



Wisconsin Department of Revenue

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New Pre-Refund Process To Protect Wisconsin Citizens From Identity Theft

Beginning in January 2014, the Wisconsin Department of Revenue (DOR) will implement a process to protect Wisconsin citizens from identity theft and combat the loss of taxpayer dollars to identity theft. Through the use of nationwide sources and analytics, the DOR will select certain individual income tax returns for identity verification. Those selected will be sent a letter asking them to take an identity verification quiz. They will be able to take the quiz online or over the telephone. Their refund request will be processed only after they pass the identity quiz. If a person is not able to pass the quiz, they will be asked to provide documentation to prove their identity. Through this new process, the DOR hopes to protect Wisconsin citizens and save taxpayer dollars from being issued to fraudsters.

Application To Register Qualified Wisconsin Businesses Debuts January 2, 2014

On January 2, 2014, the Department of Revenue (DOR) will debut an online application for businesses to register as a "qualified Wisconsin business." An investor in a "qualified Wisconsin business" may be eligible for deferral and exclusion of certain long-term capital gains (see [Fact Sheet 1102](#) for additional information concerning the deferral and exclusion).

A business may register with the DOR as a "qualified Wisconsin business" for 2014 if, in the business's taxable year ending immediately before the date of registration, both of the following apply:

1. The business has at least two full-time employees and the amount of payroll compensation paid by the business in Wisconsin is equal to at least 50 percent of the amount of all payroll compensation paid by the business; and

2. The value of real and tangible personal property owned or rented and used by the business in Wisconsin is equal to at least 50 percent of the value of all real and tangible personal property owned or rented and used by the business.

The application will provide an immediate confirmation of registration. Registered businesses will be placed by the DOR on an Internet listing of qualified Wisconsin businesses.

News in Review

The department strives to make [News for Tax Professionals](#) a valuable resource for the timely and accurate information you need. Guidance has been issued on a number of topics:

- [Combat Zone Related Deaths](#)
- [Increased Tuition Subtraction For 2013](#)
- [Wisconsin Estate Tax Eliminated – Update](#)
- [Tax Guidance For Individuals In A Same-Sex Marriage](#)
- [No Change to Wisconsin Withholding Tax Rates for 2014](#)
- [Septic System Installers – Taxable Items Less Than 10% of Total Contract Price](#)
- [One-Payment Leases of Automobiles – Where Does the Sale Take Place?](#)

Form PW-2 Approval Process Changed

Based on a recent review of previously approved Forms PW-2, *Wisconsin Nonresident Partner, Member, Shareholder, or Beneficiary Withholding Exemption Affidavit*, the department has changed its approval process. On a case-by-case basis, the department will be issuing a "continuous" exemption, which relieves a nonresident of the requirement to file Form PW-2 in future years.

As a nonresident may not apply for a "continuous" exemption, there is no change in how Form PW-2 is filed. Exemptions will be issued using criteria similar to that used to approve Form PW-2. The exemption will be reviewed annually to ensure the nonresident is paying estimated tax and filing returns as required. Noncompliance by the nonresident will result in revocation of the exemption.

The department anticipates this process change will benefit both nonresidents and pass-through entities by reducing annual recordkeeping and filing requirements.

Taxability of Farmland Preservation Credit Clarified

A schedule published in *Wisconsin Tax Bulletin 178* (January 2013) concerning reporting credits as income has been revised as follows:

- A correction to "Taxable Income in 2012?" has been made to indicate a 2012 farmland preservation credit from Schedule FC is **not** taxable income in 2012. As indicated in the "Special Instructions," it is income in the year received.
- An addition to the "Special Instructions" clarifies a farmland preservation credit from Schedule FC-A is included in taxable income in the year received.

Click [here](#) to view the revised schedule.

Question and Answer – Wisconsin's Treatment of the Federal Fuel Tax Credit

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.

(Corporation Franchise and Income Tax)

Q: Does Wisconsin offer a credit similar to the federal fuel tax credit?

A: No. Wisconsin does not offer a fuel tax credit.

