locates to this state" means moving either 51 percent or more of the workforce payroll of the business or at least \$200,000 of wages, as defined in sec. 3121 of the Internal Revenue Code, paid to such workforce in Wisconsin during the first taxable year to which this credit applies.

"Doing business in this state" includes, except as prohibited under P.L. 86-272, issuing credit, debit, or travel and entertainment cards to customers in this state; regularly selling products or services of any kind or nature to customers in this state that receive the product or service in this state; regularly soliciting business from potential customers in this state; regularly performing services outside this state for which the benefits are received in this state; regularly engaging in transactions with customers in this state that involve intangible property and result in receipts flowing to the taxpayer from within this state; holding loans secured by real or tangible personal property located in this state; owning, directly or indirectly, a general or limited partnership interest in a partnership that does business in this state, regardless of the percentage of ownership; and owning, directly or indirectly, an interest in a limited liability company that does business in this state, regardless of the percentage of ownership, if the limited liability company is treated as a partnership for federal income tax purposes. A taxpayer doing business in this state for any part of the taxable year is considered to be doing business in this state for the entire taxable year.

The credit is equal to the amount of income or franchise tax liability for the taxable year after applying all other allowable credits, deductions, and exclusions.

Partnerships, limited liability companies, and tax-option corporations may not claim the relocation credit.

The amount of the computed credit must be included in the claimant's income.

No person may claim the relocation credit if the person has done business in Wisconsin during any of the two taxable years preceding the first taxable year in which the credit would otherwise be allowed.

The department shall promulgate rules to administer the credit.

**Job Creation Tax Deduction** (2011 Act 5, create secs. 71.26(1)(h) and 71.45(1)(c) and nonstatutory provision, effective for taxable years beginning on or after January 1, 2011.)

See description under "Individual and Fiduciary Income Taxes."

**Exempt and Excludable Income – Wisconsin Economic Development Corporation** (2011 Act 7, amend sec. 71.26(1)(be), effective February 24, 2011.)

Income of the Wisconsin Economic Development Corporation is exempt from corporation franchise and income tax.

**Dairy and Livestock Farm Investment Credit Extended** (2011 Act 15, amend secs. 71.28(3n)(a)2.(intro.), 5.(intro.), and 6.b. and (b)1. and 2. and 71.47(3n)(a)2.(intro.), 5.(intro.), and 6.b. and (b)1. and 2., effective for taxable years beginning after December 31, 2011, and before January 1, 2017.)

The availability of the dairy and livestock investment credit is extended to taxable years that begin before January 1, 2017. Under prior law, the credit was available for taxable years beginning before January 1, 2012.



*Sales and Use Taxes*

**General Exemptions – Wisconsin Economic Development Corporation** (2011 Act 7, amend sec. 77.54(9a)(a), effective February 24, 2011.)

The sales price from sales to, and the storage by, use by or other consumption of tangible personal property, and items and property under sec. 77.52(1)(b) and (c), Wis. Stats., and taxable services by the Wisconsin Economic Development Corporation is exempt from sales and use tax. [☞](#)

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## Capital Loss Issues for Corporations

### Capital Loss Carryforwards:

Under sec. 71.255(4)(i) and (11), Wis. Stats. (2009-10), and sec. Tax 2.61(6)(c), Wis. Adm. Code (November 2010 Register), the capital loss limitation is determined on an aggregate basis for the combined group, similar to how it is determined for a consolidated group for federal purposes under Treas. Regs. §1.1502-22 and 1.1502-23. However, the aggregate computation for the combined group cannot include capital gain or loss items that members must report on a separate entity basis or non-sharable capital loss carryovers from pre-2009 capital losses.

### Freddie Mac and Fannie Mae Losses:

For federal tax purposes, the Emergency Economic Stabilization Act of 2008 (Public Law 110-343) allows recognition of ordinary loss on the sale or exchange of Federal National Mortgage Association (Fannie Mae) or Federal Home Loan Mortgage Corporation (Freddie Mac) preferred stock. Wisconsin does not follow the provisions of Public Law 110-343, so any loss on the sale or exchange of Fannie Mae or Freddie Mac preferred stock is a capital loss for Wisconsin tax purposes.

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Wisconsin Schedule V must be used to adjust for the difference between the ordinary loss deducted on the federal return and any capital loss that is deductible for Wisconsin. When completing line 12 of Schedule V, it may be necessary to prepare pro-forma federal Forms 1120 and 4797 and Schedule D to determine the allowable capital loss for Wisconsin. These pro-forma forms and schedule would be similar to the separate federal Schedule D and Form 4797 used to compute line 18 of Wisconsin Form 4R.

Records must be maintained to document the allowable Wisconsin capital loss remaining to carry forward to future tax years. The carryover losses are entered on Wisconsin Form 4CL as either a shareable or non-shareable loss, as applicable. [☞](#)

## Credit Card Purchases – Don't Pay Twice!

Many businesses and individuals pay for purchases using credit cards. Typically, these purchases are made from out-of-state vendors. The order may be placed on the Internet, via FAX, or by telephone, and the purchaser may not always print or keep a copy of the receipt.

It is presumed that all purchases of tangible personal property, or items, property, or goods specified under [sec. 77.52 \(1\)\(b\)](#), [\(c\)](#), or [\(d\)](#), Wis. Stats. (2009-10), or taxable services are subject to use tax, unless the contrary is established. Without a copy of the receipt with the tax separately stated, the purchaser is liable for the tax. Section 77.53(2), Wis. Stats. (2009-10), states, in part, the following:

**“The person's liability is not extinguished until the tax has been paid to this state, but a receipt with the tax separately stated from a retailer engaged in business in this state ... given to the purchaser ... relieves the purchaser from further liability for the tax to which the receipt refers.”** (Emphasis added.)

When auditing a business, the Department of Revenue will make adjustments where no documentation exists to show that sales or use tax has been paid on a taxable transaction. Businesses and individuals should make sure they have copies of receipts showing that tax has been paid to ensure they don't pay the tax twice! [☞](#)

## Reminders: Nexus Determinations

### Filing a Return in Another State Does Not Create Nexus

Filing an income or franchise tax return in another state, or obtaining a certificate of authority to transact business in another state, does not by itself give rise to nexus in that state. For nexus to be established, the entity must have business activity not protected by Federal Public Law 86-272 in that state.

