

Wisconsin TAX BULLETIN

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Annual Tax Booklet Mailings to Individuals Discontinued

In recent years, the Internal Revenue Service and several states have discontinued the practice of annually mailing individual income tax forms and instructions. These decisions have been prompted by the continued growth of electronic filing, the availability of free filing options, and the need to reduce costs. The Department of Revenue (DOR) has joined this trend by discontinuing its annual mailing of Form 1, 1A and WI-Z, 1NPR, and, with limited exceptions, Schedule H and H-EZ booklets for individual income tax.

Individual income tax forms and instructions for 2011 will be available from DOR's web site and participating libraries. DOR will also mail forms and instructions upon request. However, individuals are encouraged to file electronically, whether through Wisconsin *e-file* or other means. [☞](#)

Update: Health Care Benefits for Children Under Age 27

The department previously provided [tax information](#) relating to differences in the federal and Wisconsin treatment of health care benefits for children under age 27. To date these differences remain, and will continue until the provisions of the federal Affordable Care Act are adopted for Wisconsin income tax purposes.

The Wisconsin Legislature is currently in special session, and has passed legislation that would adopt the provisions of the Affordable Care Act for taxable years beginning on January 1, 2011. When this legislation or other pending special session legislation affecting Wisconsin taxes becomes law, information will be provided in [News for Tax Professionals](#) and the next issue of the *Wisconsin Tax Bulletin*. [☞](#)

More Individuals and Businesses Are Going Electronic

Listed below are the most recent e-file percentages for the more common types of tax returns the department processes:

- Sales and use taxes - 88%
- Withholding taxes - 86%
- Individual income tax - 80%
- Pass-through withholding - 77%
- Corporation taxes - 69%
- Partnership taxes - 66%
- Composite returns - 11%

Also, in 2011 the department received the first electronic Forms 2 for trusts and estates and Schedules CC for closing certificates. Beginning in 2012, trusts and estates will be able to use the department's free Wisconsin *e-file* application to file Form 2 and Schedule CC.

The department would like to thank all of the individuals and businesses that electronically file their tax returns and make payments using direct deposit or direct withdrawal. It's a simple yet important way that taxpayers are able to work with government to help it become more efficient and operate more effectively. [☞](#)

Draft Forms for Job Creation Incentives Available

The department recently posted draft forms that qualifying job-creating businesses will use to claim credits and deductions on their 2011 income and franchise tax returns. [Schedule JC](#) will be used to claim the job creation deduction, and [Schedule RB](#) will be used to claim the relocated business credit or deduction.

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Draft Forms for Job Creation Incentives Available*(continued from page 1)***Job Creation Deduction**

Beginning with taxable years commencing on or after January 1, 2011, a subtraction from federal income is allowed based on the increase in the number of full-time equivalent employees that are employed in Wisconsin during the taxable year. The subtraction from federal income is equal to \$2,000 per eligible employee for businesses with gross receipts of greater than \$5 million and \$4,000 per eligible employee for businesses with gross receipts of \$5 million or less.

Relocated Business Credit or Deduction*Corporate Franchise and Income Tax:*

For taxable years beginning on or after January 1, 2011, for two consecutive taxable years beginning with the year in which the taxpayer's business relocates to Wisconsin from another state or country and begins doing business in Wisconsin, a credit is allowed equal to the amount of income or franchise tax liability after applying all other allowable credits, deductions, and exclusions.

Individual and Fiduciary Income Taxes:

For taxable years beginning on or after January 1, 2011, for two consecutive taxable years beginning with the year in which the taxpayer's business relocates to Wisconsin from another state or country and begins doing business in Wisconsin, a subtraction from federal income is allowed for the net business income earned by the relocated business.

