WISCONSIN TAX BULLETIN

Published by:

Wisconsin Department of Revenue
Income, Sales, Inheritance and
Excise Tax Division
P.O. Box 8910
Madison, Wisconsin 53708

OCTOBER 1981
NUMBER 25

CORPORATIONS MAY HAVE TO INCREASE REMAINING 1981 DECLARATION PAYMENTS

Corporations which have been making declaration payments for the 1981 taxable year in amounts computed to meet certain exceptions which avoid an addition to the tax penalty for underpayment of estimated tax may have to increase their remaining installment payments. A recent change in Wisconsin law establishes a new minimum payment requirement for purposes of claiming exception 1 or 2.

Exception 1 (s. 71.22(10)(a)) provides that the addition to the tax penalty will not be due if installment payments for 1981 equal or exceed the tax shown on the 1980 return. Exception 2 (s. 71.22(10)(b)) provides no penalty is due if installment payments for 1981 equal or exceed an amount determined using the tax rates applicable to 1981, but otherwise on the basis of the facts and income shown on the 1980 return and the law applicable for 1980.

IN THIS ISSUE

	PAGE
Corporations May Have To Increase Remaining 1981 Declaration Payments	1
Federal Tax Laws Enacted In 1981 (Except Depreciation Changes) Do Not Apply For Wisconsin	2
New 1981 Income Tax Brackets	2
1982 Declaration Of Estimated Tax Procedures Change For Individuals	2
New ISI & E Division Rules And Rule Amendments In Process	2
Bulk Orders Of Tax Forms	3
Reminder! Employers Must Submit Copies Of Certain Employe Withholding Exemption Certificates To The Department of Revenue	3
Report On Litigation	3
Tax Releases	10
Tax Report	13
Index To Wis. Tax Bulletins, Issues 1 To 25	15

The new law establishes a minimum installment payment requirement to claim exception 1 or 2. To qualify for exception 1 or 2, a corporation's installment payments of 1981 taxes must be the larger of (a) the amounts required under exception 1 or 2, or (b) 60% of the actual tax liability for 1981. The 60% must be prorated among the appropriate installment periods according to the schedule which appears below.

For example, assuming a corporation which reports on the calendar year basis computes amounts under the 60% requirement that are larger than the amounts required under exceptions 1 or 2, it would be required to pay 15% of its 1981 net tax liability by September 15, 1981, the due date of the third installment, and 60% of its 1981 net tax liability by January 15, 1982, the due date of the fourth installment.

A special notice alerting corporations to this change in law was included with declaration installment payment notices which the department mailed in August and September and it will also be included in notices mailed this month.

Percentage of 1981 Tax to be Paid by
Installment Due Dates Under 60% Payment Requirement

Month in Which Tax Year Ends		Installment Number 1	2	3	4
July, 1981	- October, 1981	0	0	0	15%
November, 1981		0	0	15%	30%
December, 1981	- January, 1982	0	0	15%	60%
February, 1982		0	15%	30%	60%
March, 1982	- April, 1982	0	15%	37.5%	60%
May, 1982	- June, 1982	15%	30%	45%	60%

FEDERAL TAX LAWS ENACTED IN 1981 (EXCEPT DEPRECIATION CHANGES) DO NOT APPLY FOR WISCONSIN

With the exception of the new depreciation provisions, federal tax laws enacted during 1981 may not be used in determining Wisconsin taxable income for 1981. This will result in certain income and deduction items being different on 1981 Wisconsin and federal income tax returns. As in past years, Wisconsin Schedule I should be used to adjust for these differences.

The following is a listing of changes which were enacted as part of the Economic Recovery Tax Act of 1981 and are effective for federal purposes for part or all of the 1981 taxable year. These changes will not apply for Wisconsin for 1981.