Q: The federal fuel tax credit was required to be included in my federal taxable income. May I deduct this amount when computing my Wisconsin taxable income?

A: No. Wisconsin tax law does not provide a modification (subtraction) for the amount of fuel tax credit included in federal income. If the credit is required to be included in federal taxable income, it is also required to be included in Wisconsin taxable income.

Q: The IRS required me to reduce the amount of fuel costs by the amount of the federal fuel tax credit that I received. May I deduct the full amount of fuel costs for Wisconsin even if I received a portion of it back as a federal fuel tax credit?

A: No. Wisconsin tax law does not provide a modification for the amount of the federal fuel tax credit that is used to reduce fuel costs deducted on the federal return. The same amount of fuel costs should be deducted to arrive at federal taxable income and Wisconsin taxable income.

Q: If I included the fuel tax credit in federal taxable income **and** reduced the amount of fuel costs deducted by the amount of the federal fuel tax credit, am I allowed a deduction for the fuel costs in computing Wisconsin taxable income?

A: No. If you included the federal fuel tax credit in federal taxable income **and** also reduced the fuel costs by the same amount to arrive at federal taxable income, your federal taxable income is overstated. Your federal taxable income should be recomputed before computing Wisconsin taxable income.

Petroleum Inspection Fee Collection Point Changes at Milwaukee Airport

A 2 cent per gallon petroleum inspection fee is due on all petroleum products that are received by a supplier for sale in Wisconsin. Section 78.07(1a), Wis. Stats., as created by 2013 Wisconsin Act 20, changed the imposition of the Wisconsin petroleum inspection fee at General Mitchell International Airport effective October 1, 2013. The October 2013 tax return, due December 2, 2013, will be the first return affected by this change, with payment due on or before November 15, 2013.

Background

General Mitchell International Airport refueling operation consists of two separate areas; the terminal and the hydrant system. The terminal is located outside the airport at 1701 E College Avenue, Milwaukee, and the hydrant system within the airport at 4792 S Howell Avenue, Milwaukee.

The terminal receives product directly from the West Shore Pipe Line. Fuel shipments are received into the terminal and stored in a 100,000 barrel tank before being filtered into a 20,000 barrel tank and then shipped to the hydrant system. Because the terminal does not “break bulk,” it is not recognized as a terminal by the Internal Revenue Service (IRS). Instead, the IRS has assigned terminal control number T-39-WI-3092 to the hydrant system.

The hydrant system has two 40,000 gallon underground tanks, which normally receive several shipments from the terminal each day. In addition to receiving shipments from the terminal, the hydrant system is also equipped to receive shipments by truck if necessary.

Taxation Points Prior to October 1, 2013

Pipe Line Deliveries: The point of taxation is when the fuel is metered out of the hydrant system (T-39-WI-3092). The party that owns the fuel within the hydrant system is considered the "position holder" and is responsible for filing a tax return and paying the petroleum inspection fee.

Truck Deliveries: Truck deliveries into the hydrant system are treated as terminal to terminal tax free transactions. The fee is due from the "position holder" when fuel is metered out of the hydrant system.

Taxation Points Beginning on October 1, 2013

Pipe Line Deliveries: Under sec. 78.07(1a), Wis. Stats., the petroleum inspection fee is due from the supplier (owner of the fuel) that receives the fuel into the storage facility at 1701 E College Avenue from the West Shore Pipe Line. This is prior to the delivery of the fuel into the hydrant system. The owner of the fuel must report these receipts on its tax return and pay the fee based on the gallons received.

Truck Deliveries: The point of taxation on fuel received into the hydrant system by truck is at the IRS-registered terminal from which the fuel is removed. Fuel loaded into the hydrant system includes the petroleum inspection fee and is not allowed an exemption for a terminal to terminal tax free transaction.

This change does **not** affect how the IRS treats or taxes this fuel. For questions, contact Chris Roy at (608) 266-7453.

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 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 2013 *Sales and Use Tax Report* (Issue 2-13).