For further information, you may visit the Wisconsin Department of Revenue web site at www.revenue.wi.gov, write to the Wisconsin Department of Revenue, Mail Stop 5-144, PO Box 8906, Madison WI 53708-8906, or call the Department of Revenue at 608-266-2772. [✉](#)

DATCP Provides Information Concerning Farmland Preservation Credits

The Department of Agriculture, Trade and Consumer Protection (DATCP) recently posted an [information sheet](#) for tax preparers concerning the Working Lands Initiative and its effect on the farmland preservation program. Of particular interest is that, with the creation of about 200,000 acres of new Agricultural Enterprise Areas during 2011, more farmers have become eligible to participate in the program and claim the associated income tax credits. [✉](#)

**New My Tax Account Functionality**

In the near future, the department will be adding the functionality for employers to submit Forms W-2 through *My Tax Account*. Status updates will be provided through the department's withholding tax e-mail list, click [here](#) to subscribe. [✉](#)

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P.O. Box 8933
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DOR Routinely Receives Federal Audit Report Information

The Department of Revenue (DOR) routinely receives two types of federal audit reports from the Internal Revenue Service (IRS):

1. CP2000s - Federal adjustments for unreported income based on data matching between information returns from payers/employers and amounts reported on the recipient's federal income tax return. The IRS form number for the adjustment notice is "CP2000."
2. RARs - Federal adjustments resulting from an IRS audit for unreported business income, nondeductible expenses and incorrect credits claimed. These adjustments are discovered after a thorough review of taxpayer books and records by an IRS auditor.

Under Wisconsin law, a taxpayer must notify DOR within 90 days of the date the IRS adjustments are final (sec. 71.76, Wis. Stats. (2009-10)). The IRS notice of amount due advises taxpayers that the adjustments may apply to their state income tax return.

What If a Taxpayer Fails to Report IRS Adjustments to DOR?

DOR receives federal audit reports one to two years after the final IRS notice. If the taxpayer does not self-report the federal adjustments to DOR within 90 days, DOR has four years from the date it receives the federal audit report to adjust the Wisconsin return if appropriate (sec. 71.77(7)(b), Wis. Stats. (2009-10)).

DOR has automated some adjustments so that a system-generated notice is sent to the taxpayer as soon as the federal audit report is received from the IRS. The automated notice is identified as a "Federal to State Adjustment."

Also, DOR is just beginning to send system-generated letters to taxpayers as soon it receives their federal audit reports from the IRS. The letters request taxpayers to amend their Wisconsin returns rather than wait for DOR to bill them. It's in the taxpayer's best interest to amend their Wisconsin return in order to reduce interest and in many cases avoid a penalty.

What if the Taxpayer Can't Pay the Wisconsin Amount?

If you can't pay the amount due, you should still amend your Wisconsin return, pay what you can, and request an installment agreement to pay amounts owed over time. Information on installment agreements is available from the department's web site, see "Payment" under "Frequently Asked Questions" below.


Tips for Filing an Amended Return

See the article "Tips for Filing an Amended Return" on page 4 for information that applies to amended returns in general. If you are filing an amended return to report federal audit adjustments, also:

- Attach a copy of the IRS notice of tax due.
- If the IRS changed its original notice of tax due, include a copy of the IRS letter describing the change.
- If there was Wisconsin withholding on the additional income you are reporting, include a copy of the Form W-2, 1099-R, or W2-G (or other applicable information return form) to verify the withholding.

Frequently Asked Questions

DOR has published frequently asked questions (FAQs) on its web site to address some of the common questions that relate to federal audit reports. The FAQs that apply the most are:

- [Amended Returns](#)
- [Notice of Amount Due - Federal to State Adjustment](#)
- [Audits](#)
- [Payment](#) 

Have Frequently Asked Questions...Frequently?

Check out the wide variety of [FAQ categories](#) that are available. At the end of each FAQ is information regarding how to contact the department, if you have additional questions.

Tips for Filing an Amended Return

The following tips will help the department process an amended return faster:

- Make sure an original return was filed for the same tax year.
 - File electronically using Wisconsin e-File (2009 and later returns).
 - Full year residents - Use Form 1X, unless amending to change residency (use Form 1NPR).
 - Part-year and nonresidents - Use Form 1NPR.
 - Form 1NPR filers - Check the amended box near the top of the form.
 - Use the correct year's amended form (same tax year as the original return you are amending).
 - Attach Schedule H if first claiming homestead credit on the amended return or homestead credit was claimed on the original return.
 - Complete Schedule 1 (itemized deduction credit) and Schedule 2 (married couple credit) if first claiming the credits on the amended return or changing the credits claimed.
 - Include the refund or tax due from the original return, or as adjusted by the department, on the correct line. Do not include underpayment interest.
 - Include a detailed explanation of the change(s) and any schedules that will further explain the changes.
 - Do not include a copy of the original return. [🔗](#)
-



As If You Didn't Know...

