



Wisconsin Department of Revenue

TAX BULLETIN

January 2013
Number 178

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Tax Release Concerning Net Business Losses Revised

The department has superseded a tax release titled "Carryforwards of Wisconsin Net Business Losses." The revised tax release appears on page 10 of this Bulletin. (**Note:** The department is also developing guidance concerning the carryforward of net operating losses by individuals. Additional information will be published in the April issue of the *Wisconsin Tax Bulletin*).

The superseded tax release was published in *Wisconsin Tax Bulletin* 139 (July 2004), page 21. It provided corporations could not go back to a closed year and compute a net business loss where one had not previously been claimed or carry forward a net business loss from a Wisconsin return filed after the statute of limitations had expired. The department has reversed its position, as reflected in Answers 2 and 3 of the revised tax release. Answers 1, 4, and 5 of the tax release have not substantively changed.

DATCP Reminder: Claiming 2012 Farmland Preservation Credits

The Department of Agriculture, Trade and Consumer Protection (DATCP) recently issued a [news release](#) concerning claiming farmland preservation credits for 2012. Of particular emphasis is filing the correct schedule with the Wisconsin income tax return, so as to not under-claim the credit.

Report Certain Franchise/Income Tax Credits As Income

Certain credits that you claim on your Wisconsin franchise or income tax return must be reported as an income in either the year received/ computed or the following year. Credits are reported as income even if all or a portion is carried forward. Credits from a pass-through entity should be reported as income by the pass-through entity. The following schedule lists 2012 franchise and income credits and whether the credit should be reported as income.

Credit (Schedule)	Taxable Income in 2012?		Special Instructions
	Corporation	Individual	
Angel investment (VC)	N/A	No	Credit computed reduces basis of investment
Armed forces member (none)	N/A	No	
Beginning farmer and farm asset owner (FL)	Yes	Yes	Income in year computed
Biodiesel fuel production (BC)	Yes	Yes	
Community rehabilitation program (CM)	Yes	N/A	
Community rehabilitation program (CM)	Yes	Yes	
Dairy and livestock farm investment (DI)	Yes	Yes	
Dairy cooperatives (DM)	No	No	Members of dairy cooperative allocated a 2012 credit must report the credit as income and claim the credit on the member's 2013 tax return.
Dairy manufacturing facility investment (DM)	Yes	Yes	Income in year computed
Development zones (DC)	Yes	Yes	
Early stage seed investment (VC)	No	No	Credit computed reduces basis of investment
Earned income (federal EIC)	N/A	No	
Economic development (ED)	Yes	Yes	Income in year computed
Electronic medical records (EM)	Yes	Yes	
Eligible veterans and surviving spouses property tax (none)	N/A	No	
Enterprise zone jobs (EC)	Yes	Yes	Income in year computed
Ethanol and biodiesel fuel pump (EB)	Yes	Yes	
Farmland preservation (FC) (REVISED 10-30-13)	No	No	Income in year received
Farmland preservation (FC-A) (REVISED 10-30-13)	No	No	
Film production company investment (FP)	Yes	Yes	Income in year computed
Film production services (FP)	Yes	Yes	
Food processing plant and food warehouse investment (FW)	Yes	Yes	
Health insurance risk-sharing plan assessments (HI)	Yes	N/A	
State historic rehabilitation (HR)	N/A	No	Credit computed reduces basis of investment
Supplement to the federal historic rehabilitation (HR)	No	No	Add the qualified rehabilitation expenses to basis of building and depreciate them using the straight-line method. In addition, you must subtract the credit computed from the basis of the building.
Homestead (H or H-EZ)	N/A	No	
Itemized deduction (1)	N/A	No	
Jobs tax (JT)	Yes	Yes	Income in year computed
Manufacturing investment (MI)	Yes	Yes	
Married couple (2)	N/A	No	
Meat processing facility investment (MP)	Yes	Yes	Income in year computed
Net income tax paid to another state (OS)	N/A	No	
Postsecondary education (PE)	Yes	Yes	Income in year computed
Research (R)	Yes	N/A	
Research expense (R)	Yes	N/A	
Research facilities (R)	Yes	N/A	
Research facilities (internal combustion engines) (R-1)	Yes	N/A	
Research facilities (certain energy efficient products) (R-2)	Yes	N/A	
Super research and development (R)	Yes	N/A	
School property tax (none)	N/A	No	
Technology zone (TC)	Yes	Yes	Income in year computed
Veteran employment (VE)	Yes	Yes	
Water consumption (WC)	Yes	Yes	
Woody biomass harvesting and processing (WB)	Yes	Yes	
Working families credit (none)	N/A	No	

Filing Date Extended For Farmers and Fishers

Wisconsin farmers and fishers will not be subject to interest on underpayment of estimated tax if they file and pay the tax due by April 15, 2013. Normally, farmers and fishers who choose not to make quarterly estimated tax payments are not subject to interest on underpayment of estimated tax if they file their Wisconsin income tax returns and pay the full amount of tax due by March 1. For 2012 returns only, the March 1, 2013, date is extended to April 15, 2013.

A taxpayer qualifies as a farmer or fisher for tax-year 2012 if at least two-thirds of the taxpayer's gross income was from farming or fishing in either 2011 or 2012. For a married couple filing a joint return, gross income is the joint total gross income of both spouses.