- -Residence replacement period extended for deferring gains (Act Sec. 122a)
- -Exclusion for gain on sale of residence by person over 55 increased to $125,000 (Act Sec. 123)
- -Itemized deduction for adoption expenses (Act Sec. 125)
- -7% imputed interest on installment sales of real estate between related parties (Act Sec. 126)
- -Rules relating to state legislator's away from home travel expenses (Act Sec. 127)
- -Incentive stock option provisions (Act Sec. 251)
- -Limitation for amortizing low-income housing rehabilitation expenditures increased (Act Sec. 264)
- -Limitation on deduction of non-cash gifts by employers to employes (Act Sec. 265)
- -Exclusion of savings certificate interest (Act Sec. 301)
- -Rollover into IRA of redemption proceeds from U.S. bonds distributed under bond purchase plans (Act Sec. 313)
- -Removal of ban on HR10 plan contributions after termination of prior plan (Act Sec. 314(a))
- -Treatment of gains and losses from regulated futures contracts (Act Sections 501, 503 and 509)
- -Capitalization of interest relating to commodity investments (Act Sec. 502)
- -Treatment of government bonds issued at discount as a capital asset (Act Sec. 505)
- -Identification of dealer held securities as capital assets (Act Sec. 506)
- -Capital gain and loss treatment for proceeds from dispositions which are not a sale (Act Sec. 507)
- -Capital gain treatment for gain from sale of stock in a foreign investment company (Act Sec. 832)

The 1981 Wisconsin Schedule I will contain more detailed information about these new federal tax laws which apply for federal purposes for 1981 but not for Wisconsin. Schedule I will be available at department offices in late December, 1981.

Wisconsin law for 1981 permits individuals to use the new federal cost recovery (depreciation) provisions enacted as part of the Economic Recovery Tax Act of 1981.

NEW 1981 INCOME TAX BRACKETS

Section 71.09(2) of the Wisconsin Statutes requires that the income tax brackets for individuals be indexed (adjusted) each year to reflect the percentage change in the consumer price index from June of the preceding year to June of the current year. The specific index to be used is the U.S. consumer price index for all urban consumers, U.S. city average. For 1981 the indexing rate is 9.6%. The tax rates have not changed for 1981. The new brackets and the rates which apply to each bracket for 1981 are as follows:

Income Brackets	Tax Rate
0 - 3,600	3.4%
3,600 - 7,200	5.2
7,200 - 10,900	7.0
10,900 - 14,500	8.2
14,500 - 18,100	8.7
18,100 - 24,100	9.1
24,100 - 48,200	9.5
48,200 and over	10.0

As indicated in another article in this issue, administrative rule Tax 2.081 is being revised to reflect the new tax brackets.

1982 DECLARATION OF ESTIMATED TAX PROCEDURES CHANGE FOR INDIVIDUALS

Effective for the taxable year 1982, the department will be changing the manner in which declaration forms are distributed to individuals. Under the new system, individuals will receive only a single mailing of declaration forms each year. The mailing will be made in January and it will provide all declaration forms (including 4 pre-addressed payment vouchers) and instructions needed for the taxable year.

In prior years, individuals received two mailings of declaration forms. First, they were mailed the Form 1-ES (Wisconsin Declaration of Estimated Income Tax) which included payment voucher number 1. After payment voucher 1 was filed (and before the next installment due date) the department mailed the remaining payment vouchers needed for the year.

Declaration forms for 1982 will automatically be mailed to all individuals who filed a declaration for 1981. Other persons needing declaration forms should contact the nearest Department of Revenue office after January 15, 1982.

NEW ISI & E DIVISION RULES AND RULE AMENDMENTS IN PROCESS

Listed below, under parts A, B and C, are proposed new administrative rules and amendments to existing rules that are currently in the rule adoption process. The rules are shown at their stage in the process as of September 15, 1981. Part D lists new rules and amendments which have been adopted in 1981.