### Nexus is Determined on an Annual Basis

Section Tax 2.82, Wis. Adm. Code (November 2010 Register), describes generally the kind of activity which, when conducted in Wisconsin, creates nexus for income and franchise tax purposes. Section 71.22(1r), Wis. Stats. (2009-10), defines “doing business in this state” (i.e., nexus). A taxpayer doing business in Wisconsin for any part of a taxable year is considered to be doing business in Wisconsin for the entire taxable year. The statutory language relating to the non-recognition of part-year nexus applies to any period for which the statute of limitations has not expired.

### Nexus for a Member of a Combined Group

Effective for taxable years beginning on or after January 1, 2009, for a combined group, nexus is determined for the unitary business as a whole, as provided in sec. 71.255(5)(a), Wis. Stats. (2009-10). If a member of a combined group has nexus in Wisconsin and that nexus is attributable to the combined group’s unitary business, all members of the combined group have nexus in Wisconsin. If any member of a combined group has nexus in another state attributable to the combined group’s unitary business, all members of the combined group have nexus in that state.

### Nexus When Returns are Filed on a Separate Entity Basis

For taxable years beginning **prior** to January 1, 2009, and for taxpayers not filing as part of a combined group for taxable years beginning on or after January 1, 2009, nexus is determined on a separate entity basis. [☞](#)

## Updated Publications

The following publications of the Income, Sales, and Excise Tax (IS&E) Division of the Department of Revenue have recently been revised:

MF-107	Motor Vehicle Fuel Tax (2/11)
MF-109	Motor Vehicle Fuel Tax – How Does It Apply to Biodiesel and Vegetable Oil Used in Vehicles? (2/11)
114	Your Wisconsin Taxpayer Bill of Rights (4/11)
401	Extensions of Time to File (1/11)
500	Tax Guide for Wisconsin Political Organizations and Candidates (4/11)
503	Wisconsin Farmland Preservation Credit (1/11)
508	Wisconsin Tax Requirements Relating to Nonresident Entertainers (1/11)

All of the IS&E Division’s publications may be downloaded or ordered [online](#). There are over 70 publications available, covering a wide range of topics. [☞](#)

## E-Filing for Insurance Companies

**Concern:** Internal Revenue Service (IRS) [guidelines](#) do not allow insurance companies that have a property and casualty insurance company or life insurance company as a parent to electronically file a consolidated federal return. How do insurance companies in this situation comply with Wisconsin’s electronic filing mandate for combined returns?

**Solution:** The federal/state [program](#) allows insurance companies using supporting software to file just a Wisconsin combined return with federal return information and any other schedules attached as a PDF file. The IRS will forward the return to the Department of Revenue for processing.

Practitioners or taxpayers may also request an electronic filing waiver. [Form EFT-102](#) allows taxpayers to request a waiver by identifying why e-filing is not possible. [☞](#)

## Not-For-Profit Members Do Not Extend Combined Return Due Date

When for-profit and not-for-profit entities are part of the same unitary group, the due date of the combined return is the 15th day of the third month after the close of the combined group's taxable year. The fact that a not-for-profit corporation is required to file by the 15th day of the fifth month after the close of its taxable year does not extend the due date of the combined return. If the designated agent does not have enough information concerning the not-for-profit entities to file the combined return by the due date, there are two available options:

**File under an extension.** The Department of Revenue grants an automatic extension of seven months or until the original due date of the combined group's corresponding federal return, whichever is later. Any extension granted by law or by the IRS for filing the corresponding federal return will also extend the deadline for filing the combined return.

An extension to file the combined return is not an extension to pay the tax. Any unpaid amount will accrue interest during the extension period at the rate of 12% per year from the original due date. Interest during the extension period can be avoided by paying the taxes that are due by the original due date of the combined return.

**File using available information.** The combined return may be filed by the due date using the best data available for the not-for-profit entities. When all information is available, an amended return may be filed to reflect any necessary changes or corrections. Any additional tax due with the amended return will be subject to interest at the rate of 12% per year from the original due date of the return. [✎](#)

## Businesses – How to Track Your Use Tax Liability

Use tax is the counterpart of sales tax. It must be paid on all taxable items purchased from retailers who do not collect Wisconsin sales tax and on all taxable items brought into Wisconsin.\* It applies to purchases made in foreign countries as well as other states. Use tax only applies when Wisconsin sales tax is not charged.

For example, Company A purchases a computer for its business from Retailer B, who is located in another state. Retailer B ships the computer to Company A's Wisconsin location and does not charge Company A sales tax. Company A owes Wisconsin use tax on its purchase of the computer.

**There are convenient ways to keep track of taxable purchases during the year.** Two of these methods are described, below:

1. **Use Tax Calculator** –The Wisconsin Department of Revenue has developed a free [Use Tax Calculator](#) (in an Excel spreadsheet) to help individuals and businesses track and calculate use tax owed to Wisconsin. The spreadsheet can be used by persons who have some type of spreadsheet software on their computers (Excel, Lotus, QuattroPro, etc.). If you don't have the Microsoft Excel software, you can download a free viewer.

Calculate the use tax by multiplying the total cost of the taxable goods or services purchased, including separately stated charges such as shipping and handling, by the tax rate.

2. **Use Tax Accrual Account** – Some businesses will set up an account in its books of ledger to accrue its use tax liability. For purchases that are subject to use tax, the business will debit the expense account for the amount of the purchase plus the amount of use tax due on the item. The amount of the use tax will be entered as a credit in the use tax accrual account. The balance in the use tax accrual account is remitted when the business files its sales and/or use tax return.

A business should note on the invoice that use tax was remitted when filing its return. A business may also want to keep a copy of such invoices separately to support the use tax remitted.

### Businesses have two options for paying Wisconsin use tax.

1. A business can pay use tax on its Wisconsin sales and use tax return, or
2. A business can report and pay use tax quarterly on a [Wisconsin Form UT-5, Consumer Use Tax Return](#).



The Department of Revenue audits businesses and enters into agreements with other states to ensure that use tax owed on out-of-state purchases is remitted to the department. Businesses that don't pay the use tax owed may be subject to interest and penalties in addition to the use tax.