- Motor Vehicle Dealers' Measure of Use Tax Increased to \$149
- Wisconsin/Minnesota Sales Tax Seminars
- One-Payment Leases Of Automobiles – Where Does The Sale Take Place?
- Article for Septic System Installers Revised
- Reminder – New Tax Laws That Are Now Becoming Effective
- Wisconsin Use Tax on Motor Vehicles

Change in Taxes Included in Taxable Sales Price

The definitions of "sales price" and "purchase price" were amended effective July 2, 2013, pursuant to 2013 Wisconsin Act 20.

Changes in the tax treatment of the following are a result of this amendment:

- **State Universal Service Fund (USF) Fee** - The state USF fee *is not included* in the retailer's taxable sales price. Therefore, the retailer should not charge tax on this fee.

Prior to July 2, 2013, the retailer was required to collect and remit tax on the state USF fee.

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- **Federal Excise Tax on Heavy Trucks and Trailers** - The federal excise tax imposed on the first retail sale of heavy trucks and trailers under s. 4051 of the Internal Revenue Code is included in the retailer's taxable sales price.

Prior to July 2, 2013, this tax was not included in the retailer's sales price.

When taxes are imposed on a retailer, the tax is not included in the retailer's taxable sales price if both of the following apply:

1. The retailer separately states the tax on the invoice, bill of sale, or similar document that the retailer gives to the purchaser; and
2. The law imposing or authorizing the tax provides that the seller may, but is not required to, pass on and collect the tax from the user or consumer.



Report on Litigation

Summarized below are recent significant Wisconsin Tax Appeals Commission (WTAC) and Wisconsin Court decisions.

The following decision is included:

Sales and Use Tax	
Admissions	
<i>Cellar Door North Central, Inc.</i>	6

SALES AND USE TAX

Admissions. *Cellar Door North Central, Inc. vs. Wisconsin Department of Revenue* (Dane County Circuit Court, August 26, 2013).

This is a judicial review of a Wisconsin Tax Appeals Commission decision dated January 22, 2013. See *Wisconsin Tax Bulletin* 170 (April 2013), pages 9 and 10, for a summary of the Wisconsin Tax Appeals Commission's decision.

The case involves two issues for which the Commission interpreted and applied two statutes. First the Commission determined that Cellar Door North Central, Inc. (Cellar Door) was a retailer that sold admissions and merchandise under sec. [77.52\(1\)](#) and [\(2\)](#), Wis. Stats. (2011-12).

Next, the Commission determined that under sec. [77.59\(9m\)](#), Wis. Stats. (2011-12), Cellar Door was "liable in the alternative" with its co-promoter, New Riverside Corporation (Riverside), for sales tax collected on the sale of admissions and merchandise which took place at the Riverside Theatre in Milwaukee.

Cellar Door and Riverside Theatre had entered into a co-promoting agreement that gave both parties joint responsibility to manage and control events, including ticketing. Cellar Door determined the nature of the event by communicating with artists' agents, researching sale potential and building, submitting and negotiating an offer for the artist. Cellar Door worked with artist and venue to decide the price and scale of admissions. Cellar Door also received ticket sale proceeds.

The Court affirmed the Commission's decision, concluding (1) there was substantial evidence to support the Commission's conclusion that Cellar Door was a "retailer" under Tax 11.54(3), Wis. Adm. Code (August 2013 Register), selling taxable admissions to events, (2) the Commission's interpretation and application of sec. 77.52(1) and (2)(a)2., Wis. Stats. (2011-12) was reasonable and supported by substantial evidence and, (3) Cellar Door was properly assessed "in the alternative" under sec. 77.59(9m), Wis. Stats. (2011-12).

At the time of publication it is not known if the taxpayer will appeal this decision.



Private Letter Rulings

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

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

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

The following private letter rulings are included:

Sales and Use Tax

Lease of motor vehicles
W1333001 (p. 7)

Corporation Franchise and Income Tax

Resale of gift cards to nonprofit organizations
W1335002 (p. 9)

* W1333001 *

May 17, 2013

Type Tax: Sales and Use Tax

Issue: Lease of motor vehicles

Statute: Section [77.54\(8\)](#), Wis. Stats. (2011-12)

Administrative Code: Section Tax 11.27(1)(b), Wis. Adm. Code (May 2010 Register)

This letter responds to your request for a private letter ruling dated February 7, 2013.