A. Rules At Legislative Council Rules Clearinghouse

2.081(3)	Indexed income tax rate schedule for taxable year 1981 - **new rule**
2.39	Apportionment method - **amendment**
2.40	Nonapportionable income - **repealed and recreated**
11.53	Temporary events - **new rule**
11.71	Automatic data processing - **new rule**

B. Rules At Legislative Standing Committees

11.56 Printing industry
-new rule

C. Rules Approved By Legislature But Not Yet Effective

11.12 Farming, agriculture, horticulture and floriculture
- amendment

11.16 Common or contract carriers
- amendment

11.40 Exemption of machines and processing equipment
- amendment

D. Rules Adopted In 1981

1.11 Requirements for examination of returns (8/1/81)
- amendment

2.081 Indexed income tax rate schedule (5/1/81)
- new rule

2.31 Taxation of personal services income of nonresident professional athletes (1/1/81)
- new rule

2.505 Apportionment of net business income of interstate professional sports clubs (1/1/81)
- new rule

2.955 Credit for income taxes paid to other states (2/1/81)
- amendment

4.53 Certificate of authorization (1/1/81)
- new rule

8.87 Intoxicating liquor tied-house prohibitions (6/1/81)
- new rule

9.08 Cigarette sales to and by Indians (8/1/81)
- new rule

11.83 Motor vehicles (7/1/81)
- amendment

11.88 Mobile homes (1/1/81)
- new rule

11.925 Sales and use tax security deposits (8/1/81)
- new rule

BULKS ORDERS OF TAX FORMS

In early October, the department will mail out the order blank (Form P-744) which practitioners and other persons or organizations should use to request bulk orders of 1981 Wisconsin income tax forms. As in past years, professional tax preparers are subject to a handling charge on orders which they submit. No charge is made for forms which will be used for distribution to the general public (for example, in a bank, library or post office).

In view of increasing paper and printing costs, every person ordering forms is urged to determine their needs as accurately as possible. Orders should be placed as early as possible after you receive the order blank. By receiving the orders early, the department can better identify possible shortages of specific forms.

This year's mailing list for bulk order blanks contains the names of all persons and organizations who placed orders for 1980 forms. If you are not on this mailing list and do not receive a Form P-744, you may request the bulk order blank by contacting any department office or by writing to the Wisconsin Department of Revenue, Central Services Section, Post Office Box 8903, Madison, WI 53708.

REMINDER! EMPLOYERS MUST SUBMIT COPIES OF CERTAIN EMPLOYE WITHHOLDING EXEMPTION CERTIFICATES TO THE DEPARTMENT

Wisconsin law requires employers to submit copies of employe withholding exemption certificates to the department whenever they are required to provide such information to the Internal Revenue Service (IRS). The copies must be submitted to the department within 15 days after they are filed with IRS.

For both federal and Wisconsin purposes employers are required to submit copies of any employe's withholding exemption certificate if: 1) the number of exemptions claimed is 10 or more, or 2) the employe is claiming complete exemption from withholding and he or she earns more than $200 per week.

REPORT ON LITIGATION

(This portion of the WTB summarizes recent significant Tax Appeals Commission 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:

Income and Franchise Taxes

Hydro-Flo Products, Inc. vs. Wisconsin Department of Revenue

Sales/Use Taxes

Wisconsin Department of Revenue vs. H. Derksen & Sons Co., Inc.

Jay Advertising, Inc. vs. Wisconsin Department of Revenue

Leicht Transfer and Storage Company, Inc. vs. Wisconsin Department of Revenue

North-West Services Corporation and North-West Telephone Company vs. Wisconsin Department of Revenue

Wisconsin Department of Revenue vs. J.C. Penney Company, Inc.

Delmore and Lawrence Peterson (d/b/a Peterson Brothers) vs. Wisconsin Department of Revenue

Carl Schroeder, Jr. vs. Wisconsin Department of Revenue

Shopper Advertiser, Inc., d/b/a Shopper Advertiser - Walworth County, and Shopping News, Inc., d/b/a Greater Beloit Shopping News vs. Wisconsin Department of Revenue

Excise Taxes

State of Wisconsin vs. Black Steer Steak House, Inc.