\*Wisconsin allows a credit against the use tax due for the combined state and local sales taxes properly paid to another state. For additional information about this credit, see the tax release titled “[Credit for Sales and Use Taxes Paid to Other States and Their Local Units of Government](#)” published in *Wisconsin Tax Bulletin* 157 (July 2008) for information about how to compute the tax due. [✎](#)



## Enforcement Report

### Waukesha Man Charged with Sales Tax Theft

Mark Staley has been charged in Waukesha County Circuit Court with one count of felony theft of sales taxes. Staley is the former operator of Custom Detailing, LLC, and Diversified Maintenance Group, LLC.

According to the criminal complaint, Staley failed to remit \$3,703.08 in sales tax that he collected from January 2003 through December 2007. Staley admitted that he had collected the sales tax, but did not remit the taxes owed on his sales tax returns between 2003 and 2007. Staley said that after collecting the sales tax, he began to run into problems and used the sales tax money collected to pay other business bills.

Staley was charged by the Waukesha County District Attorney's Office following an investigation by the Wisconsin Department of Revenue.

If convicted on all counts, Staley could face up to three years and six months in prison and fines totaling \$10,000. In addition to the criminal penalties, Wisconsin law provides for substantial civil penalties on the civil tax liability, which would follow a conviction for criminal violations.

### Town of Benton Woman Charged with Tax Crimes

Attorney General J.B. Van Hollen announced that on March 11, 2011, an attorney for the Wisconsin Department of Justice, acting as special prosecutor for Lafayette County and Dane County, filed a summons and criminal complaint in Lafayette County Circuit Court accusing Kathy Richard, town of Benton resident, with five counts of Fraudulent Claim for Tax Credit. Each count is a Class H Felony with a maximum penalty of a fine not to exceed \$10,000 or imprisonment not to exceed six years, or both.

According to the criminal complaint, Ms. Richard obtained \$7,979 by submitting fraudulent earned income tax credit claims to the Wisconsin Department of Revenue for 2004, 2006, 2007, 2008, and 2009. In each of the claims, Ms. Richard falsely claimed to own and operate a daycare business. She also obtained \$12,165 by filing similar claims with the federal government.

The charges are the result of an investigation by the Wisconsin Department of Justice - Division of Criminal Investigation, the Wisconsin Department of Revenue, and the United States Office of the Inspector General. Assistant Attorney General Eric D. Défort represents the State of Wisconsin as the special prosecutor.

### Slinger Resident Found Guilty of Tax Fraud, Other Crimes

***Note:** Information for the following section of this article was obtained from the March 11, 2011, edition of the Milwaukee Journal Sentinel.*

Algernon Thompson, 29, of Slinger was found guilty in Milwaukee County Circuit Court of fraudulent writings, income tax fraud, and knowingly making a false statement in a car title application.

Thompson had made significant cash deposits into his bank accounts that weren't reflected in his tax returns. He testified he later amended those returns to account for the cash, which he said he earned boxing at illegal matches in Chicago. He also bought a 1984 Camaro for \$5,800 in \$20 bills in August 2008. However, when he registered the car he listed the purchase price as \$25.

Sentencing is set for May 17. In addition to the criminal penalties, Wisconsin law provides for substantial civil penalties on the civil tax liability, which follow a conviction for criminal violations. [✎](#)



## 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 decision is included:

### Sales and Use Taxes

Compromise for inability to pay  
*Gegare Tile, Inc., vs. Wisconsin Department of Revenue* ..... 10

### SALES AND USE TAXES

**➔** **Compromise for inability to pay.** [\*Gegare Tile, Inc., vs. Wisconsin Department of Revenue\*](#) (Wisconsin Tax Appeals Commission, March 11, 2011).

The issue in the case is whether sales and use taxes owed can be reduced based on a taxpayer's inability to pay.

The Department of Revenue issued a "Notice of Proposed Audit Report" to Gegare Tile, Inc. ("Gegare"). A conference was held with the department's auditor and a portion of the proposed assessment was reversed for settlement purposes. Gegare then fully agreed with the adjustments and additional tax due on the report. The department issued its "Final Notice of Field Audit Action" to Gegare assessing the agreed-to sales and use taxes and interest.

Gegare subsequently sent a letter to the Department of Revenue requesting a redetermination of the agreed-to additional sales and use tax assessment alleging an inability to pay. Gegare also filed a pre-delinquent "Petition for Compromise" with the department while the appeal was pending in the department's Resolution Unit, which resulted in the department offering an additional reduction of the assessment as a compromise in order to resolve the assessed liability.

Gegare did not accept the department's compromise offer. A notice was issued by the department denying Gegare's petition for redetermination.

A timely Petition for Review was filed by Gegare with the Wisconsin Tax Appeals Commission, pleading only an inability to pay the assessed amount due. Section 73.01(5)(a), Wis. Stats.(2009-10), allows anyone who is "aggrieved by a redetermination or action of the Department of Revenue" to petition to the Commission for a review of the department's action.

The Commission granted the department's motion to dismiss Gegare's appeal on two grounds:

1. ***Gegare is not a person aggrieved by an action or determination of the department.*** Gegare signed a statement agreeing to the additional tax due and interest and did not object before the Commission to the assessment on any factual or legal grounds and only sought a reduction in the amount due. Therefore, the Commission ruled that Gegare was not a person aggrieved by an action or determination of the department.
2. ***Gegare does not state a claim upon which the Commission can give relief.*** It is clear that Gegare wishes to compromise the agreed-upon assessment with the Department of Revenue. In fact, Gegare and the department have entered into discussions on compromise; however, they have been unsuccessful. In this appeal, Gegare requests that the Commission be a part of these compromise efforts. The Commission does not have the power to review petitions for compromise or subsequent agreements. Those powers are reserved for the Department of Revenue, as provided by law. Consequently, Gegare has not stated a claim upon which the Commission can give relief.

The taxpayer has not appealed this decision.



## Tax Releases

*“Tax Releases” are designed to provide answers to the specific tax questions covered, based on the facts indicated. In situations where the facts vary from those 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 the position of 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 answers in a tax release.)*

The following tax releases are included:

### Individual Income Tax

1. Computation of Wisconsin Taxable Income from Gambling Winnings..... 11

2. Telecommuting and Mobile Employees..... 13

### Corporation Franchise and Income Tax

3. Entities Included in a Combined Report and Combined Group – Subsidiaries of Foreign Insurance Companies..... 15

4. Non-Stock Corporations Subject to Combined Reporting ..... 16

5. Wisconsin Tax Treatment of Corporations With Net Operating Loss and Charitable Contribution Carryovers ..... 18

taxpayers with gambling activity are considered nonprofessional gamblers.