The extension is due to the January enactment of the federal American Taxpayer Relief Act (ATRA), which has caused a delay in the release of several tax forms that are often filed by farmers and fishers, including Form 4562, *Depreciation and Amortization*. The Internal Revenue Service (IRS) is providing similar relief.

Farmers and fishers who file their Wisconsin income tax returns and pay the amount of tax due by April 15, 2013, can request this waiver of underpayment interest by entering exception code 4 in the bracketed space on line 55 of Form 1 (line 83 of Form 1NPR). The farmers and fishers do not have to attach Schedule U, *Underpayment of Estimated Tax by Individuals and Fiduciaries*, to their Wisconsin income tax returns.

New Business Seminar

The Eau Claire Area Chamber of Commerce and Wisconsin Department of Revenue (DOR) will hold a half-day seminar for new businesses on February 20, 2013, at the Chamber's office. Invitations were mailed by DOR on January 14, 2013, to businesses that registered for a seller's permit since January 1, 2012, have reported a tax due for any reporting period, and have a business location in Eau Claire County or a Wisconsin county adjacent to Eau Claire County. Flyers have also been posted for those that may not have received an invitation.

The seminar will cover:

- Wisconsin's basic sales and use and withholding tax regulations
- Available DOR resources to help make taxpaying easier
- Helpful DOR programs like *My Tax Account* and what common mistakes to avoid
- Information on recordkeeping and exemption certificates

Those wishing to attend must register with the Eau Claire Area Chamber of Commerce before February 15 at information@eauclairechamber.org or by calling 715-834-1204.

Sales and Use Tax Report Available

The latest issue of the [Sales and Use Tax Report](#) became available on the Department of Revenue's website in December. 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 December 2012 *Sales and Use Tax Report* (Issue 4-12). Links provided are to related articles in [News for Tax Professionals](#).

- [Hurricane Sandy Victims Qualify for Disaster Relief](#)
- [Motor Vehicle Trade-Ins and Turn-Ins](#)
- Don't Get Stuck With Successor's Liability
- Souvenir Milkcaps (Pull-Tabs)
- Exemptions for Fuel and Electricity Used in Manufacturing and Qualified Research

Wisconsin/Minnesota Sales Tax Seminars

The Wisconsin and Minnesota Departments of Revenue will present a series of free sales and use tax seminars in April and May 2013. The seminars will provide an overview of Minnesota and Wisconsin sales and use tax laws for companies that do business in both states. They are designed for business owners, bookkeepers, purchasing agents, and accountants who need a working knowledge of each state's laws and how to meet their obligations. Topics covered will include:

- who needs to register for sales and use taxes in Minnesota, Wisconsin, or both states;
- what cities, counties, and other jurisdictions in each state have local taxes;
- what's taxable in each state;
- exceptions to the general taxation rules and exemptions; and
- how and when to use or accept an exemption certificate.

Although the seminars are free, registration is required. The specific dates, times, and locations of the seminars, as well as registration information, is available on the "[Training](#)" page of the Department of Revenue's website.

Publication Updates

Income and Franchise Taxes

- [103](#) Reporting Capital Gains and Losses for Wisconsin by Individuals, Estates, and Trusts (10/12)
- [104](#) Wisconsin Taxation of Military Personnel (Discontinued*)
- [106](#) Wisconsin Tax Information for Retirees (12/12)
- [109](#) Tax Information for Married Persons Filing Separate Returns and Persons Divorced in 2011 (10/12)
- [113](#) Federal and Wisconsin Income Tax Reporting Under the Marital Property Act (12/12)
- [120](#) Net Operating Losses for Individuals, Estates, and Trusts (12/12)
- [121](#) Reciprocity (11/12)
- [122](#) Tax Information for Part-Year Residents and Nonresidents of Wisconsin (11/12)
- [125](#) Credit for Tax Paid to Another State (11/12)
- [126](#) How Your Retirement Benefits are Taxed (11/12)
- [127](#) Wisconsin Homestead Credit Situations and Solutions (11/12)
- [503](#) Wisconsin Farmland Preservation Credit (11/12)

* See [Fact Sheet 1118](#), Income Tax Information for Active Military Personnel

Excise Taxes *

- [303](#) Alcohol Beverage Tax Information (1/13)
- [306](#) Alternate Fuel Tax Information (11/12)
- [307](#) Motor Vehicle Fuel Tax Information (11/12)
- [308](#) General Aviation Fuel Tax Information (11/12)

* These publications were formerly numbered AB-103, MF-106, MF-107, and MF-108

Other Topics

- [117](#) Guide to Wisconsin Information Returns (12/12)
- [501](#) Field Audit of Wisconsin Tax Returns (11/12)
- [509](#) Filing Wage Statements and Information Returns Electronically (12/12)

All [publications](#) of the Income, Sales, and Excise (IS&E) Division of the Department of revenue may be downloaded or ordered online. There are over 70 publications available, covering a wide range of topics.

Question and Answer

Caution: The answers in this article reflect the position of the Wisconsin Department of Revenue of laws enacted by the Wisconsin Legislature as of the date of this Bulletin. They may be subject to change based on laws enacted after that date, new administrative rules, and court decisions.

(Individual Income Tax)

Q Does a beneficiary for purposes of the subtraction for contributions to an Edvest program include a step-grandchild?

A A contribution to a college savings account where the beneficiary is a step-grandchild would not qualify for the subtraction from income. Section 71.05 (6) (b) 32, Wis. Stats. (2011-12), is very specific as to the beneficiary. The beneficiary must be the claimant; the claimant's child; the claimant's grandchild; the claimant's great-grandchild; or the claimant's niece or nephew. The statute does not permit the subtraction when the beneficiary is a step-grandchild.