Withholding

William A. Mitchell vs. Secretary of Revenue, Mark E. Musolf, and Chief, Central Compliance Section, W. H. Wescott; and Automation Engineering Company, Inc., AA Electric Division, 1220 Highway 143, Cedarburg, WI 53012, General Manager, Neil Stein

INCOME AND FRANCHISE TAXES

Hydro-Flo Products, Inc. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, July 8, 1981). Hydro-Flo Prod-

ucts, Inc. was a Wisconsin corporation subject to the income and franchise tax provisions of Chapter 71 of the Wisconsin Statutes. For the year 1978, the department disallowed certain travel expenses of wives of employes of the corporation and issued an assessment of additional franchise taxes in the amount of $322.49.

Taxpayer deducted as business expenses corporation expenses paid for the attendance of employes' wives at business conventions such as Mechanical Contractors Association of America and European expenses as legitimate business expenses of the corporation. Frank A. Meier, president of Hydro-Flo Products, Inc., testified that the type of business activity the corporation engages in requires the presence of the wives of the corporate employes and that it enhances customer sales by having the wives attend these conventions, even though the wives are not employed, stockholders or corporate officers of the corporation.

The taxpayer engages in the business of selling and distributing building materials to the mechanical contracting industry and has developed a policy that the presence of the employes' wives at the meetings are necessary to the corporation business in order to retain its image with the contractors. The department contended that the travel expenses taken by the taxpayer for the expenses of the wives of employes are not ordinary and necessary business expenses. The activities that the employes' wives engaged in regarding the out-of-town expenses were of a social nature.

The Commission held that the burden of proof is on the taxpayer to show in what respects the travel expenses incurred by the employes' wives are deductible as ordinary and necessary business expenses and in what respects department's assessment was in error. The corporation failed to meet its burden of proof.

The taxpayer has not appealed this decision.

SALES/USE TAX

Wisconsin Department of Revenue vs. H. Derksen & Sons Co., Inc. (Circuit Court of Dane County, May 29, 1981). In September 1976, H. Derksen & Sons Co., Inc., (taxpayer) purchased from Winchester Vending Corp. several cigarette machines, candy machines and a dollar-changing machine. Prior to and at the time of the sale, Winchester held a seller's permit, pursuant to s. 77.52, Wis. Stats. Taxpayer purchased the Winchester name, and Winchester did not continue to operate after the sale of its assets to taxpayer.

The department assessed sales tax against the taxpayer as a successor to Winchester and the assessment consisted of two elements: (1) sales tax of $734.66 for sales by Winchester prior to the sale of assets by Winchester to the taxpayer; and (2) sales tax of $1,453.66 assessed on the sale by Winchester of its assets to the taxpayer. The taxpayer filed an appeal with the Tax Appeals Commission based on the two assessments.

Based on the foregoing facts, the successor Commission made three conclusions. First, the Commission ruled that the taxpayer "is a successor or assign of Winchester within the meaning of s. 77.52(18), Wis. Stats." Second, the Commission recognized the taxpayer's responsibility to withold from the purchase price an amount sufficient to cover Winchester's liability for the $734.66 tax on sales by Winchester prior to September, 1976. Taxpayer was held liable for the payment of that amount because it failed to withhold that amount from the purchase price. Third, the Commission concluded that the taxpayer was not liable as a successor for the $1,453.66 due from Winchester's sale of its assets to the taxpayer because Winchester could have surrendered its seller's permit at any time on the day of sale. This third conclusion of the Commission was appealed by the department to Circuit Court.