If a taxpayer is not a professional gambler, he or she determines the taxable amount for each gambling session. The taxpayer includes net winnings from all winning sessions in Wisconsin taxable income if the winnings have a situs in Wisconsin. If the taxpayer has a losing session, the net loss from that session is not deductible for Wisconsin income tax purposes.

A “gambling session” is a period of continual play with only a short break in play (for example, a restroom break, beverage break, table/machine change, game change, etc.).

For taxpayers that are Wisconsin residents, gambling income has a situs in Wisconsin regardless of where the gambling activity takes place. For taxpayers that are nonresidents, gambling income has a situs in Wisconsin if the net winnings are derived from any of the following:

- A casino or bingo hall located in Wisconsin and operated by a Native American tribe or band
- Pari-mutuel wagering paid by a Wisconsin racetrack
- The Wisconsin Lottery
- A multijurisdictional lottery if the ticket was purchased from a Wisconsin retailer

The taxpayer must be able to prove the amounts deducted in arriving at the “net winnings” from a gambling session. The proof could be detailed original statements from a casino showing the taxpayer’s betting activities, or it could be the taxpayer’s own detailed records showing all bets (including the amount bet, amount won, date, location, race, etc.) if the records were prepared at the time the betting took place.

If a taxpayer has records to substantiate his or her gambling activities, the net winnings will be different than the amount reported on the W-2G that he or she received from the casino. However, if the taxpayer has no records to prove the amount spent on the gambling session, the taxpayer must include the W-2G amount in income.

## INDIVIDUAL INCOME TAX

### 1 Computation of Wisconsin Taxable Income From Gambling Winnings

**Background:** This tax release explains Wisconsin’s income tax treatment of gambling winnings, and demonstrates how a nonprofessional gambler computes his or her taxable gambling winnings for Wisconsin purposes.

A taxpayer is a “professional gambler” if his or her gambling activity is a trade or business for purposes of deducting ordinary and necessary expenses under section 162(a) of the Internal Revenue Code. All other

For a professional gambler, the total winnings for the year are reported on Schedule C as gross receipts, and the total amount wagered for the year is a Schedule C expense.

The following examples illustrate how taxable gambling winnings are computed for Wisconsin purposes:

**Example 1:**

X, a resident of Wisconsin, is a nonprofessional gambler. X plays slot machines at a casino located in Wisconsin on June 1st from 9:00 a.m. to 1:00 p.m. During that time, X bet \$500, won a \$2,000 jackpot, kept gambling, and then lost \$400 of that jackpot.

If X has records to substantiate the losses during this gambling session, X has net gambling income of \$1,100. This amount must be included in Wisconsin taxable income.

If X does not have records to substantiate the losses during this gambling session, X must include in income the \$2,000 figure shown on the W-2G that X receives from the casino.

**Example 2:**

Assume X from Example 1 returns to the same Wisconsin casino on the evening of June 1st and plays slots from 8:00 p.m. to 11:00 p.m. During that time, X bets \$700 and loses it all.

None of this loss is deductible for Wisconsin purposes and it cannot be used to reduce the winnings from earlier in the day.

**Example 3:**

Assume X from Examples 1 and 2 is a professional gambler and maintains adequate records to substantiate the losses. X would report \$2,000 as income on Schedule C and \$1,600 (\$900 + \$700) as a Schedule C expense. The net amount of \$400 would be included in Wisconsin taxable income.

**Example 4:**

Y, a resident of Wisconsin, is a nonprofessional gambler. Y goes to a casino and starts playing on a slot machine. Y bets a total of \$100. Y cashes out of that machine, receives a voucher for \$50 and immediately puts the voucher in a second machine and starts playing. Y cashes out of the second machine, receives a voucher for \$120 and immediately puts the voucher in a third machine and starts playing. Y cashes out of the third

machine, receives a voucher for \$80 and immediately puts the voucher in a fourth machine and starts playing. Y cashes out of the fourth machine, receives a voucher for \$130, redeems the voucher for cash and leaves the casino. Y has net gambling income of \$30 from this gambling session. This amount must be included in Wisconsin taxable income.

**Example 5:**

Z, a resident of Wisconsin, is a nonprofessional gambler. Z goes to a casino and starts playing on a slot machine. Z bets a total of \$100. Z cashes out of that machine, receives a voucher for \$50 and immediately puts the voucher in a second machine and starts playing. Z cashes out of the second machine, receives a voucher for \$120, redeems the voucher for cash and sits down at a blackjack table. Z exchanges \$100 in cash for \$100 in chips. Z plays for some time, leaves the table, redeems all of his chips for \$150 in cash and leaves the casino. Z has net gambling income of \$70 (\$20 + \$50) from this gambling session. This amount must be included in Wisconsin taxable income.

**Example 6:**

Assume the same facts as Example 5, except Z redeems all of his chips for \$25 in cash. Z has a net gambling loss of \$55 (\$20 - \$75) from the gambling session. This loss is not deductible for Wisconsin purposes and it cannot be used to reduce the net winnings from any other gambling session.

**Example 7:**

Assume the same facts as Example 5, except Z plays at three different blackjack tables and takes his chips with him each time. Z leaves the last table, redeems all of his chips for \$150 in cash and leaves the casino. Z has net gambling income of \$70 (\$20 + \$50) from the gambling session. This amount must be included in Wisconsin taxable income.

**Example 8:**

B, a resident of Wisconsin, is a nonprofessional gambler. B goes to a casino and starts playing on a slot machine. B bets a total of \$100. B cashes out of that machine, receives a voucher for \$50 and immediately puts the voucher in a second machine and starts playing. B cashes out of the second machine, receives a voucher for \$120, and leaves the gaming area for more than a half hour (i.e., eats lunch, goes for a walk, sees a show). B has ended a gambling session and has net gambling income of \$20 for that session. This amount must be included in Wisconsin taxable income.



**Example 9:**

C, a resident of Wisconsin, is a nonprofessional gambler. C goes to a casino and starts playing on a slot machine. C bets a total of \$100. C cashes out of that machine, receives a voucher for \$50 and immediately puts the voucher in a second machine and starts playing. C cashes out of the second machine, receives a voucher for \$120, redeems the voucher for cash, and sits down at a blackjack table. C exchanges \$100 in cash for \$100 in chips. C plays for some time, leaves the table with \$110 in chips and leaves the gaming area for more than a half hour (i.e., eats lunch, goes for a walk, sees a show). C has ended a gambling session and has net gambling income of \$30 (\$20 + \$10) from that session. This amount must be included in Wisconsin taxable income.