In your letter, you stated the following facts:

- Company A is a nationwide lessor of motor vehicles headquartered in Illinois. Under the terms of Company A's lease agreements, lessees are responsible for excess wear and tear charges at lease termination. Company A collects sales tax on these charges as required by Wisconsin tax law.
- One of the products Company A offers to its customers at lease inception is a “Lease Excess Wear Protection Waiver (LEWP).” This product allows the customer to pay a predetermined amount of excess wear and tear in lieu of the actual wear and tear charges that would otherwise be due at lease termination. The customer has the option of either paying for the LEWP at lease signing or capitalizing the cost into the monthly lease payments. Once products are capitalized into the lease payment, they no longer retain their original purpose, but become a financing option and are thereby included in the monthly payment.

- Company A is not licensed to sell insurance in the state of Wisconsin. Before offering the LEWP product for sale, Company A requested the Wisconsin Office of the Commissioner of Insurance to determine whether the LEWP qualified as insurance. On March 11, 2003, the Wisconsin Office of the Commissioner of Insurance determined that the LEWP product was not insurance, but instead “an agreement by the lessor to the lessee to forgive the excess wear and/or mileage based on the finance agreement.”
- You also stated that on November 16, 2012, the Wisconsin Department of Revenue (DOR) provided advice to one of your dealerships that contradicts the ruling of the Insurance Commissioner. According to that advice, DOR has determined that the LEWP product is non-taxable because it is considered to be insurance.
- Another service that Company A offers to some of its lessees is the option to finance negative equity on a trade-in into the monthly lease payment on a new vehicle. The lessee is not required to utilize this service and may instead elect to pay off any negative equity prior to entering into a new lease agreement. As is true of any other capitalized item or service, financed negative equity is not separately stated as a non-taxable item on the monthly lease invoice, nor is it recorded as such in our accounting records.
- The LEWP product and the negative equity are *not* separately stated on the monthly lease invoice, and Company A does *not* itemize or track the underlying components of the monthly lease payment after the account is booked as a receivable. All Company A customers have the option to pay for non-taxable items and services tax-free at leasing signing; there is no requirement to capitalize these non-taxable items into the monthly payment.
- Company A's current interpretation is that a motor vehicle lease payment is one distinct item, that it has no identity as anything other than a lease payment, that it cannot be separated into underlying taxable and non-taxable components, and that it is 100% taxable under Wisconsin state sales tax law. Due to the fact that vehicles frequently move between states during the course of a lease and in keeping with Wisconsin's membership in the Streamlined Sales Tax project, you respectfully request DOR to uphold Company A's interpretation on this issue.

Company A presented three questions, which are stated and answered, below.

Question 1: Is the LEWP product subject to Wisconsin sales and use tax?

Answer 1: No. The charge for the “Lease Excess Wear Protection Waiver (LEWP)” is considered “insurance” for Wisconsin sales and use tax purposes.

Section 77.54(8), Wis. Stats. (2011-12), provides an exemption from Wisconsin sales and use taxes for “[c]harges for insurance ... where such charges are separately set forth upon the invoice given by the seller to the purchaser.” The insurance is considered to be separately set forth upon the invoice if it is separately stated on the invoice or lease agreement.

“Insurance” is defined in sec. Tax 11.27(1)(b), Wis. Adm. Code (May 2010 Register), to mean “... a contract or agreement which promises indemnity against loss or damage resulting from perils outside of and unrelated to defects in tangible personal property ...” Please note that the word “insurance” may have a different meaning for Wisconsin sales and use tax purposes than the type of insurance that is regulated by the Commissioner of Insurance.

The charge for the LEWP is optional to the customer (i.e., the customer is not required to purchase the LEWP in order to lease the motor vehicle). When a customer opts to purchase the LEWP, a waiver agreement is signed by both the customer and the lessor. The waiver agreement states the amount of the charge to the customer for the LEWP and becomes an amendment to the lease agreement.