Q I have a taxpayer who passed away in 2012. He files using the single status. He has been eligible for, and has been claiming the veterans and surviving spouse property tax credit in previous years. May this credit be claimed on the decedent's final individual income tax return, assuming all other qualifications have been met?

A Yes. The veterans and surviving spouse property tax credit can be claimed on the final individual income tax return of the veteran as long as the veteran paid the property taxes before the date of death.

Q Which in-laws are "related persons" for the subtraction for sale of assets used in farming to a related person?

A A "related person" is your child, grandchild, great-grandchild, parent, brother or sister, nephew or niece, grandparent, great-grandparent, or aunt or uncle. The person may be related to you by blood, marriage, or adoption.

Withholding Tax Update Available

The 2012 [Withholding Tax Update](#) was posted to the department's website in December. Articles in the update are listed below.

- Withholding Tax Rates
- Filing Frequency Changes
- Did You Know?
- Deposit Report (WT-6) Filing and Payment Options
- Annual Reconciliation (WT-7) Filing and Payment Options
- Form W-2 Electronic Filing
- Wage Statements and Information Returns
- Automatic Reporting Waiver
- Amended Annual Reconciliation
- Transit Pass & Commuter Fringe Benefits
- Health Care Benefits for Adult Children Under Age 27
- Treatment of Health Savings Accounts (HSAs)
- Reciprocity Agreements

- Retirement & Pension Payments
- Election Worker Exemption from Income Tax Withholding
- Exemption for County Fair Associations Increased
- Job Creation Deduction
- Relocated Business Credit or Deduction
- Veteran Employment Credit
- *My Tax Account* Update
- Employees Claiming Exemption from Withholding
- Withholding Lock-In Letters
- Tips or Gratuities Received from Customers
- New Hire Reporting Requirement
- Financial Institutions and Insurance Agencies
- Reminder Relating to Third Party Sick Pay
- Pass-Through Entities: Quarterly Estimated Payments
- Withholding Tax Electronic Mailing List
- Where to Direct Questions. [↗](#)

Exempt Sales of Motor Vehicles to Foreign Missions

Beginning immediately, the U.S. Department of State, Office of Foreign Missions, has issued revised procedures for sales and leases of official and personal motor vehicles by eligible foreign missions and their members and dependents. Exemption from Wisconsin sales and use taxes on sales or leases of motor vehicles based on diplomatic or consular status should only be granted once the seller or lessor has been issued a *Motor Vehicle Tax-Exemption Letter* by the U.S. Department of State's Office of Foreign Missions (OFM). The *Diplomatic Tax Exemption Cards* are not acceptable documentation for the sales and use tax exemption.

Prior to finalizing a sale or lease of a motor vehicle, the seller/lessor must contact OFM during normal business hours to request a *Motor Vehicle Tax-Exemption Letter* (see sample letter on page 7). The request must include:

- The seller's or lessor's name, mailing address, and telephone and fax numbers.
- The color, year, make, and model of the motor vehicle being sold or leased; and
 - For **official** motor vehicles, the name of the purchasing foreign mission, or
 - For **personal** motor vehicles, the name (as it appears on their current "A series" or "G" series visa), of the purchasing accredited mission member or their dependent, and the individual's U.S. Department of State-issued Personal Identification Number (PID).

NOTE: Individuals must also present one of the following:

- ✓ valid passport containing their current "A series" or "G series" visa,
- ✓ U.S. Department of State-issued protocol identification card,
- ✓ U.S. Department of State-issued driver's license, or
- ✓ U.S. Department of State-issued Diplomatic Exemption Card.

Each Motor Vehicle Tax-Exemption Letter has a unique number. The letter also instructs sellers and lessors:

- to send all original ownership documents to OFM for registration and titling as on out-of-state registration

- OFM will issue a registration card and federal license plates once proper documentation is received
- OFM will send a title to the indicated lien holder to protect the interest of the lender
- they may issue a state temporary tag as long as proof of sufficient insurance is provided.

Wisconsin sellers and lessors should send the information to OFMCGCustomerService@state.gov or (312) 353-5762.

The OFM procedures authorizing sales and use, occupancy, food, airline, and gas and utility tax exemptions remain unchanged. More information is available from the OFM's [website](#).



United States Department of State

Office of Foreign Missions
Washington, D.C. 20520

December 26, 2012

Joe Dealer
Diplomatic Cars Inc
8865 Dobbin Road
Chicago, IL 60604

To Whom It May Concern:

The Department of State's Office of Foreign Missions (OFM) understands that **John Diplomat, PID # 12345678**, who is a member of the **Consulate General of Curipania** is planning to acquire a **black 2013 Honda Accord**. This letter confirms that in accordance with the requirements of the Foreign Missions Act (22 U.S.C. 4301-4316 as amended) and relevant treaties and agreements concerning diplomatic and consular privileges and immunities, that **John Diplomat** is hereby authorized to receive an exemption from any sales or use taxes, and if applicable luxury tax, imposed on their acquisition of this motor vehicle.

Pursuant to the Foreign Missions Act, all personnel of foreign missions in the United States and their family members who are entitled to claim immunity from legal process are required to register their vehicles, whether owned or leased, with OFM.