**Example 10:**

D, a resident of Wisconsin, is a nonprofessional gambler. D goes to a casino and starts playing on a slot machine. D bets a total of \$100. D cashes out of that machine, receives a voucher for \$50, redeems the voucher for cash and sits down at a blackjack table and exchanges \$50 in cash for \$50 in chips. D leaves the blackjack table and redeems all of his chips for \$150 in cash. D goes to a slot machine and bets \$60 losing all of it. D leaves the casino. D has a net gambling loss of \$10 ( $-\$50 + \$100 - \$60$ ) from this gambling session. None of this loss is deductible for Wisconsin purposes and it cannot be used to reduce the net winnings from any other gambling session.

**Example 11:**

Assume the same facts as Example 10, except assume D leaves the gaming area for more than a half hour (i.e., eats lunch, goes for a walk, sees a show) after leaving the blackjack table and before returning to the slot machine. D has two gambling sessions. For the first, D has net gambling income of \$50. This amount must be included in Wisconsin taxable income. For the second, D has a net gambling loss of \$60. None of this loss is deductible for Wisconsin purposes and it cannot be used to reduce the net winnings from any other gambling session.

**Background:** Section 71.02(1), Wis. Stats. (2009-10), imposes a net income tax on all net incomes of individuals residing within Wisconsin and, for nonresident individuals, upon such income as is derived from property located or business transacted within Wisconsin and upon such income as is derived from the performance of personal services within Wisconsin.

Section 71.03(2), Wis. Stats. (2009-10), provides that “Every nonresident person and every person who changes domicile into or out of this state during the taxable year shall file a return if the person is unmarried and has gross income of \$2,000 or more, or if the person is married and the combined gross income of the person and his or her spouse is \$2,000 or more.”

Section 71.05(2), Wis. Stats. (2009-10), provides that “All payments received by natural persons domiciled outside Wisconsin who derive income from the performance of personal services in Wisconsin shall be excluded from Wisconsin gross income to the extent that it is subjected to an income tax imposed by the state of domicile; provided that the law of the state of domicile allows a similar exclusion of income from personal services earned in such state by natural persons domiciled in Wisconsin, or a credit against the tax imposed by such state on such income equal to the Wisconsin tax on such income.” (**Note:** Wisconsin currently has reciprocity agreements with Illinois, Indiana, Kentucky, and Michigan.)

Section 71.07(7), Wis. Stats. (2009-10), provides a credit for tax paid to another state. “If a resident individual . . . pays a net income tax to another state, that resident individual . . . may credit the net tax paid to that other state on that income against the net income tax otherwise payable to the state on income of the same year. The credit may not be allowed unless the income taxed by the other state is also considered income for Wisconsin tax purposes.”

Section 71.63(2), Wis. Stats. (2009-10), provides “ ‘Employee’ means a resident individual who performs or performed services for an employer anywhere or a nonresident individual who performs or performed such services within this state. . . .”

Section 71.64(6)(a), Wis. Stats. (2009-10), provides “At the time of payment of wages to a nonresident employee which wages were derived from the performance of services both within and without the state, the employer shall deduct and withhold from the wages derived from the performance of services within the state the amount as reflected by the proper withholding table.” Paragraph (b) provides “No amount shall be withheld from the

## 2 Telecommuting and Mobile Employees

**Statutes:** Sections 71.02(1), 71.03(2), 71.05(2), 71.07(7), 71.63(2), and 71.64(6), Wis. Stats. (2009-10)



wages paid to a nonresident employee for services performed in this state if the employer reasonably estimates that during the calendar year the employee will earn less than \$1,500; but whenever it appears that the employee will earn more than \$1,500 in this state during the calendar year, the employer shall withhold, from wages paid thereafter, such additional amounts as the employer reasonably estimates will be required to offset the amounts not withheld from previous payments.”

Wisconsin has historically used the physical presence test to determine whether an employee’s income is sourced to Wisconsin. An employee who is a resident of another state and who telecommutes for a Wisconsin employer would be subject to income taxation in Wisconsin on the amount earned for the days the employee is present in Wisconsin. A Wisconsin employer would be required to withhold tax from the telecommuting employee’s pay if the total amount of Wisconsin income is over \$1,500 per year.

For an employee who is a resident of Wisconsin and telecommutes for an out-of-state employer, the employee’s income would be sourced to Wisconsin.

#### **Facts and Question 1:**

An individual is a Wisconsin resident (i.e., is domiciled in Wisconsin). The individual commutes daily to her job in another state. Is the income earned in the other state taxable to Wisconsin?

#### **Answer 1:**

Yes, the income earned in the other state is taxable to Wisconsin. Section 71.04(1)(a), Wis. Stats., provides that all income or loss of resident individuals shall follow the residence of the individual.

If the individual is required to pay an income tax to the other state on the same income that is taxable to Wisconsin, the individual may be allowed a credit on the Wisconsin income tax return for tax paid to that other state.

#### **Facts and Question 2:**

An individual is a resident of Minnesota. The individual performed services for a Wisconsin corporation during the entire calendar year. The individual received total compensation of \$60,000. During this period of time, the individual telecommuted from his home office located in Minnesota for 230 business days. The individual worked at the employer’s Wisconsin site for 10 business days during the year. What amount of income earned by the individual is taxable to Wisconsin?

#### **Answer 2:**

The individual’s total compensation for the year was \$60,000 for 240 days (230 days in Minnesota and 10 days in Wisconsin). The compensation was \$250 per day ( $\$60,000 \div 240 = \$250$ ). Because the individual worked 10 days in Wisconsin, \$2,500 ( $\$250 \times 10$ ) is taxable to Wisconsin. Because the amount subject to Wisconsin income tax is more than \$1,500, the employer must withhold Wisconsin income tax from the individual’s wages. The individual must file a nonresident Wisconsin income tax return (Form 1NPR) to report the \$2,500 of income taxable to Wisconsin. The individual must also file a Minnesota income tax return to report the \$60,000 to Minnesota. Minnesota may allow a credit for tax paid to Wisconsin.