More specifically, we welcome your suggestions, comments, or ideas concerning the *Wisconsin Tax Bulletin*. Contact Dale Kleven by e-mail at isetechsvc@revenue.wi.gov or by phone at (608) 266-8253. [🔗](#)

Reminders: Using Form W-RA

Form W-RA (Required Attachments for Electronic Filing) is used to submit supporting documentation when a Wisconsin income or franchise tax return or homestead credit claim is filed electronically. Form W-RA and attachments must be submitted to the department within 48 hours of receiving the Wisconsin acknowledgement.

The department encourages the use of its data file transmission [application](#) to send Form W-RA and attachments in an electronic file over the Internet. However, if Form W-RA and attachments are paper filed, the following reminders are offered to avoid processing delays:

- Do not send Form W-RA if the return or claim is filed on paper, even if you use software to fill in the return or claim. Form W-RA should be used only when a return or claim has been e-filed.
- Use Form W-RA only to send in supporting documentation for an e-filed return or claim. It should not be used for appealing a notice, answering correspondence, or sending any other information to the department. [🔗](#)

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 September. 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 September 2011 *Sales and Use Tax Report* (Issue 3-11).

- Reminder of New Sales and Use Tax Laws That Go Into Effect September 1, 2011:
 - Products Provided Free of Charge
 - Modular and Manufactured Homes Used in Real Property Construction Activities Outside Wisconsin (New Exemption)
 - Vegetable Oil or Animal Fat Converted to Motor Vehicle Fuel (New Exemption)
- Motor Vehicle Dealers' Measure of Use Tax Increased to \$144 (Effective January 1, 2012)
- Thank You For E-Filing
- Multi-Level Marketing Companies and Their Distributors [🔗](#)

Effect of IRC Section 338(h)(10) Election on Shareholders of Tax Option (S) Corporations

Under section 338(h)(10) of the Internal Revenue Code, a corporation which makes a qualified stock purchase of another corporation (the “target”) can elect to treat the stock purchase as an asset purchase. Under such an election, the target corporation is treated as if it sold all of its assets in a single transaction at the close of the acquisition date. The target corporation must report any resulting gain or loss on this deemed sale of its assets. Under this election, the purchasing corporation will receive a step-up (or step-down) basis for the business assets acquired.

The federal election to treat the stock purchase as an asset purchase also applies for Wisconsin. For further information on making the election, see the tax release “[Section 338\(h\)\(10\), IRC, Election](#)” in *Wisconsin Tax Bulletin* 71 (April 1991).

Shareholders are affected when the section 338(h)(10) election is made and the target corporation is a tax-option (S) corporation. Gain or loss from the deemed sale of assets passes through from the tax-option (S) corporation to the individual shareholders.

Shareholders are also affected in the following situations:

- Section 71.05(6)(b)6., Wis. Stats., provides an exclusion from income for net capital gains on small business stock, for the original purchaser of the small business stock, that is purchased at the time that the business is incorporated and where certain other conditions are met. Although the tax-option (S) corporation stock may meet the qualifications as small business stock, when the section 338(h)(10) election is in effect for Wisconsin, the reported sale of assets does not qualify as net capital gain on small business stock for purposes of the exclusion.
- Section 71.04(1), Wis. Stats., provides the situs of income. All items of income, loss and deductions of nonresident individuals derived from a tax-option corporation shall follow the situs of the business of the corporation. Income or loss derived from stocks, bonds, or securities or from the sale of similar intangible personal property shall follow the residence of the individuals. When the section 338(h)(10) election is in effect for Wisconsin, the reported sale of assets is business income and must be reported to Wisconsin by a nonresident shareholder of the tax-option (S) corporation. The sale of assets is not a sale of stock. [✎](#)