Therefore, as a seller or lessor of the vehicle, you are required to directly submit all original ownership documents to OFM, so that this vehicle can be properly registered and titled. Your dealership is advised to treat this transaction as an "out of state registration." Once such documents are received, OFM will issue a registration card and a federally issued diplomatic or consular license plate. Additionally, if necessary, in an effort to protect the interest of the lender, OFM will send the title to the indicated lien holder.

To allow **John Diplomat** the benefit of driving while this vehicle's registration is being processed by OFM, a state temporary tag may be issued, as long as proof of insurance for third party liability of at least \$300,000 CSL or split limits of \$100,000 per person, \$300,000 per accident and \$100,000 property damage is presented to your dealership.

The appropriate mailing address and contact information for this particular transaction is:

Office of Foreign Missions - Chicago
77 West Jackson Boulevard, Suite 2122
Chicago, IL 60604-1503
Phone: (312) 353-5762
Fax: (312) 353-5768

Email: OFMCGCustomerService@state.gov

Sincerely,

Jane Doe
Program Officer

Letter #: 1000131



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 Tax	
Officer liability <i>Terrill J. Marxer</i>	8
Officer liability <i>Elijah Rashaed</i>	8

SALES AND USE TAX

Officer liability. *Terrill J. Marxer vs. Wisconsin Department of Revenue* (Circuit Court for Dane County, September 19, 2012).

This is an appeal of a July 15, 2011, Wisconsin Tax Appeals Commission decision to hold the taxpayer personally liable for the unpaid taxes of Marc's Brothers, Inc. The unpaid taxes were based on the department's estimated assessment. See *Wisconsin Tax Bulletin 173* (October 2011), page 8, for a summary of the Commission's decision.

The Circuit Court agreed the taxpayer 1) had the authority to pay the taxes, 2) the duty to pay, and 3) breached his duty to pay.

The taxpayer was an owner of the company, was the sole signatory for the company's checking account, had keys to the business, and held himself out as manager of the company. He paid other third parties during the time the unpaid taxes were due.

In addition, the taxpayer failed to show the tax assessment was issued in error. The taxpayer provided no documentary evidence to support his claim that the tax assessment was incorrect. Therefore, the Circuit Court affirmed the Wisconsin Tax Appeals Commission decision.

The taxpayer has not appealed this decision.

Officer liability. *Elijah Rashaed vs. Wisconsin Department of Revenue* (Circuit Court for Dane County, November 14, 2012).

In this case the taxpayer is seeking review of the July 13, 2011, Wisconsin Tax Appeals Commission decision in which the taxpayer was held personally liable for unpaid sales and use tax. For a summary of that decision see *Wisconsin Tax Bulletin 173* (October 2011), page 9.

The taxpayer is questioning the constitutionality of sec. 77.60(9), Wis. Stats. Under this statute any person who willfully fails to collect and pay tax to the department is personally liable for such amounts. No statute of limitations applies. This is unlike the four-year statute of limitations that applies to individual and businesses that are not liable under sec. 77.60(9), Wis. Stats.

A statute violates equal protection if it can be shown that 1) the Legislature created two distinct categories of individuals, 2) legislation treats one class differently from other classes similarly situated, and 3) there is no rational basis for the statutory classification.

The Circuit Court concluded that persons liable under sec. 77.60(9), Wis. Stats., are substantially distinct from those not liable, because they have willfully failed to pay taxes. In addition, the Circuit Court felt it was not difficult to construct a rationale for the classification that is germane to the purpose of the law (collecting taxes), noting the Legislature could have decided against imposing a statute of limitations on individuals in order to enable the state to collect unpaid taxes from those who evade authorities for more than four years.

The Circuit Court added that the government is not under any obligation to limit its enforcement powers by enacting statutes of limitations and that there is a legitimate state interest in the absence of a statute of limitation in sec. 77.60(9), Wis. Stats.

The taxpayer used a number of different names without informing the department and operated stores with different business names under one seller permit. It was the court's view that the department acted reasonably by extending the investigation beyond four years.

The Circuit Court concluded that the taxpayer failed to prove that sec. 77.60(9), Wis. Stats., is unconstitutional.

At the time of publication it is not known if the taxpayer will appeal 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:

Corporation Franchise and Income Tax	
1. Carryforwards of Wisconsin Net Business Losses	10
2. Dividend Received Deduction – Entire Taxable Year Stock Ownership Requirement:.....	12

CORPORATION FRANCHISE AND INCOME TAX

1 Carryforwards of Wisconsin Net Business Losses

This tax release supersedes the tax release published in *Wisconsin Tax Bulletin* 139 (July 2004), page 21, [Carryforwards of Wisconsin Net Business Losses](#). Answers 2 and 3 have been revised to reflect a change in the department's position concerning 1) going back to a closed year and computing a net business loss where one had not previously been claimed and 2) carrying forward a net business loss from a Wisconsin return filed after the statute of limitations has expired. (**Note:** The department is also developing guidance concerning the carryforward of net operating losses by individuals. Additional information will be published in the April issue of the *Wisconsin Tax Bulletin*).

Statutes: Sections [71.26\(4\)](#), [71.45\(4\)](#), [71.75](#), [71.76](#), and [71.77](#), Wis. Stats. (2011-12)

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

Background: Section 71.26(4), Wis. Stats. (2011-12), provides in part:

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

With respect to insurers, sec. 71.45(4), Wis. Stats., (2011-12), states in part:

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

Facts and Question 1: Corporation A computed a Wisconsin net business loss of \$300,000 on its Wisconsin franchise or income tax return for the 2011 calendar year.