**Note:** The answer would be different in these examples if the individual was a resident of a state with which Wisconsin has a reciprocity agreement. Under a reciprocity agreement, Wisconsin will not tax the wages of an individual who is a resident of the other state working in Wisconsin, and the other state will not tax the wages of a Wisconsin resident working in that other state. If, for example, the individual was a resident of Illinois instead of Minnesota, the wages earned in Wisconsin by the Illinois resident would not be taxable to Wisconsin. (Wisconsin formerly had a reciprocity agreement with Minnesota, but that agreement ended on January 1, 2010.)

#### **Facts and Question 3:**

An individual is a resident of Wisconsin who generally works in Wisconsin. The individual’s employer temporarily assigns her to work in Minnesota for four months to complete a project. The individual continues to receive her pay from her Wisconsin employer. The individual earns \$5,000 per month. How much of the individual’s income is taxable to Minnesota?

#### **Answer 3:**

Because the individual performed four months of service in Minnesota, \$20,000 ( $\$5,000 \times 4$  months) of her compensation is sourced to Minnesota and taxable to Minnesota. The total income for the year, \$60,000 ( $\$5,000 \times 12$  months) is taxable to Wisconsin. The individual must file a nonresident income tax return in Minnesota to report the \$20,000 taxable to Minnesota. The individual must also file a resident Wisconsin income tax return (Form 1) and report the \$60,000 of income taxable to Wisconsin. The individual may be able to claim a credit on the Wisconsin return for tax paid to Minnesota.

**Facts and Question 4:**

An individual is a resident of Minnesota and works for a Minnesota company. The individual has a second home in Wisconsin. The individual telecommutes from her second home on Fridays and then spends the weekend in Wisconsin. During the year, the individual works 52 Fridays in Wisconsin. Her total annual salary is \$50,000. What portion of the individual's income is taxable to Wisconsin?

**Answer 4:**

\$10,000. The individual works 1/5 of her total work time in Wisconsin ( $\$50,000 \div 5 = \$10,000$ ). If the Minnesota company does business in Wisconsin (has nexus in Wisconsin) and is required to file a Wisconsin income or franchise tax return, the employer must withhold Wisconsin income tax from the Wisconsin wages as those wages are more than \$1,500. If the Minnesota company does not have nexus in Wisconsin, the employer is not required to withhold Wisconsin income tax but may voluntarily register and withhold Wisconsin income tax. If the employer does not withhold Wisconsin tax, the individual may be required to make estimated payments of Wisconsin income tax if the individual expects to owe \$200 or more with her Wisconsin income tax return.

In this case, as a nonresident of Wisconsin the individual is required to file a Wisconsin income tax return using Form 1NPR to report the income taxable to Wisconsin (\$10,000). The individual is also required to file a Minnesota income tax return to report the Minnesota income (\$50,000). Minnesota may allow a credit for the tax paid to Wisconsin.

**Facts and Question 5:**

An individual is a resident of Wisconsin and works for a Wisconsin company. The individual has a second home in Minnesota. The individual telecommutes from her second home in Minnesota on Fridays. During the year, the individual works 52 Fridays in Wisconsin. Her total annual salary is \$50,000. What portion of the individual's income is taxable to Wisconsin?

**Answer 5:**

\$50,000. All income earned by a Wisconsin resident is taxable to Wisconsin. The individual works 1/5 of her total work time in Minnesota. Thus \$10,000 ( $\$50,000 \div 5 = \$10,000$ ) is also taxable to Minnesota.

**Facts and Question 6:**

In the previous questions and answers, it is assumed the individual earns the income evenly throughout the year. What happens if income is not earned evenly throughout the year?

**Answer 6:**

If income is not earned evenly throughout the year, the amount of income taxable to a state may have to be determined on a monthly, weekly, or hourly basis.

For example, a Minnesota resident earned \$54,000 during the year. He was paid \$4,000 a month for the first six months of the year and \$5,000 a month for the last six months. The individual was required to work five months of the year in Wisconsin. During the first month he worked in Wisconsin, the individual was paid at the rate of \$4,000 per month. He was paid \$5,000 per month for the remaining four months he worked in Wisconsin. The amount of income taxable to Wisconsin is \$24,000 (1 month x \$4,000 + 4 months x \$5,000).

## CORPORATION FRANCHISE AND INCOME TAX

### 3 Entities Included in a Combined Report and Combined Group – Subsidiaries of Foreign Insurance Companies

**Statutes:** Sections 71.255(1) and (2) and 71.45(1), Wis. Stats., (2009-010)

**Background:** This tax release clarifies which entities are included in the combined report and combined group for Wisconsin franchise tax purposes.

A group of companies sells non-life insurance products such as property and casualty insurance. Some of the entities perform non-insurance related activities as their trade or business. Insurance companies may be part of the same unitary group as non-insurance companies, provided the domestic (Wisconsin) insurance company meets the unitary standards found in ch. 71, Wis. Stats. (2009-10). Foreign (non-Wisconsin) insurance companies are not included in the combined group under s. 71.45(1), Wis. Stats. (2009-10).

**Question:** Is an investment company that is a third-tier subsidiary under a Foreign Insurance Operation Company a member of the Wisconsin combined unitary return, even though its parent, a non-Wisconsin insurance company, is not part of the Wisconsin combined filing group?

**Answer:** The investment company subsidiary is a part of the unitary filing group if it is unitary with any member of the filing group, including the exempt parent.

**Analysis:** Section 71.255(1)(c)1., Wis. Stats. (2009-10), defines “commonly controlled group” and refers to “chains” of corporations with “direct” or “indirect” ownership. There is no mention of taxability or exemption from taxation as being criteria in determining a “commonly controlled group.”

Similarly, in sec. 71.255(1)(n), Wis. Stats. (2009-10), in defining “unitary business,” there is no mention of the taxability of an entity or of the taxability of any part of its income. The statute addresses the unitary principles of functional integration, centralized management and economies of scale in the description of the kinds of relationships that create unitariness.

Section 71.255(2)(a), Wis. Stats. (2009-10), requires corporations to use combined reporting. This statute provides that a corporation, other than the one whose income is exempt, must file a combined report if unitary with “one or more members in the same . . . group.”

If the subsidiary investment company is unitary with any other corporation in the combined group, as defined in sec. 71.255(1)(n), Wis. Stats. (2009-10), it must file a Wisconsin tax return.