The Circuit Court held in favor of the department. The Court held that the plain, unambiguous language of the statutes compels the conclusion that the taxpayer is liable for the sales tax imposed upon the sale of Winchester's assets, as well as for the sales tax which was owed before the sale was made. Winchester held a valid seller's permit at the time it sold its assets to taxpayer. Section Tax 11.13, Wis. Adm. Code, provides that the sale of business assets consisting of personal property by a person who holds a seller's permit at the time of the sale is subject to the sales tax. Winchester could have avoided this tax liability by surrendering its permit prior to the sale (pursuant to section Tax 11.13(2), Wis. Adm. Code); however, it did not. Wisconsin case law holds that the failure to so surrender a seller's permit bars completely the "occasional sale" sales tax exemption (*Ramrod, Inc. v. Dept. of Revenue,* 64 Wis. 2d 499, 219 N.W. 2d 604 (1974); *Midcontinent Broadcasting Co. v. Dept. of Revenue,* 98 Wis. 2d 379, 284 N.W. 2d 112 (1980)). Accordingly, at the time the sale of assets was made to the taxpayer, Winchester became liable for the sales tax on that sale. Section 77.52(18), Wis. Stats., provides that when any retailer who is liable for any amount of sales tax sells out its business, as Winchester did, the successor or assign shall withhold a sufficient amount of the purchase price to cover such amount. Subsection (a) provides that if the purchaser fails to withhold the amount of the sales tax due from the purchase price, the purchaser becomes personally liable for the payment of that amount should the seller default in its payment. The taxpayer was not completely powerless to avoid liability for this tax since the remedy of withholding this amount from the purchase price was available to him.

The taxpayer has not appealed this decision.

Jay Advertising, Inc. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, July 17, 1981). Jay Advertising, Inc. is in the creative advertising business, involved in creating, producing and selling items that advertise and promote the sale of a specific product, such as Schlitz beer. During the period of June 1, 1975 to December 31, 1978, the taxpayer created, produced and sold the following items of tangible personal property: stackers, international road signs, ethnic plaques, nature box stackers, perpetual calendars, wall clocks and beer tab knobs.

All of the items above are three-dimensional, displayed the name and product of the customer (Schlitz beer), and were made mainly from plastic material. The methods used by the taxpayer in producing the above products included silk screening, vacuum forming, mold-

ing, vapor plating, injection molding, hot stamping, zinc die casting, some printing and similar type processes. Some of the items listed above included the use of electric motors, batteries, feet, poles, instruction sheets and letter fronts. Custom tooling was billed to Schlitz Brewery as a part of the costs associated with the production of 30,000 beer tab knobs delivered under invoice #1050.

The items listed above were sold by Jay Advertising, Inc., after it received from the customer an exemption certificate claiming the printed material exemption contained in s. 77.54 (25), Wis. Stats. After the taxpayer sold these products they were stored in various warehouses in Wisconsin for subsequent shipment and delivery outside the State of Wisconsin. In May of 1977, a tax representative of the Wisconsin Department of Revenue, spent approximately six hours at the offices of the taxpayer's accountant examining all of the taxpayer's sales invoices covering the years 1975-1977. His stated purpose was to attempt to reconcile receipts reported on the taxpayer's filed sales tax returns to those reflected in its sales journals. No written determination of any kind was made by the department as the result of said effort; instead, said matter was referred to the field audit section of the department, which ultimately resulted in the field audit under review.

The issues involved are as follows:

(1) Whether the advertising items in question are exempt from sales and use tax as "printed material" as defined in s. 77.54 (25), Wis. Stats.

(2) Whether the taxpayer's acceptance of the printed material exemption certificate on the sale of the items in dispute meets the "good faith" requirements of s. 77.52 (14), Wis. Stats.

(3) Whether the department made a field audit determination in May of 1977 so as to preclude a further audit and assessment of the period involved per the provisions of s. 77.59 (2), Wis. Stats.

(4) Whether the department properly included in its measure of tax shipping or transportation charges incurred by the taxpayer.

The Commission held that the items in dispute do not constitute "printed material" within the intent and meaning s. 77.54 (25), Wis. Stats., and thus are not exempt from sales and use tax under that exemption section. Jay Advertising, Inc., could not accept the exemption certificates given in good faith as required in s. 77.52 (14), Wis. Stats., as the items purchased were not "printed material".