Updated Publications

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

Sales and Use Taxes

- 201 Wisconsin Sales and Use Tax Information (9/11)
- 203 Sales and Use Tax Information for Manufacturers (10/11)
- 207 Sales Tax Information for Contractors (10/11)
- 211 Cemetery Monument Dealers: How Do Wisconsin Sales and Use Taxes Affect You? (9/11)
- 217 Auctioneers: How Do Wisconsin Sales and Use Taxes Affect Your Operations? (10/11)
- 219 Hotels, Motels, and Other Lodging Providers (9/11)
- 222 Motor Vehicle Fuel Dealers: Do You Owe Use Tax? (9/11)
- 225 Barber and Beauty Shops – How Do Wisconsin Sales and Use Taxes Affect Your Operations? (9/11)
- 228 Temporary Events (8/11)
- 230 Sales and Use Tax Information for Sellers of Antiques, Crafts, and Artwork (9/11)

Other Topics

- 505 Taxpayers’ Appeal Rights of Office Audit Adjustments (8/11)
- 506 Taxpayers’ Appeal Rights of Field Audit Adjustments (7/11) [✎](#)



Enforcement Report

Couple Sentenced for Income Tax Fraud

On July 22, 2011, Bryan D. Hoel and Amy L. Hoel were sentenced for multiple counts of state income tax fraud and bail jumping. Bryan Hoel was ordered to spend three years in prison, while Amy was ordered to spend two years and nine months in prison.

Judge Stephen Ehlke further sentenced Bryan and Amy Hoel to extended supervision of four years and two years, respectively. Judge Ehlke ordered the Hoels to pay all delinquent taxes, file all future tax returns in a timely manner, and pay court costs.

According to the criminal complaint, from 1997-2005 Bryan and Amy Hoel received more than \$400,000 in income. However, they reported total income of \$3,574 on their income tax returns for those years.

The complaint also indicated that the Hoels filed trust returns in their own names for 1997, 1998, and 1999; and that Amy Hoel filed trust returns for 2000 and 2001. They reduced their trust income to zero or a negative number through deductions. When the Department of Revenue requested each of them to provide supporting documentation, they did not provide any.

The couple was prosecuted by the Dane County District Attorney's office following an investigation by the Wisconsin Department of Revenue. The Hoels were found guilty on May 26, 2011, at the conclusion of a two-day jury trial. [Ⓜ](#)



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:

Sales and Use Taxes

Boat docking and storage services <i>Brennan Marine, Inc.</i>	7
Officer liability <i>Terrill J. Marxer</i>	8
<i>Elijah M. Rashaed</i>	9
Real property construction activities versus tangible personal property <i>Chula Vista, Inc.</i>	11

SALES AND USE TAXES

Boat docking and storage services. [*Brennan Marine, Inc. vs. Wisconsin Department of Revenue*](#) (Wisconsin Tax Appeals Commission, September 7, 2011). The issue in this case is whether the taxpayer's barge fleeting service on the Mississippi River is subject to Wisconsin sales and use taxes as "docking or providing storage space for boats" under sec. 77.52(2)(a)9., Wis. Stats.

The taxpayer is a Wisconsin corporation, with its principal place of business in La Crosse, Wisconsin. Initially founded in 1984 as a marine service company, it has grown to provide a wide variety of marine transportation and management services throughout the Upper Mississippi River region. The taxpayer's transportation services include fleeting, switching, short haul towing, and barge cleaning, along with topside and dry-dock repairs.

Some fleeting industry terms and tools of the trade are as follows:

A "barge" is a long, large, usually flat-bottomed, unpowered vessel that is towed or pushed by other craft. It is typically used for transporting freight.

A "tow" is a group of interconnected barges that are transported by a tugboat or tow boat. A "line tow" is made up of a group of barges that are transported by line-haul towboats over long distances and between major ports. Line-haul towboats are typically larger tugboats equipped with living quarters for the crew designed to operate in line-haul operations.

"Line-haul operations" are operations involved in the transportation of freight between ports, usually dedicated to a river section, such as the Lower Mississippi.