For 2012, Corporation A has Wisconsin net income of \$25,000 before subtracting its 2011 Wisconsin net business loss carryforward. The income is derived from business activities in a Wisconsin development zone. Corporation A has a \$2,000 development opportunity zone investment credit carryforward from its 2007 taxable year. It has no other 2012 tax credits or credit carryforwards.

May Corporation A choose not to deduct any part of its 2011 Wisconsin net business loss carryforward on its 2012 Wisconsin return so that it may use its development opportunity zone investment credit carryforward?

Answer 1: Yes, Corporation A may choose not to deduct any part of its 2011 Wisconsin net business loss carryforward on its 2012 Wisconsin return. Corporation A may claim the net business loss carryforward in any year between the loss year and the next 15 succeeding years.

Section 71.26(4), Wis. Stats. (2011-12), provides that a corporation “may” offset against its Wisconsin net business income any Wisconsin net business loss sustained in any of the next preceding 15 years. In statutes, the word “may” denotes an optional or permissive privilege, right, or grant of discretionary authority. Thus, the Legislature’s use of the word “may” for the net business loss carryforward indicates that taxpayers have the option to offset the loss against income in any future year during the 15-year carryforward period.

Facts and Question 2: Corporation B timely filed its 2005 Wisconsin franchise or income tax return and paid Wisconsin franchise tax of \$25,000. After the statute of limitations had expired, Corporation B determines that it made an error in computing its deductions and actually sustained a \$100,000 net business loss for the taxable year.

May Corporation B carry forward and claim any portion of the 2005 net business loss in open years?

Answer 2: Yes, Corporation B can go back to a closed year and compute a net business loss where one had not previously been claimed. Therefore, Corporation B has an unused net business loss of \$100,000 from 2005 to carry forward to any future years included in the 15-year carryforward period that are open under the statute of limitations.

Facts and Question 3: On July 1, 2012, Corporation C files a late Wisconsin franchise or income tax return for the 2006 calendar year. The return reports a net business loss of \$500,000.

May Corporation C carry forward the \$500,000 net business loss to receive a refund of taxes paid in open years, even though its Wisconsin return was filed after the statute of limitations for 2006 had expired?

Answer 3: If Corporation C was subject to Wisconsin franchise or income tax during 2006, it can carry forward the \$500,000 of net business loss shown on its 2006 return to any future years included in the 15-year carryforward period that are open under the statute of limitations.

If Corporation C was not subject to Wisconsin franchise or income tax during 2006 (for example, because it did not have nexus for franchise or income tax purposes with Wisconsin during that year), then no net business loss sustained in 2006 may be carried forward. Section 71.26(4), Wis. Stats. (2011-12), expressly conditions the ability to carry forward net business losses to situations where the corporation is subject to franchise or income tax in the taxable year that the loss was sustained.

Facts and Question 4: Corporation D claimed a \$750,000 net business loss on its timely filed, calendar-year 2006 Wisconsin franchise or income tax return. The corporation carried forward the loss to offset the net business income reported on its 2007, 2008, and 2009 Wisconsin returns of \$100,000, \$150,000, and \$275,000, respectively. Thus, Corporation D reported an unused net business loss carryforward of \$225,000 on its 2009 return. The Department of Revenue conducts an audit of Corporation D’s 2006 through 2009 Wisconsin franchise or income tax returns. At the time of the audit, only the 2009 return is open to assessment by the department. The department determines that Corporation D overstated its net business loss on its 2006 return by \$75,000 and understated its income on its 2007, 2008, and 2009 returns by \$50,000, \$75,000, and \$125,000, respectively.

May the department adjust Corporation D's 2006 net business loss and its net business income reported on its 2007, 2008, and 2009 returns?

Answer 4: Yes, the department can adjust Corporation D's 2006 net business loss and the net business income reported on its 2007, 2008, and 2009 returns. The statute of limitations relates only to assessments and does not prevent income from being recomputed in order to determine the correct net business loss to carry forward to future years. The department determines that Corporation D's 2006 net business loss is \$675,000. Corporation D's net business income before the deduction for its net business loss carryforward is \$150,000 for 2007, \$225,000 for 2008, and \$400,000 for 2009. As a result, \$150,000 of the net business loss is applied against the adjusted 2007 net business income and \$225,000 is applied against the adjusted 2008 net business income, leaving a balance of \$300,000 of net business loss to be carried forward to 2009. The department can issue an assessment to Corporation D for the \$100,000 increase in net income reportable on the corporation's 2009 Wisconsin return.

Facts and Question 5: Corporation E claimed a \$550,000 net business loss on its timely filed, calendar-year 2006 Wisconsin franchise or income tax return. The corporation carried forward the loss to offset the \$200,000 of net business income reported on its 2007 Wisconsin return and \$350,000 of the \$400,000 of net business income reported on its 2008 return. The Department of Revenue conducts an audit of Corporation E's 2006 through 2009 Wisconsin franchise or income tax returns. At the time of the audit, only the 2009 return is open to assessment by the department. The department determines that Corporation E understated its net business loss on its 2006 return by \$50,000. In addition, the department determines that the net business income before any net business loss offset that Corporation E reported on its 2007, 2008, and 2009 returns is correct.

May the department adjust Corporation E's 2006 net business loss and its net business income reported on its 2007, 2008, and 2009 returns?