The Commission also held that the department did not make a "determination" pertaining to the taxpayer in May of 1977, and thus no period of the audit under review is closed per the provisions of s. 77.59 (2), Wis. Stats. (*Department of Revenue v. Moebius Printing Co.*, 89 Wis. 2d 610 (1979)). Assessments made by the department are presumed to be correct with the person challenging them having the burden to show in what respect they are in error. The taxpayer did not submit sufficient credible evidence to show that the department's imposition of a sales and use tax on its shipping/transportation charges was in error.

The taxpayer has appealed this decision.

Leicht Transfer and Storage Company, Inc. vs. Wisconsin Department of Revenue (Court of Appeals, District IV, May 26, 1981). The department assessed Leicht Transfer and Storage Company, Inc. for sales and use taxes for the period January 1, 1970 through March 31, 1975, arising out of the taxpayer's purchase and use of corrugated boxes and van equipment and supplies. The van equipment and supplies consisted of furniture pads, covers, packing supplies, tape, straps, pianoboards, ladders and walkboards. The Tax Appeals Commission concluded that the purchases and uses were not tax exempt. The Circuit Court affirmed the Commission as to the boxes but reversed as to the van equipment and supplies. The taxpayer and the department appealed and cross-appealed, respectively, the Circuit Court's decision.

The first issue involved the department's assessment of sales and use tax arising from the purchase and use of corrugated boxes. Section 77.54 (6) (b), Wis. Stats., exempts the following from the sales and use taxes:

> Containers, labels, sacks, cans, boxes, drums, bags or other packaging and shipping materials for use in packing, packaging, or shipping tangible personal property, provided such items are used by the purchaser to transfer merchandise to his customers.

The boxes are containers used by the purchaser to pack or ship tangible personal property consisting of household goods. The issue is whether the taxpayer as the purchaser uses the boxes "to transfer merchandise to his customers", within the meaning of s. 77.54 (6) (b), Wis. Stats.

The Commission concluded that s. 77.54 (6) (b), Wis. Stats., 1975, is inapplicable because the boxes are not used to transport the taxpayer's merchandise to its customers. *Webster's Third New International Dictionary* (unabr. ed. 1976) defines "merchandise" as "commodities or goods that are bought and sold in business," and defines "customer" as "one that purchases some commodity or service". Accordingly, the department contended that "customer" in s. 77.54 (6) (b), Wis. Stats., means the purchaser of merchandise and "transfer" as used in the statute refers to a transaction in the nature of a sale.

The Court of Appeals held that a strict but reasonable construction of the phrase "to transfer merchandise to his customers" requires that doubts as to the meaning of "merchandise" be resolved by defining merchandise as something bought and sold. "Customer" is therefore used in the sense of a purchaser and "transfer" refers to facilitation of a sale to the customer-purchaser.

The taxpayer used the boxes to transport household goods to its customers consisting of persons changing their residences, but did not transport merchandise sold to customers. Accordingly, the Court of Appeals affirmed the decision of the Circuit Court, that the purchase and use by the taxpayer of the boxes involved is not exempt under s. 77.54 (6) (b), Wis. Stats.

The second issue was whether the purchase and use of miscellaneous van equipment and supplies are exempt from Wisconsin sales and use

tax under s. 77.54 (5) (b), Wis. Stats., which exempts the following from sales and use taxes:

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

The undisputed evidence disclosed that pads, covers and straps protect or secure household items during transit and packing supplies secure smaller items packed in taped boxes in transit. Pianoboards were used to transport pianos. Ladders were used to pack and unpack the van, permitting the taxpayer to use its full interior and walkboards were used for easy access to the van during loading and unloading. The Court of Appeals indicated that the pads, covers, straps, pianoboards, ladders and walkboards come within the dictionary definition of accessories. The packing supplies and tape fit the dictionary definition of supplies. The Court of Appeals held that the taxpayer's equipment and supplies accompany the vans in transit and are sufficiently identified with trucks used exclusively as common or contract carriers to be exempt under s. 77.54 (5) (b), Wis. Stats. The Court did not decide whether accessories which do not accompany a truck in transit can be exempt under s. 77.54 (5) (b), Wis. Stats., 1975. It concluded only that the department's attempted limitation of the s. 77.54 (5) (b), Wis. Stats., exemption is unreasonable as to the taxpayer's van equipment and supplies.