A "dock" is a structure that is connected to the shore and serves as the location where a barge is loaded and unloaded with cargo. Docking fees are generally charged by dock operators to customers on a per hour or per ton basis for the use of the dock to load or unload a barge.

A "fleet," "fleeting area," or "fleeting site" is an off-shore staging area where barges are staged until appropriate transportation can be arranged. There is no access to the fleeting site from the shore other than by boat. Rather than allowing the barges to drift in the waterway, the barge is secured in the fleeting area. Typically, the barge is staged at the fleeting area because either (1) the dock where the barge is loaded or unloaded is being utilized, or (2) the tow responsible for transporting the barge is not immediately available.

"Fleeting" or "fleeting services" consists of the temporary staging or marshalling of barges in the fleeting area and the disassembly and assembly of tows. A fleeting charge for fleeting services is charged by the owner or operator of a fleeting area on a per day basis.

The taxpayer's fleeting services begins when the taxpayer rearranges barges in the tow to allow access to the barges designated for the specific port and certain docks in the area and removes the barges from the tow. The taxpayer then transports all barges removed from the tow to a fleet site using a harbor tug or switch boat. Because a particular dock may not be immediately available for loading or unloading, the barge or barges will be temporarily fleeted or staged by the taxpayer at the fleeting area until the dock is ready for the particular barge.

When the dock is available, the taxpayer tows a selected barge or barges from the fleeting site to docks for loading and unloading. Barges that have been unloaded at a dock are then towed by the taxpayer to another dock where they are cleaned, if necessary, or back to the fleeting area.

The taxpayer's next step for the empty barge is to load it with cargo in the port, at which time the taxpayer tows the barge to the dock for loading. Alternatively, the empty barge departs empty when the taxpayer places the barge in a passing line-haul tow to transport the barge to the next fleeting and loading port. Once the tow arrives, the taxpayer is responsible for switching the barges from the fleeting area to an outward-bound tow.

Barges that have been loaded at a dock are subsequently towed by the taxpayer to the fleeting area for future tow assembly. Once the tow arrives, the taxpayer is responsible for reassembling the tow.

In less frequent instances, barges that have been repaired by the taxpayer in its dry-dock are staged at a fleeting area until a tow arrives to pick up the barge. The taxpayer tows the barge from the dry-dock area to the fleeting area, and once the tow arrives, the taxpayer is responsible for towing the barge from the fleeting area to the tow, and reassembling the tow itself.

The barge fleeting services at issue encompass all of the services provided by the taxpayer, as described above. In all instances, the taxpayer's fleeting services are provided in connection with barges in excess of a 50-ton burden which are primarily engaged in transporting freight or cargo in interstate or foreign commerce. The taxpayer does not provide fleeting services with regard to watercraft that are designed and constructed for the transportation of persons on water.

Barges that are staged at a fleeting area are available for immediate use and transportation. Barges are typically staged at any one fleet for an average period of twelve days. The taxpayer does not, and has not, used its fleeting areas to store barges that are out of service for extended periods of time. The taxpayer does not own a dock, and the taxpayer does not charge its customers a docking fee.

The Department of Revenue argued that the taxpayer's barge fleeting services are subject to sales tax as "docking" under sec. 77.52(2)(a)9., Wis. Stats. Alternatively, the department argued that the taxpayer's activity constitutes providing storage space for boats.

The taxpayer filed a Petition for Redetermination, arguing that its fleeting charges are not taxable under sec. 77.52(2)(a)9., Wis. Stats., because fleeting services are neither "docking" nor providing "storage space" for boats, and that the barges being fleeted do not fall within the definition of a "boat."

The Wisconsin Tax Appeals Commission reversed the Department of Revenue's sales tax assessment against the taxpayer. While the Commission concluded that a "barge" is a "boat," for purposes of sec. 77.52(2)(a)9., Wis. Stats., the Commission also concluded that barge fleeting services are not subject to sales and use taxes under sec. 77.52(2)(a)9., Wis. Stats.

The Department of Revenue has not appealed this decision.