Answer 5: The department can adjust Corporation E's 2006 net business loss and the net business income reported on its 2009 Wisconsin return. The department determines that Corporation E's 2006 net business loss is \$600,000. Since Corporation E's 2007 and 2008 returns are closed to refunds, the additional \$50,000 of net business loss is carried forward and applied against Corporation E's 2009 net business income. The department can issue a refund to Corporation E for the \$50,000 decrease in net income reportable on the corporation's 2009 Wisconsin return.

2 Dividend Received Deduction – Entire Taxable Year Stock Ownership Requirement

Statutes: Sections [71.22\(10\)](#) and [71.26\(3\)\(j\)](#), Wis. Stats. (2011-12)

Wis. Adm. Code: Section Tax [3.03\(3\)](#), Wis. Adm. Code (July 2012 Register)

Background: A Wisconsin dividend received deduction is allowed if the corporation receiving the dividend owned at least 70% of the total combined voting stock of the payor corporation for the entire taxable year. The question becomes, what constitutes an entire taxable year of the receiving corporation? Section 71.22(10), Wis. Stats. (2011-12), defines a taxable year as the basis for which the taxable income is computed for federal tax purposes, which is considered to be the taxpayer's annual accounting period.

Conclusion: For purposes of the entire taxable year stock holding requirement of the recipient corporation for the Wisconsin dividend received deduction, the department will construe entire taxable year to mean all days of the receiving corporation's taxable year up to 11:59:59 p.m. of the last day of the receiving corporation's taxable year, in the time zone of the state the recipient corporation was incorporated in.

Facts and Question 1: Corporation A has a taxable year beginning January 1, 2012 and ending December 31, 2012. Corporation A owns 100% of the common stock of Corporation B from January 1, 2012 until 11:29 p.m. on December 31, 2012 when Corporation A sells the stock. May Corporation A claim a Wisconsin dividend received deduction for the dividend it receives from Corporation B?

Answer 1: No. Corporation A may not claim a Wisconsin dividend received deduction for the dividend issued by Corporation B because Corporation A did not own the common stock of Corporation B for the entire taxable year since the stock was sold on December 31, 2012 at 11:29 p.m.

Facts and Question 2: Corporation C has a taxable year beginning July 1, 2011 and ending June 30, 2012. Corporation C owns 100% of the common stock of Corporation D from July 1, 2011 until 12:00 a.m. on July 1, 2012 when Corporation C sells the stock. May Corporation C claim a Wisconsin dividend received deduction for the dividend it receives from Corporation D?

Answer 2: Yes. Corporation C may claim a Wisconsin dividend received deduction for the dividend it receives from Corporation D because it held the common stock for the entire taxable year.

Facts and Question 3: Corporation E has a taxable year beginning January 1, 2012 and ending December 31, 2012 and is incorporated in Wisconsin. Corporation E owns 100% of the common stock of Corporation F from January 1, 2012 until 11:59:59 p.m. Central Time (CT) on December 31, 2012 when Corporation E sells the stock through a stock broker located in California. Because of time zone differences, the stock is actually sold at 9:59:59 p.m. Pacific Time (PT). May Corporation E claim a Wisconsin dividend received deduction for the dividend it receives from Corporation F?

Answer 3: No. Corporation E sold the stock at 11:59:59 p.m. rather than holding it through the end of the year. Even though the actual stock sale takes place in California at 9:59:59 p.m. PT, Corporation E is incorporated in Wisconsin so the stock sale is deemed to occur in the time zone of the state of incorporation, which is 11:59:59 p.m. CT.

Applicable Statutes and Administrative Code:

Section [71.22\(10\)](#), Wis. Stats. (2011-12), provides that “taxable year” means the taxable period upon the basis of which the taxable income of the taxpayer is computed for federal income tax purposes. The taxable year of a corporation that keeps its accounting records on the basis of a 52–53 week period ends on the last day of the month closest to the end of the 52–53 week period.

Section [71.26\(3\)\(j\)](#), Wis. Stats. (2011-12), provides that corporations may deduct from income dividends received from a corporation with respect to its common stock if the corporation receiving the dividends owns, directly or indirectly, during the entire taxable year at least 70% of the total combined voting stock of the payor corporation. In this paragraph, “dividends received” means gross dividends minus taxes on those dividends paid to a foreign nation and claimed as a deduction under this chapter. The same dividends may not be deducted more than once.

Section Tax [3.03\(3\)](#), Wis. Adm. Code (July 2012 Register), provides that a corporation may deduct from gross income 100 percent of the dividends received from a payer corporation during a taxable year if the dividends are paid on common stock of the payer corporation and the corporation receiving the dividends owns directly or indirectly during the entire taxable year in which the dividends are received at least 70 percent of the total combined voting stock of the payer corporation.



Private Letter Rulings

“Private letter rulings” are written statements issued to a taxpayer by the department, that interpret Wisconsin tax laws based on the taxpayer’s specific set of facts. Any taxpayer may rely upon the ruling to the extent the facts are the same as those in the ruling.

The ruling number is interpreted as follows: The “W” is for “Wisconsin”; the first four digits are the year and week the ruling becomes available for publication (80 days after it is issued to the taxpayer); the last three digits are the number in the series of rulings issued that year. The date is the date the ruling was issued.

Certain information that could identify the taxpayer has been deleted. Additional information is available in Wisconsin Publication 111, “How to Get a Private Letter Ruling From the Wisconsin Department of Revenue.”