Neither the department nor the taxpayer have appealed this decision.

North-West Services Corporation and North-West Telephone Company vs. Wisconsin Department of Revenue (Wisconsin Circuit Court of Dane County, May 22, 1981)

The issue before the Court was whether the telephone company was leasing tangible personal property or providing a telephone service when it entered into lease agreements with customers using its private branch exchange (PBX) equipment. Its purchases of equipment may be made without tax for resale if it is leasing the PBX's, while such purchases of equipment are taxable if the equipment is used in providing a telephone service. The Tax Appeals Commission's decision of May 22, 1980, which was summarized in Wisconsin Tax Bulletin #20, held that such purchases are exempt purchases for resale, and the Circuit Court affirmed that decision.

North-West Telephone Company offers the lease of PBX's to a customer in competition with others, not public utilities, who lease or sell such equipment. Such competitors are not in the business of furnishing utility service. North-West Telephone Company is a regulated public utility and does furnish what is described as telephone service. Customers are not required to obtain their telephone instruments or PBX's from the telephone company, but may connect instruments or PBX's to the telephone lines without the permission of the telephone company.

Because the telephone company is furnishing a telephone connection which permits use of the company's lines, it does furnish a service. It may, and often does, also furnish the customer instruments which the customer may reject for its own. The telephone company collected and reported sales taxes on these leases to its customers.

The Tax Appeals Commission took the position that the factual situation involved in the leases of PBX's was not clearly covered by s. 77.52 (2) (a) 4, Wis. Stats., and that the section was ambiguous. The ambiguity was decided in favor of the telephone company. The Court indicated that this is a situation where the utility's competitors who stand as purveyors of PBX's cannot be said to be furnishing any telephone service.

The Court also indicated that the statutes contemplate that within its territory a telephone company has a monopoly on furnishing telephone service in return for which the utility subjects itself to a multitude of regulations. Where an area of activity is opened to competition, as in the case of sales and leases of PBX equipment, the sale or leasing can be said to be no longer a service, but a sale or lease of tangible property. Because these purchases of PBX equipment are for sale or lease as tangible personal property, the Court ruled such purchases are not subject to the 4% tax.

The department has not appealed this decision.

Wisconsin Department of Revenue vs. J.C. Penney Company, Inc. (Circuit Court of Dane County, July 30, 1981). This case included issues involving (1) catalogs, (2) advertising supplements and (3) merchandising sales.

1. Catalogs The Department of Revenue assessed a use tax (s. 77.53, Wis. Stats.) upon the transaction involved in the distribution of the taxpayer's catalogs. The taxpayer operates retail stores in Wisconsin and elsewhere and issues catalogs of its merchandise in the conduct of a mail order business. The catalogs are printed and assembled in Indiana by a printer under contract with the taxpayer. The addresses and names of recipients are furnished by the taxpayer. The catalog is delivered directly to the addressee in Wisconsin by mail or contract carrier. The addressee pays nothing for the catalog. The catalogs were sent to anyone requesting one as well as being furnished without request to customers.

It was the position of the department "that the catalogs were stored, used, or otherwise consumed in Wisconsin by the taxpayer and were subject to the use tax under s. 77.53 (1), Wis Stats." The Circuit Court concluded that the Tax Appeals Commission was correct in determining that the distribution of the catalogs from Indiana to persons in Wisconsin was not subject to sales or use tax in Wisconsin and the Commission's conclusion should be affirmed.