Officer liability. [*Terrill J. Marxer vs. Wisconsin Department of Revenue*](#) (Wisconsin Tax Appeals Commission, July 15, 2011).

The issues in this case are (1) whether the taxpayer is a responsible person who is liable for the unpaid sales taxes of Marc's Brothers, Inc. under sec. 77.60(9), Wis. Stats., for the period of September 1, 2002 through March 31, 2004, and (2) if the Department of Revenue's estimated assessment is correct.

Marc's Brothers, Inc. was formed as a Nevada corporation for purposes of operating a used car dealership and did business under the name Precision Auto Center. At the beginning of the operation of Marc's Brothers, Inc., Marc Baldwin, Jack Elsinger, and the taxpayer were each 33.3% owners of the corporation. The taxpayer was also identified as a 33.3% owner of Marc's Brothers, Inc. on the Entity/Owner Statement document filed with the Department of Transportation (DOT) and was listed on DOT records as a salesperson for Marc's Brothers, Inc., as well as the holder of a Buyer Identification Card for the company. A Buyer Identification Card is necessary for the purchase of automobiles at auction, which the taxpayer did.

The taxpayer was listed as "Manager" on the bank signature card for Marc's Brothers, Inc. and was the only authorized signatory on the company's checking account. The vast majority of the checks signed on behalf of Marc's Brothers, Inc. were signed by the taxpayer.

The company applied for a Wisconsin seller's permit, authorizing it to collect and remit sales taxes. Sales taxes were collected from customers on cars sold, and these taxes were deposited into the company's bank accounts.

Some cars were sold by Marc's Brothers, Inc. for between \$200 and \$1,000 each. Jack Elsinger bought a car from the company for \$15,700, and paid sales tax to the company on that purchase. None of the owners were able to state the dollar amount of the sales of cars by Marc's Brothers, Inc., and the taxpayer did not submit any records of the actual amount of sales by the company in evidence to the Commission.


Marc's Brothers, Inc. was required to file monthly sales tax returns. The company filed sales tax returns for the period April through August 2002, but did not file sales tax returns for the period September 2002 through March 2004. The department made estimated sales tax adjustments against Marc's Brothers, Inc. for each month of the period September 2002 through March 2004, in the amount of \$1,875.00 tax, plus applicable penalties, interest, and fees.

The taxpayer testified that the bank statements came to his home and that he had access to these statements. There was no indication in the company's check register or on stubs that any checks were being written to the Wisconsin Department of Revenue for sales taxes, and the taxpayer was aware that sales tax was due when a car is sold. The taxpayer had access to the checkbook of the company, but never signed any company checks to pay sales tax. Numerous checks payable to various third parties were signed by the taxpayer during the period at issue, and the amount shown as deposits into the company's bank account exceeded the total estimated sales taxes, indicating that the company was able to pay the sales taxes that were due. At one point, Jack Elsinger signed over his 1/3 interest in the company to the taxpayer, making the taxpayer a 2/3 owner of the company, but the business ended in 2004.

The Commission concluded that the taxpayer is personally liable for the unpaid sales taxes of Marc's Brothers, Inc. from September 1, 2002 through March 31, 2004. The Commission stated that the Department of Revenue met its burden of proof in presenting evidence that the taxpayer as manager, and eventually majority owner of Marc's Brothers, Inc., had the **authority** to sign checks on behalf of the company. As manager and part owner, and the only one authorized to sign checks, the taxpayer clearly had the **duty** to pay the taxes. The Commission also stated that the evidence was clear that the taxpayer wrote checks to other creditors while sales taxes were due, thereby satisfying that the taxpayer **intentionally breached his duty**.

Regarding the second issue of whether the Department of Revenue's assessment was correct, the taxpayer did not meet his burden of proving the assessment to be incorrect. Neither at trial, nor in any of the documents filed before the trial, did the taxpayer offer any evidence as to what the correct amounts of the company's sales were. Therefore, the Commission was forced, under the law, to accept the department's estimated assessment as correct.

The taxpayer has appealed this decision to the Circuit Court.