The following private letter ruling is included:

Sales and Use Tax

Prosthetic devices and drugs
W1249001 (p. 14)

✱ **W1249001** ✱

September 18, 2012

Type Tax: Sales and Use Tax

Issue: Prosthetic devices and drugs

Statutes: Sections 77.51(1f) and (11m) and 77.54(14)(d) and (22b), Wis. Stats. (2009-10)

Administrative Code: Sections Tax 11.08(4), 11.09, and 11.17 Wis. Adm. Code (November 2010 Register)

This letter responds to your requests for a private letter ruling dated May 30 and June 15, 2012.

Company A is a biotechnology company specializing in the development and commercialization of innovative drug-device combination products to promote the healing of musculoskeletal injuries and diseases, including orthopedic, spine, and sports injury applications.

You have requested the Wisconsin sales and use tax treatment of two of Company A's products: Product 1 and Product 2. The additional facts that you provided are detailed in Appendices 1 and 2.

Question: Are Company A's sales of Product 1 and Product 2 to hospitals and surgery centers in Wisconsin subject to sales or use tax?

Answer: No. Company A's sales of Product 1 and Product 2 to hospitals and surgery centers in Wisconsin are exempt from sales and use tax.

Analysis for Company A's sales of Product 1

Company A's sales of Product 1 to hospitals and surgery centers in Wisconsin are exempt from sales and use tax as sales of prosthetic devices used for a human being.

Section 77.54(22b), Wis. Stats. (2009-10), provides an exemption from Wisconsin sales and use taxes for "... durable medical equipment that is for use in a person's home, mobility-enhancing equipment, and prosthetic devices, and accessories for such equipment or devices, if the equipment or devices are used for a human being."

"Prosthetic device" is defined to mean "a device, including the repair parts and replacement parts for the device, that is placed in or worn on the body to artificially replace a missing portion of the body; to prevent or correct a physical deformity or malfunction; or to support a weak or deformed portion of the body." (Section 77.51(11m), Wis. Stats. (2009-10))

A device is "worn in or on the body" if the device is implanted or attached so that it becomes part of the body or if it is carried by the body and does not hinder the mobility of the individual. (Section Tax 11.08(4)(b), Wis. Adm. Code (November 2010 Register))

Conclusion

Product 1 is worn in or on the body and prevents or corrects a physical deformity or malfunction. Therefore, Product 1 meets the definition of "prosthetic device," and Company A's sales of Product 1 are exempt from Wisconsin sales and use tax when used for a human being.

The tax treatment of Product 1 is consistent with the tax treatment of bone cement and wax; bone pins, plates, nails, screws, etc.; and collagen implants, as listed in sec. Tax 11.08(4)(c), Wis. Adm. Code (November 2010 Register), as examples of exempt prosthetic devices.

Analysis for Company A's sales of Product 2

Company A's sales of Product 2 to hospitals and surgery centers in Wisconsin are exempt from sales and use tax.

When combined, the two major components of Product 2 meet the definition of "prosthetic device," as described above. However, Product 2 is not sold in a combined state. Product 2 is sold as a kit that includes individual products: (1) Component 1; (2) Component 2; and (3) plastic mixing apparatus. Component 1 meets the definition of "drug," and Component 2 meets the definition of "prosthetic device," (as further explained below) both of which are exempt from Wisconsin sales and use tax when sold to hospitals and surgery centers. There is no exemption, however, for the plastic mixing apparatus. When taxable and nontaxable products are sold for one nonitemized price, the tax treatment is dependent on whether sale of the product is a "bundled transaction."

Component 1 is a Drug

Section 77.54(14)(d), Wis. Stats. (2009-10), provides an exemption from Wisconsin sales and use taxes for drugs that are "[s]old to a licensed physician, surgeon, podiatrist, dentist, or hospital for the treatment of a human being."

"Drug" is defined in sec. 77.51(3pj), Wis. Stats. (2009-10), to mean "... a compound, substance, or preparation, or any component of them, other than food and food ingredients, dietary supplements, or alcoholic beverages, to which any of the following applies:

- a. It is listed in the United States Pharmacopoeia, Homeopathic Pharmacopoeia of the United States, or National Formulary, or any supplement to any of them.
- b. It is intended for use in diagnosing, curing, mitigating, treating, or preventing a disease.
- c. It is intended to affect a function or structure of the body.

Component 1 meets the definition of "drug." Therefore, the sale of Component 1 to a hospital or surgery center in Wisconsin is exempt from tax, as provided in sec. 77.54(14)(d), Wis. Stats. (2009-10).

Component 2 is a Prosthetic Device

Section 77.54(22b), Wis. Stats. (2009-10), provides an exemption from Wisconsin sales and use taxes for "... durable medical equipment that is for use in a person's home, mobility-enhancing equipment, and prosthetic devices, and accessories for such equipment or devices, if the equipment or devices are used for a human being."

"Prosthetic device" is defined to mean "a device, including the repair parts and replacement parts for the device, that is placed in or worn on the body to artificially replace a missing portion of the body; to prevent or correct a physical deformity or malfunction; or to support a weak or deformed portion of the body." (Section 77.51(11m), Wis. Stats. (2009-10))

A device is "worn in or on the body" if the device is implanted or attached so that it becomes part of the body or if it is carried by the body and does not hinder the mobility of the individual. (Section Tax 11.08(4)(b), Wis. Adm. Code (November 2010 Register))

Component 2 is worn in or on the body and prevents or corrects a physical deformity or malfunction. Therefore, Component 2 meets the definition of "prosthetic device," and is exempt from Wisconsin sales and use tax when used for a human being.