Therefore, since the charge for the LEWP is optional to the customer and is separately stated in the lease agreement, the charge for the LEWP is not subject to Wisconsin sales or use tax.

The definition of “warranty” provides that a warranty promises indemnity against defects in the product. The LEWP is not like a warranty where the customer is reimbursed for charges to him for repairing a vehicle because of defects in the vehicle. In effect, the LEWP protects the insured from not taking good care of the vehicle.

Question 2: If the LEWP product is not subject to sales and use tax and its cost has been capitalized into the monthly lease payment, is the entire monthly lease payment then entitled to a reduced, individualized tax rate based on the original, proportional value of the LEWP?

Answer 2: When the LEWP has been capitalized into the monthly lease payment (i.e., the LEWP is paid for over the term of the lease agreement), an allocation of the monthly lease payment must be made to reflect the taxable portion of the lease payment and the exempt portion of the lease payment. Wisconsin sales or use tax should be applied to the taxable portion of the monthly payment.

Question 3: If negative equity has been capitalized into the monthly lease payment, is the entire monthly lease payment then entitled to a reduced, individualized tax rate based on the original, proportional value of the negative equity?

Answer 3: The portion of the monthly lease payment that relates to the negative equity of an owned trade-in vehicle is not subject to tax. Please note that if the lessee had paid the negative equity amount to the financier in settlement of the debt, the negative equity amount would not have been taxable. The total sales price of the vehicle would have been taxed when the vehicle was purchased. This tax treatment is illustrated in *Example 14* of the tax release that you referenced titled “Motor Vehicle Lease Dealers – ‘Trade-Ins’ and ‘Turn-Ins,’ ” which was published in *Wisconsin Tax Bulletin #177* (October 2012).

The portion of the monthly lease payment that relates to the negative equity of a leased trade-in vehicle is, however, subject to tax. Please note that if the lessee had paid the negative equity amount to the original leasing company in settlement of the lease, the negative equity amount would have been taxable. This tax treatment is illustrated in *Example 20* of the tax release that you referenced entitled “Motor Vehicle Lease Dealers – ‘Trade-Ins’ and Turn-Ins,” which was published in *Wisconsin Tax Bulletin #177* (October 2012).

* W1335002 *

May 31, 2013

Type Tax: Corporation Franchise and Income Tax

Issue: Resale of gift cards to nonprofit organizations

Statute: Sections [71.23\(1\)](#) and [\(2\)](#), [71.25\(5\)](#), [\(9\)](#), and [\(12\)](#), and [551.02\(28\)](#), Wis. Stats. (2011-12)

Administrative Code: Sections Tax 2.39(2)(cm), 2.45, and 2.82(1) and (4), Wis. Adm. Code (July 2012 Register)

We received your request for a private letter ruling dated November 5, 2012, in regards to the Wisconsin corporate franchise/income tax treatment of Company A's intention to resell third party gift cards to Wisconsin nonprofit organizations and license Wisconsin nonprofits to use their software for tracking and managing the gift cards.

Background:

Company A, a limited liability company classified as a corporation for federal income tax purposes, is headquartered and organized in another state. Company A is not considered a tax-exempt entity under the Internal Revenue Code.

Company A intends to purchase and resell gift cards to Wisconsin nonprofit organizations. The gift cards will not be issued by Company A, and instead will be purchased from various retailers at less than face value and resold to the nonprofits for an amount greater than Company A paid for the gift cards. Company A will receive some of the gift

cards with value already on them, while others will have no value until the time of purchase at which point value will be loaded onto the card. The gift cards will be kept at Company A's out of state facility until they have been ordered by a nonprofit organization. Company A will have the ability to remove value from the majority of the gift cards if fraud or other issues warrant it.

Along with the sale of gift cards, Company A is planning to sell proprietary software licenses to nonprofit organizations in order to help them manage their gift card programs. Company A does not anticipate having employees or representatives working in Wisconsin when the business commences operations in Wisconsin because all contact will be through the Internet or phone. However, in the future Company A may send employees or representatives into Wisconsin to recruit new gift card vendors.

Finally, the only other anticipated income Company A may receive is interest on investment accounts.