 **Officer liability.** [*Elijah M. Rashaed vs. Wisconsin Department of Revenue*](#) (Wisconsin Tax Appeals Commission, July 13, 2011). The main issue in this case is whether the taxpayer is personally liable for the sales and use tax liability of M & S, Inc.

M & S, Inc. filed an application for a Wisconsin seller's permit on or about January 29, 1996, listing its principal business as retail clothing. According to the Department of Revenue's computer records, M & S, Inc. had a lengthy history of filing its monthly sales and use tax returns late, as well as a lengthy history of not remitting or timely remitting the sales and use taxes due per its return. When the returns for the periods at issue were filed, they appear to have been signed by the taxpayer, using variations of his name, or by Laura Scruggs, using variations of her name. **Note:** The taxpayer filed a petition with the Milwaukee Circuit Court on August 8, 2001, requesting that his name be legally changed from Dennis Bell to Elijah Mohammad Rashaed. Variations of his name have been used on documents (e.g., checks, accounts) throughout.

In August 2001, the Department of Revenue made a determination to revoke M & S, Inc.'s Wisconsin seller's permit as of December 31, 2000, for failure to timely file its sales and use tax returns and for failure to timely remit the sales taxes due. The department also billed M & S, Inc. by issuing notices of amount due for the unpaid sales taxes, including interest, fees, and penalties. Various collection activities were pursued by the department.

On March 21, 2005, the Department of Revenue issued to Mohammed Rashada, n/k/a Elijah M. Rashaed, a Notice of Amount Due of an assessment of personal liability for the unpaid estimated sales and use taxes* of M & S, Inc. for the months of August 2000, October 2000, November 2000, and December 2000. The taxpayer's attorney appealed this assessment on behalf of the taxpayer stating in the taxpayer's Amended State-

ment of Facts and Objections that “Through July 31, 2000, Mr. Rashada controlled the corporation known as M&S Incorporated ...” Also per the Amended Statement of Facts and Objections, it was stated that “On or about July 31, 2000, Mr. Rashada relinquished control of M&S Incorporated ...”

*Also on March 21, 2005, the department issued to Mohammed Rashada, n/k/a Elijah M. Rashaed, a Notice of Amount Due of an assessment of personal liability for the unpaid withholding taxes of M & S, Inc., for the periods 1999 WT-7, the annual reconciliation withholding tax report, January 2000 through September 2000, and 2000 WT-7, the annual reconciliation withholding tax report. The taxpayer subsequently paid the delinquent assessment of personal liability for these withholding taxes.

On January 19, 2007, the Department of Revenue received M & S, Inc.’s sales and use tax returns for August 2000, October 2000, and November 2000, which were signed by the taxpayer. The department reduced the estimated tax assessment against M & S, Inc. to the return amounts. It was further stipulated that the reduction also applied to the personal liability of the taxpayer for tax, penalty, and interest.

In September 2008, the department gathered evidence to personally assess the taxpayer for the unpaid sales and use taxes of M & S, Inc. for various periods from February 28, 1998 to May 31, 2000. The Department of Revenue mailed a letter to the taxpayer, dated February 3, 2009, informing the taxpayer that interviews were being conducted to establish personal liability for the delinquent account of M & S, Inc. On March 6, 2009, the Department of Revenue assessed the taxpayer for the unpaid sales and use tax, including interest and penalties, of M & S, Inc. for various periods from February 28, 1998 to May 31, 2000. The taxpayer appealed this assessment.

The Wisconsin Tax Appeals Commission was asked to review the following issues:

1. Whether the taxpayer is personally responsible under sec. 77.60(9), Wis. Stats., for the assessment made by the Department of Revenue on March 6, 2009.
2. Whether the amount of the assessment is correct.

3. Whether the assessment is timely as the assessment is over 10 years old.

In addition, the Department of Revenue requested costs under sec. 73.01(4)(am), Wis. Stats., on the ground that the taxpayer’s Petition for Review was frivolous in that it contained no facts showing that the taxpayer was not personally responsible under sec. 77.60(9), Wis. Stats., for the unpaid sales taxes of M & S, Inc.