## 4 Non-Stock Corporations Subject to Combined Reporting

**Statutes:** Sections 71.255(1)(c) and (2)(a), 71.26(1)(a), and 71.45(1)(a), Wis. Stats. (2009-10)

**Wis. Adm. Code:** Sections Tax 2.60(2) and 2.61(2)(d) and (3), Wis. Adm. Code (November 2010 Register)

**Background:** Section 71.255(1)(c), Wis. Stats. (2009-10), provides that a corporation is in a controlled group if the “...parent corporation and any one or more corporations or chains of corporations that are connected to the parent corporation by direct or indirect ownership by the parent corporation, if the parent corporation owns stock representing more than 50 percent of the voting

power of at least one of the connected corporations or if the parent corporation or any of the connected corporations own stock that cumulatively represents more than 50 percent of the voting power of each of the connected corporations.”

Section 71.255(2)(a), Wis. Stats. (2009-10), states: “A corporation, not including a corporation of which all its income is exempt from taxation under s. 71.26 (1) or 71.45 (1), engaged in a unitary business with one or more other corporations in the same commonly controlled group shall report its share of income from that unitary business in the amount determined by a combined report filed by a designated agent of the unitary business...”

Section 71.26(1)(a), Wis. Stats. (2009-10), provides there shall be exempt from taxation the income “...of corporations organized under ch. 185, except income of a cooperative health care association organized under s. 185.981, or of a service insurance corporation organized under ch. 613, that is derived from a health maintenance organization as defined in s. 609.01 (2) or a limited service health organization as defined in s. 609.01 (3), or operating under subch. I of ch. 616 which are bona fide cooperatives operated without pecuniary profit to any shareholder or member, or operated on a cooperative plan pursuant to which they determine and distribute their proceeds in substantial compliance with s. 185.45, and the income, except the unrelated business taxable income as defined in section 512 of the internal revenue code and except income that is derived from a health maintenance organization as defined in s. 609.01(2) or a limited service health organization as defined in s. 609.01(3), of all religious, scientific, educational, benevolent or other corporations or associations of individuals not organized or conducted for pecuniary profit....”

Section 71.45(1)(a), Wis. Stats. (2009-10), provides there shall be exempt from taxation the income “...of insurers exempt from federal income taxation pursuant to section 501(c)(15) of the internal revenue code, town mutuals organized under or subject to ch. 612, foreign insurers, and domestic insurers engaged exclusively in life insurance business, domestic insurers insuring against financial loss by reason of nonpayment of principal, interest and other sums agreed to be paid under the terms of any note or bond or other evidence of indebtedness secured by a mortgage, deed of trust or other instrument constituting a lien or charge on real estate and corporations organized under ch. 185, but not including income of cooperative health care associations organized under s. 185.981, or of a service insurance

corporation organized under ch. 613, that is derived from a health maintenance organization as defined in s. 609.01(2) or a limited service health organization as defined in s. 609.01 (3), or operating under subch. I of ch. 616 which are bona fide cooperatives operated without pecuniary profit to any shareholder or member, or operated on a cooperative plan pursuant to which they determine and distribute their proceeds in substantial compliance with s. 185.45. This paragraph does not apply to income that is realized from the sale of or purchase and subsequent sale or redemption of lottery prizes if the winning tickets were originally bought in this state.”

### **Facts and Question 1:**

A unitary business group consists solely of tax-exempt entities with no unrelated business taxable income. Is this group of entities considered part of a commonly controlled group and required to file combined Wisconsin income or franchise tax returns?

### **Answer 1:**

Provided the unitary business group consists of only tax exempt entities that have no unrelated business taxable income, the unitary group is not subject to combined reporting.

Section 71.255(2)(a), Wis. Stats. (2009-10), excludes corporations from combined reporting that are exempt from taxation under sec. 71.26(1)(a), Wis. Stats. (2009-10), [corporations or associations of individuals not organized or conducted for pecuniary profit] or sec. 71.45(1)(a), Wis. Stats. (2009-10), [certain insurance companies]. Section Tax 2.61(2)(d), Wis. Adm. Code (November 2010 Register), further clarifies that a corporation that is exempt from tax under sec. 71.26(1)(a) or 71.45(1)(a), Wis. Stats. (2009-10), is not an includable corporation in the combined group except to the extent it has unrelated business taxable income as defined in section 512 of the Internal Revenue Code.

### **Facts and Question 2:**

A unitary business group consists solely of tax-exempt entities that have unrelated business taxable income. Is this group of unitary businesses required to use combined reporting?

### **Answer 2:**

A group composed exclusively of tax- exempt, nonstock corporations would not be subject to combined reporting even if they have unrelated business taxable income.

Section 71.255(1), Wis. Stats. (2009-10), requires combined reporting for corporations that are in the same commonly controlled group, engaged in a unitary business operation with one or more corporations, and derive less than 80 percent of its worldwide income from foreign source income. The commonly controlled group test is based on common ownership of stock representing more than 50 percent of the voting power of the corporations. Tax-exempt entities generally do not issue stock so the commonly controlled group test cannot be applied; as sec. Tax 2.61(3), Wis. Adm. Code (November 2010 Register), requires common ownership or control of stock representing more than 50 percent of the voting power of the corporations in the group.

### **Facts and Question 3:**

A unitary group of businesses consists of stock corporations and tax-exempt entities that do not have unrelated business taxable income. Is this group of unitary businesses required to use combined reporting?

### **Answer 3:**

Tax-exempt entities generally do not issue stock so the commonly controlled group test cannot be performed and therefore is not met. As long as the tax-exempt entity has no unrelated business taxable income, it is not subject to combined reporting. The remaining stock corporations may be a combined group and would have to apply the three combined group tests (commonly controlled group, unitary business, and water's edge) in order to determine if a combined group exists.

Section 71.255(1), Wis. Stats. (2009-10), requires combined reporting for corporations that are in the same commonly controlled group, engaged in a unitary business operation with one or more corporations, and derive less than 80 percent of its worldwide income from foreign source income. In order for a group of corporations to be in a commonly controlled group, common ownership representing more than 50 percent of the voting power of stock must exist.



**Facts and Question 4:**

A unitary group of businesses consists of stock corporations and tax-exempt parent that has unrelated business taxable income. Is this group of unitary businesses required to use combined reporting?

**Answer 4:**

In this situation, the tax-exempt entity is required to be included in the combined group because of the unrelated business taxable income and the fact that it owns more than 50 percent of the for-profit corporation's stock.