Questions Presented:

1. Will Company A have nexus for Wisconsin corporate franchise/income tax purposes based strictly on the gift card resales?
2. Does the answer to question number one change if Company A sends employees or representatives into Wisconsin to meet with management of possible new gift card vendors?
3. Does the answer to question number one change if Company A licenses its software to nonprofit organizations located in Wisconsin?
4. What is Company A selling when it resells gift cards to nonprofit organizations in Wisconsin?
5. Is the revenue received from the resale of gift cards considered apportionable income to Wisconsin?
6. How are the gift card resales, interest earned on investment accounts, and software license revenue accounted for in the Wisconsin apportionment factor?

Answers and Analysis:

- 1. Will Company A have nexus for Wisconsin corporate franchise/income tax purposes strictly based on the gift card resales?**

Company A will have nexus for Wisconsin corporate franchise/income tax purposes. Section 71.23(1) and (2), Wis. Stats. (2011-12), imposes an income or franchise tax on corporations that, among other criteria, own property in Wisconsin, are doing business in Wisconsin, or derive income from sources or activities in Wisconsin. Section Tax 2.82(1), Wis. Adm. Code (July 2012 Register), interprets sec. 71.23, Wis. Stats., and provides a non-exhaustive list of activities that would create nexus for Company A. The statute requires every corporation incorporated under Wisconsin laws and every licensed foreign corporation to file a corporate franchise or income tax return regardless of whether or not business was transacted. An unlicensed foreign corporation is subject to Wisconsin franchise or income taxes only if it participates in nexus creating activities in sec. Tax 2.82(4) Wis. Adm. Code.

Section Tax 2.82(4)(b), Wis. Adm. Code, provides that if a corporation has any of the activities that are included in the definition of doing business in this state under sec. 71.22(1r), Wis. Stats., and not prohibited by P.L. 86-272, the corporation has nexus with Wisconsin. Section 71.22(1r), Wis. Stats., provides that doing business in Wisconsin includes, among other things, issuing credit, debit, or travel and entertainment cards to customers in Wisconsin, regularly selling products or services of any kind or nature to customers in Wisconsin that receive the product or service in Wisconsin, regularly soliciting business from potential customers in Wisconsin, and regularly engaging in transactions with customers in Wisconsin that involve intangible property and result in receipts flowing to the taxpayer from within Wisconsin.

Company A has nexus with Wisconsin based on the following: regularly reselling gift cards to nonprofit organizations located in Wisconsin that receive the benefit in Wisconsin, regularly soliciting business from potential customers in Wisconsin, and regularly engaging in transactions with nonprofit organizations in Wisconsin that involve intangible property with the receipts flowing to Company A from within Wisconsin.

2. Does the answer to question number one change if Company A sends employees or representatives into Wisconsin to meet with management of possible new gift card vendors?

The answer to question number one does not change if Company A sends employees or representatives into Wisconsin to meet with the management of possible new gift card vendors; rather it provides further evidence of nexus with Wisconsin. As explained in the answer to question number one, nexus is already established with Wisconsin by virtue of Company A regularly reselling products in Wisconsin and soliciting business from potential customers in Wisconsin. By sending employees or representatives into Wisconsin to meet with the management of possible new gift card vendors, additional nexus criteria consisting of regularly soliciting business from potential customers in Wisconsin could be established per sec. Tax 2.82(4)(b)3., Wis. Adm. Code (July 2012 Register).

3. Does the answer to question number one change if Company A licenses its software to nonprofit organizations located in Wisconsin?

The answer to question number one does not change if Company A licenses its software to nonprofit organizations located in Wisconsin; rather it provides further evidence that nexus is established in Wisconsin. Section Tax 2.82(4)(a)9., Wis. Adm. Code (July 2012 Register), provides that nexus is established in Wisconsin by virtue of licensing intangible rights for use in Wisconsin. Since Company A would be licensing its software to customers (nonprofit organizations) for use in Wisconsin, the nexus requirements of sec. Tax 2.82(4)(a)9., Wis. Adm. Code, would be met.