Personal Liability

For a person to be personally liable for a sales tax assessment, the Department of Revenue must establish that the taxpayer (1) had the **authority** to make, or direct, payment of the taxes; (2) had the **duty** to make, or direct, payment of the taxes; and (3) **willfully breached that duty**.

Although the taxpayer alleged that he did not meet the definition of a responsible officer under sec. 77.60(9), Wis. Stats., the Commission found that he conceded the issue of personal liability in the footnote to his brief. In that footnote, the taxpayer stipulated that he was personally liable for the sales taxes of M & S, Inc., for August, October, and November of 2000.

Correctness

Assessments made by the Department of Revenue are presumed to be correct and the taxpayer must show by clear and convincing evidence that they are incorrect.

Since the taxpayer did not brief this issue or argue it, or provide any evidence to overcome the presumption, the Commission determined that the presumption would stand and the assessment was correct.

Timeliness

The assessment was made in March 2009, but refers to sales-related liabilities beginning on February 1, 1998, and ending on May 31, 2000. The taxpayer argued that the department is barred from making the assessment because it allegedly violated a self-imposed four-year policy of limitation, thus the department should be equitably estopped from enforcing its assessment.

The Commission determined that equitable estoppel does not apply to this case, since the government’s conduct was to lawfully investigate the personal liability of the taxpayer for sales tax. The department’s conduct of investigating and issuing an assessment in 2009 was within the law and did not result in any injustice to the taxpayer.

The Commission concluded that there was no genuine issue as to any material fact and granted the Department of Revenue's motion for summary judgment. The Commission also chose not to assess the taxpayer for costs under sec. 73.01(4)(am), Wis. Stats., since the issue of timeliness of the assessment was arguable enough to defeat the claim that the entire appeal was frivolous.

The taxpayer has appealed this decision to the Circuit Court.

Real property construction activities versus tangible personal property. *Chula Vista, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, August 5, 2011). The issue in this case is whether the steel support beams (and related design and installation services) for a water slide are taxable tangible personal property or nontaxable real property improvements for purposes of Wisconsin sales and use taxes.

The taxpayer is a Wisconsin tax option S-corporation, with its principal place of business in Wisconsin Dells, Wisconsin. The taxpayer has been operating a hotel resort in Wisconsin Dells for 59 years. In 1993, the taxpayer purchased and installed its first water slide as a resort amenity. Since 1993, the taxpayer and/or its LLC have purchased and installed over 20 additional water slides, some indoor and some outdoor.

Each water slide has included as its components fiberglass flumes, the steel support structure that holds up the fiberglass flumes, and a start tower or some type of stairs. A flume is an inclined channel for conveying water and, in this instance, passengers. Prior to the water park and water slides at issue in this case, the taxpayer had a smaller indoor water park containing three water slides that the taxpayer built in the late 1990's and later demolished in 2008, without destroying the building in which they were housed.

In 2005, the LLC paid Whitewater West Industries, Ltd. for the engineering design services, installation, and water slide equipment at issue, which included nine fiberglass water slides, steel slide supports for those water slides, and one Aquaplay. Engineering design services and installation services were also included in the sale. The concrete foundation works, including footings, piers, columns, supply and setting of anchor bolts, were specifically excluded from the purchase of the water slides. The LLC paid Wisconsin sales or use tax on its purchase of the fiberglass water slides and conveyors (flumes) and the Aquaplay. The LLC did not pay Wisconsin sales or use tax on its purchase of the engineering

design services associated with the water slides, the structural steel supports, or the installation services for the water slides, including the steel supports and towers.

The question before the Commission is whether the steel support beams became part of the real estate when installed or remain tangible personal property after installation. If the steel beams became part of the real property, the LLC's purchase of the installed beams is not subject to Wisconsin sales and use taxes. However, if the steel support beams remain tangible personal property after installation, the LLC's purchase of them is subject to sales and use taxes.

The Commission ruled that the sale of the steel support beams (and related installation service) is a nontaxable sale of a real property improvement. Therefore, the taxpayer's Motion for Summary Judgment was granted, and the Department of Revenue's action on the Petition for Redetermination was reversed.

The Department of Revenue has not appealed this decision.