Section Tax 2.61(2)(d), Wis. Adm. Code (November 2010 Register), provides that a corporation that is exempt from income and franchise taxes under sec. 71.26(1)(a) or 71.45(1)(a), Wis. Stats. (2009-10), is a nonincludable corporation for combined reporting purposes except to the extent it has unrelated business taxable income as defined in section 512 of the Internal Revenue Code. The net unrelated business taxable income and any corresponding apportionment factors are subject to combination to the extent the net income or loss is derived from the unitary business and is otherwise subject to combination under the water's edge rules.

Alternatively, if the for-profit stock corporation was the parent company and the tax-exempt entities were subsidiaries with unrelated business taxable income, the tax-exempt entities would not be subject to combined reporting because the parent stock corporation does not meet the commonly controlled group test of owning more than 50 percent of the voting power of the exempt entity corporations because the exempt entities do not issue stock.

## 5 Wisconsin Tax Treatment of Corporations With Net Operating Loss and Charitable Contribution Carryovers

**Note:** Additional information on the Wisconsin tax treatment of corporations with net operating loss and charitable contribution carryovers is available in the tax release with the same title that was published in *Wisconsin Tax Bulletin* 68 (July 1990), page 32. The example from that tax release is revised in the next column to clarify that the charitable contributions are not deductible on the current year's federal income tax return.

**Statutes:** Section 71.26(2)(a), (3), and (4), Wis. Stats. (2009-10)

**Background:** Internal Revenue Code (IRC) sec. 170(b)(2) provides that a corporation's deduction for charitable contributions generally may not exceed 10% of taxable income computed without regard to:

- any deduction for contributions;
- the special deductions under IRC sec. 241-247 and 249-250;
- the deduction for domestic production activities under IRC sec. 199;
- any NOL carryback to the tax year under IRC sec. 172; and
- any capital loss carryback to the tax year under IRC sec. 1212(a)(1).

Special rules apply if the corporation has a net operating loss (NOL) carryover to the tax year. In determining the charitable contributions deduction for the current tax year, the 10% limit is applied using taxable income after taking into account any deduction for the NOL.

To figure the amount of any remaining NOL carryover to later years, taxable income must be modified (IRC sec. 172(b)). To the extent that charitable contributions are used to reduce taxable income for this purpose and increase an NOL carryover, a charitable contributions carryover is not allowed (IRC sec. 170(d)(2)(B)). The following example illustrates how a federal NOL carryover and charitable contribution carryover are determined under these special rules:

**Example:**

Corporation X, which reports its income on a calendar-year basis, earned federal taxable income of \$80,000 in 2010 before taking into account \$10,000 of charitable contributions made in 2010 and a net operating loss carryover from 2009 of \$100,000. After taking into account the net operating loss deduction of \$80,000, Corporation X is not allowed any deduction for charitable contributions on its 2010 federal income tax return.

For purposes of determining Corporation X's federal NOL carryover to 2011, 2010 taxable income is modified as follows:

- The NOL deduction of \$80,000 is disregarded.
- A charitable contribution deduction of \$8,000 (10% of \$80,000) is allowed based on the taxable income figured without regard to the NOL deduction.



Corporation X's 2010 taxable income as modified is \$72,000 ( $\$0 + \$80,000 - \$8,000$ ), resulting in a \$28,000 ( $\$100,000 - \$72,000$ ) NOL carryover to 2011.

Corporation X's charitable contributions have been used to modify taxable income and increase its NOL carryover from \$20,000 to \$28,000. Therefore, \$8,000 of Corporation X's charitable contribution carryover to 2011 is not allowed. Corporation X's charitable contribution carryover to 2011 is \$2,000 ( $\$10,000 - \$8,000$ ).

#### **Facts and Question 1:**

In addition to the facts in the above example:

- All of Corporation X's 2010 income is attributable to Wisconsin.
- Due to differences in depreciation and section 179 expensing, taxable income for 2010 and the NOL carryover from 2009 differ for federal and Wisconsin purposes. Wisconsin net income before net business loss offset for 2010 is \$90,000 and the Wisconsin NOL carryover from 2009 is \$115,000.

What are Corporation X's Wisconsin NOL and charitable contribution carryovers to 2011?

#### **Answer 1:**

The federal charitable contribution deduction and carryover are used for Wisconsin purposes unless a) a corporation makes a different election for federal and Wisconsin purposes or b) a provision of the Internal Revenue Code, other than depreciation or section 179 expensing, does not apply for Wisconsin. (For example, a corporation that claims a Wisconsin deduction for expenses for which a federal tax credit is allowed must recompute its charitable contribution deduction.) Therefore, the Wisconsin NOL carryover to 2011 is increased by \$8,000 to \$33,000 ( $\$115,000 - \$90,000 + \$8,000$ ) and the Wisconsin charitable contribution carryover to 2011 is \$2,000.

#### **Facts and Question 2:**

Assume the same facts as in Facts and Question 1, except 2010 Wisconsin net income before net business loss offset is \$50,000 and the Wisconsin NOL carryover from 2009 is \$10,000. What are Corporation X's Wisconsin NOL and charitable contribution carryovers to 2011?

#### **Answer 2:**

The Wisconsin NOL carried forward from 2009 and deducted in 2010 is increased by \$8,000 to \$18,000, resulting in 2010 Wisconsin net income of \$32,000. As the Wisconsin NOL is used in full in 2010, there is no carryover to 2011. The Wisconsin charitable contribution carryover to 2011 is \$2,000.

#### **Facts and Question 3:**

Assume the same facts as in Facts and Question 1, except 2010 Wisconsin net income before net business loss offset is \$70,000 and there is no Wisconsin NOL carryover from 2009. What are Corporation X's Wisconsin NOL and charitable contribution carryovers to 2011?

#### **Answer 3:**

As the \$8,000 of charitable contributions may not be used to create a Wisconsin NOL deduction or carryover, Corporation X's 2010 Wisconsin net income is \$70,000. Since the charitable contributions are not used to increase a Wisconsin NOL, the Wisconsin charitable contribution carryover is not reduced. Corporation X has no Wisconsin NOL carryover to 2011, and a Wisconsin charitable contribution carryover to 2011 of \$10,000.

#### **Question 4:**

Do Answers 1 to 3 change if Corporation X is subject to combined reporting?

#### **Answer 4:**

No. Each entity in the combined group computes its own Wisconsin income, charitable contribution deduction and carryover, and NOL deduction and carryover.