How to Determine Whether the Product 2 Kits are "Bundled Transactions"

When taxable and nontaxable products are sold for one nonitemized price, the tax treatment is dependent on whether the sale of the product is a "bundled transaction." "Bundled transactions" are defined in sec. 77.51(1f), Wis. Stats. (2009-10), as "...the retail sale of 2 or more products, not including real property and services to real property, if the products are distinct and identifiable products and sold for one nonitemized price." The entire sales price of a bundled transaction is subject to tax. (Section 77.52(20)(a), Wis. Stats. (2009-10))

However, sec. 77.51(1f)(e), Wis. Stats. (2009-10), provides that "bundled transaction" does not include:

"The retail sale of taxable tangible personal property, or items, property, or goods under s. 77.52 (1) (b), (c), or (d) and tangible personal property, or items, property, or goods under s. 77.52 (1) (b), (c), or (d) that is exempt from the taxes imposed under this subchapter, **if the transaction includes food and food ingredients, drugs, durable medical equipment, mobility-enhancing equipment, prosthetic devices, or medical supplies and if the seller's purchase price or the sales price of the taxable tangible personal property, or items, property, or goods under s. 77.52 (1) (b), (c), or (d) is no greater than 50 percent of the seller's total purchase price or sales price of all the tangible personal property, or items, property, or goods under s. 77.52 (1) (b), (c), or (d) included in what would otherwise be a bundled transaction, as determined by the seller using either the seller's purchase price or the sales price, but not a combination of both.**" (Emphasis added)

The Product 2 kits include a drug (i.e., Component 1) and a prosthetic device (i.e., Component 2), as well as taxable tangible personal property (i.e., the plastic mixing apparatus). The purchase price and sales price of the plastic mixing apparatus is very minor in relation to the cost and sales price of the other two components of Product 2. Thus, the sales of the Product 2 kits are not "bundled transactions," as provided in sec. 77.51(1f)(e), Wis. Stats. (2009-10).

Section 77.54(52), Wis. Stats. (2009-10), provides an exemption from Wisconsin sales and use tax for the following:

"The sales price from the sales of and the storage, use, or other consumption of products sold in a transaction that would be a bundled transaction, except that the transaction meets the conditions described in s. 77.51 (1f) (e)."

Conclusion

Company A's sales of Product 2 are exempt from Wisconsin sales and use taxes when sold to hospitals and surgery centers. Although Product 2 contains both taxable and nontaxable products for one nonitemized price, the sale of Product 2 is not a "bundled transaction," since Product 2's purchase price and sales price of the taxable product (i.e., the plastic mixing apparatus) is no greater than 50 percent of Product 2's total purchase price and sales price of Product 2.

APPENDIX 1
Facts Relating to Company A's sales of Product 1

The facts as provided in your May 30, 2012 letter are as follows:

Product 1 is a sterile, synthetic, non-pyrogenic material intended for use in combination with autologous bone marrow for bone void filling and fracture repair of the pelvis and extremities.

The product material is a composition of Material 1 and Material 2. Material 1 is a form of calcium phosphate that closely resembles the mineral phase of natural human bone. The granules are interspersed within Material 2, providing an enhanced osteoconductive scaffold to support bone remodeling. The scaffold is highly porous with ample surface area for absorption of bone marrow aspirate ("BMA") and stem cell attachment.

The Product 1 family is available in a variety of configurations: pads, strips, blocks, plugs, and paste.

Upon saturation with BMA, Product 1 may be manipulated as desired. This flexible structure allows the grafts to be shaped based on patient anatomy and surgical environment. Pads, strips, blocks, and plugs may be compressed, folded, trimmed, or layered. Hydrated paste may be molded.

Product 1 has been approved by the FDA as a Class II device for prescription use only.

Company A will sell Product 1 to hospitals and surgery centers in Wisconsin for use in surgery.

APPENDIX 2
Facts Relating to Company A's sales of Product 2

The facts as provided in your June 15, 2012 letter and subsequent telephone conversation are as follows:

Product 2 is a combination product pending marketing approval by the FDA as a Class 3 Medical Device.

Product 2 was developed as a fully synthetic replacement to autograft in hindfoot and ankle surgery.

Product 2 consists of two components: Component 1 and Component 2. It is supplied as a kit for a single use only. At the point of use the two primary components are combined in entirety, mixed and subsequently applied to the surgical site.

Component 2 is a highly porous, resorbable and osteoconductive scaffold which provides a framework for bone regeneration, aids in preventing soft tissue infiltration and promotes stabilization of the blood clot.

Component 1 acts by stimulating the recruitment and proliferation of a variety of cell types.

Product 2 is placed on defects, such as gaps between bones where a surgeon is trying to achieve fusion. It provides a scaffold for natural occurring tissue (bone) regeneration and is gradually resorbed by the body and turned into bone. The presence of the protein stimulates this naturally occurring biological process.

Company A will sell Product 2 to hospitals and surgery clinics in Wisconsin for use in hindfoot and ankle surgeries.

The sample/test kits of Product 2 contain a plastic apparatus for mixing the two components together prior to use. It is not known at this time whether this or a similar apparatus will be included in the salable product/kit, but it is reasonable to assume that it will. The cost and sales price of the apparatus will be very minor in relation to the cost and sales price of the other two components of Product 2.