4. What is Company A selling when it resells gift cards to nonprofit organizations?

The classification of the gift cards is important because it determines if the resales result in apportionable income and whether or not they are included in the apportionment factor for Wisconsin corporate franchise/income tax purposes. For purpose of this ruling, Company A is reselling gift cards in two different forms: electronic and traditional paper/plastic form.

Section 71.25(9), Wis. Stats. (2011-12), provides the method of determining the sales apportionment factor for corporations that are engaged in business both in and outside of Wisconsin. The determination of how sales are apportioned to Wisconsin consists of the following categories: tangible personal property, computer software, services, royalties/licensing of intangible property, and sales of intangible property.

Under the facts presented, Company A is reselling intangible property when it resells its gift cards to the nonprofit organizations, regardless if the gift card is in tangible or electronic form. The gift cards are considered sales of intangible property and are Wisconsin sales if the purchaser uses the intangible property in Wisconsin, the purchaser is billed for the purchase in Wisconsin, or the purchaser has its commercial domicile in this state. Section Tax 2.39(2)(cm), Wis. Adm. Code (July 2012 Register), defines intangible property to include [emphasis added] patents, copyrights, trademarks, trade names, service names, franchises, licenses, plans, specifications, blueprints, processes, techniques, formulas, designs, layouts, patterns, drawings, manuals, technical know-how, contracts, and customer lists. Intangible property does not include stocks, bonds, certificates of deposit, or other securities.

The intangible property listed in s. Tax 2.39(2)(cm), Wis. Adm. Code, is not an all-inclusive list; rather it is intended to provide a list of the more common forms of intangible property. By use of the word "includes", the definition is intended to encompass other intangibles not specifically listed. As a result, the gift cards would fall into the intangible property category since the gift cards, whether in tangible or electronic form, simply convey a monetary right to purchase goods or services at a future date. It is the denomination of the gift card that is of value, not the card itself.

Although it was suggested that the gift card resales be classified as securities for Wisconsin corporate franchise/income tax purposes, they are best classified as intangible property as explained above. Chapter 71 – Income and Franchise Taxes for State and Local Revenues, of the Wisconsin Statutes does not define securities, nor does Chapter Tax 2 of the Wisconsin Administrative Code. However, Chapter 551 - Wisconsin Uniform Securities Law, defines a security as a note; stock; treasury stock; security future; bond; debenture; evidence of indebtedness; limited partnership interest; life settlement investment or similar agreement; certificate of interest or participation in a profit-sharing agreement; collateral trust certificate; preorganization certificate or subscription; transferable share; investment contract; voting trust certificate; certificate of deposit for a security; fractional undivided interest in oil, gas, or other mineral rights; put, call, straddle, option, or privilege on a security, certificate of deposit, or group or index of securities, including an interest therein or based on the value thereof; put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency; or, in general, an interest or instrument commonly known as a "security"; or a certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. [Section 551.102(28), Wis. Stats. (2011-12)].

Unlike a gift card, a security represents a financial or investment instrument issued by a company or government agency that represents an ownership interest and provides evidence of a debt, a right to share in earnings and profits of the issuer, or the right to a distribution of property. As such, gift cards are not classified as securities for Wisconsin corporate franchise/income tax purposes.

Finally, regarding the concern over possible distortion by including gift card sales in the apportionment factor, while distortion of the sales apportionment factor can occur in certain circumstances, the analysis and arguments of distortion cannot be argued without actual facts and evidence to show that distortion of the sales factor is present. Should there be an apportionment factor concern once the facts are known, sec. 71.25(12), Wis. Stats., and sec. Tax 2.45, Wis. Adm. Code, give the department some discretion in ascertaining the income properly assignable to Wisconsin.

5. Is the revenue received from the resale of gift cards considered apportionable income to Wisconsin?

Section 71.25(5)(a), Wis. Stats. (2011-12), provides that...corporations engaged in business both within and without this state are subject to apportionment. Income gain or loss the sources listed in this paragraph is presumed apportionable as unitary or operational income or other income that has a taxable presence in this state. Apportionable income includes all income or loss of corporations, other than nonapportionable income as specified in par. (b), including, but not limited to, income gain or loss from the following sources: sale of inventory...

Consistent with your analysis, the revenue received from the sale of gift cards is apportionable income taxable to Wisconsin. Pursuant to sec. 71.25(5)(a)1., Wis. Stats., apportionable income includes all income or loss of corporations, other than nonapportionable income, including, but not limited to income, gain or loss from the sale of inventory. Under the facts presented, Company A would be in the business of buying and reselling gift cards and this activity would be considered the sale of inventory under sec. 71.25(9)(e)1., Wis. Stats.

6. How are the gift card resales, interest earned on investment accounts, and software license revenue accounted for in the Wisconsin apportionment factor?

Gift card resales:

Section 71.25(9)(dk), Wis. Stats. (2011-12), provides that sales of intangible property, excluding securities, are sales in this state if any of the following applies:

1. The purchaser uses the intangible property in the regular course of business operations in this state or for personal use in this state. If the purchaser uses the intangible property in more than one state, the sales shall be divided between those states having jurisdiction to impose an income tax on the taxpayer in proportion to the use of the intangible property in those states.

2. The purchaser is billed for the purchase of the intangible property at a location in this state.

3. The purchaser of the intangible property has its commercial domicile in this state.

The resale of gift cards to nonprofit organizations in Wisconsin by Company A would be included in the sales factor for Wisconsin apportionment purposes. Under the facts presented, Company A could potentially meet any of the requirements under sec. 71.25(9)(dk), Wis. Stats. For example, although not mentioned in the facts of the private letter ruling request, it is reasonable to assume that the Wisconsin nonprofit organizations would be billed for the purchase of the gift cards at a location in Wisconsin. Similarly, it is also possible that Wisconsin nonprofit organizations have their commercial domicile in Wisconsin.

Interest earned on investment accounts:

Section 71.25(9)(f), Wis. Stats., provides that the following items are not included in “sales” in this subsection:

1. Gross receipts and gain or loss from the sale of tangible business assets, except those under par. (e) 1., 2. and 3.
2. Gross receipts and gain or loss from the sale of nonbusiness real or tangible personal property.
3. Gross rents and rental income or loss from real property or tangible personal property if that real property or tangible personal property is not used in the production of business income.
4. Royalties from nonbusiness real property or nonbusiness tangible personal property.
5. Proceeds and gain or loss from the redemption of securities.
6. **Interest**, except interest under par. (e) 7., and dividends.
7. Gross receipts and gain or loss from the sale of intangible assets, except those under par. (e) 1.
8. Dividends deductible by corporations in determining net income.
9. Gross receipts and gain or loss from the sale of securities.
10. Proceeds and gain or loss from the sale of receivables.
11. Refunds, rebates and recoveries of amounts previously expended or deducted.
12. Other items not includable in apportionable income.
13. Foreign exchange gain or loss.
14. Royalties and income from passive investments in the property under sub. (5) (a) 21.

Although we do not have enough information to make a definitive determination, based on the limited facts available, it is possible the interest that Company A receives from its investment accounts does not fall within the definition of a sale and is not included in the Wisconsin sales factor per sec. 71.25(9)(f)6., Wis. Stats.

Software license revenue:

Section 71.25(9)(df), Wis. Stats., provides that the gross receipts from the use of computer software are in this state if the purchaser or licensee uses the computer software at a location in this state. Computer software is used at a location in this state if the purchaser or licensee uses the computer software in the regular course of business operations in this state, for personal use in this state, or if the purchaser or licensee is an individual whose domicile is in this state. If the purchaser or licensee uses the computer software in more than one state, the gross receipts shall be divided among those states having jurisdiction to impose an income tax on the taxpayer in proportion to the use of the computer software in those states. To determine computer software use in this state, the department may consider the number of users in each state where the computer software is used, the number of site licenses or workstations in this state, and any other factors that reflect the use of computer software in this state.

The software licensing revenue that Company A receives from the Wisconsin nonprofit organizations to help manage their gift card program is included in the Wisconsin apportionment sales factor because the purchaser/licensee will be using the software at a location in Wisconsin.