2. Advertising Supplements The Tax Appeals Commission determined that newspaper supplements purchased by taxpayer and distributed with newspapers are exempt from sales and use taxes in accordance with s. 77.54 (15), Wis. Stats. The Circuit Court stated there was no real difference between the advertising supplement and a full page advertisement which may have news printed on the reverse and that advertising supplements are part of the newspaper in which they are distributed and are exempt from tax.

3. Merchandise Sales The department assessed a sales tax on sale of merchandise ordered by someone out of state from the catalog. In most cases the order was sent to the Milwaukee catalog center and from there sent to the addressee in Wisconsin. In some instances the order was filled by an out-of-state manufacturer and sent to the addressee from out of state. In most cases, however, the merchandise was sent from Milwaukee. In both cases the orders were received in Milwaukee.

The taxpayer collects a tax from an out-of-state orderer when the Wisconsin addressee has the same last name as the orderer. But taxpayer considers that, if the addressee's name is different from that of the orderer, the merchandise is considered as an untaxable gift. Just what compels the inference that there was a gift as the result of dissimilarity of names is not clear.

When an order is received in Milwaukee with payment and is accepted there and is delivered to the person or address directed by the orderer, a sale has occurred. Up to the time the order is received in Milwaukee there is nothing but an offer to purchase. The acceptance of the offer and the purchase price and the delivery of the goods to the order of the purchaser all takes place in Wisconsin and must therefore be considered a Wisconsin transaction and a sale within the definition of s. 77.51 (4), Wis. Stats.

The Tax Appeals Commission concluded that s. 77.52 (1), Wis. Stats., did not contemplate imposition of a sales tax on such merchandise. The Circuit Court stated this conclusion is wrong. The tax imposed by s. 77.52 (1), Wis. Stats., is on "the privilege of selling." The taxpayer has done just that. It has made a sale in Wisconsin for delivery in Wisconsin. Taxpayer exercised its privilege of selling in Wisconsin and completed the sale there. The sale is one clearly covered by the sales tax. The Court did not believe that the fact that the order originated in a foreign state is enough to exclude the sale from taxation. Assuming that the ultimate recipient was the object of the orderer's gift, the sale was between the orderer who paid for the merchandise and the taxpayer. The donee was not a party to the sale. The contracting parties were the person who made the order and the taxpayer which filled it.

The department has appealed this decision to the Court of Appeals.

Delmore and Lawrence Peterson (d/b/a Peterson Brothers) vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, June 12, 1981). Taxpayer was a partnership doing business in Wisconsin as Peterson Brothers. Delmore and Lawrence Peterson each owned a 50% interest in the partnership.

The department issued to Peterson Brothers an assessment of sales and use taxes and interest in the total amount of $1,676.10 dated July 7, 1978, with the explanation, in part, that "The common or contract carrier exemption from sales tax is nullified when the vehicle is used in a private haul operation. A motor vehicle inspection report shows that a private haul was made with this vehicle during the period or date shown above" (November 1977).

The principal business of the partnership was providing hauling or transportation services to business entities requiring these services. Besides the truck at issue, the partnership had 3 other trucks. The partnership had no employes of its own so its customers had to provide drivers for the trucking services. When a truck was used, the customer was commonly billed for both the use of the truck and the driver's salary and the portion of the amount paid to the taxpayer attributable to the driver's salary was returned to the customer. In April 1975, the Peterson Brothers partnership purchased a 1975 Mack truck in Wisconsin for $40,390 and did not pay sales tax on the truck, asserting that the transaction was exempt because the purchaser was a common or contract carrier and would use the vehicle exclusively as a carrier under authority number LC 38020.

Delmore and Lawrence Peterson were the sole and equal owners of Peterson Bros., Inc., a Wisconsin corporation whose business activities included excavating and selling sand and gravel. The Peterson Brothers partnership provided its hauling services to Peterson Bros., Inc., which constituted between 25% to 75% of the partnership's business in different years. When the corporation used the partnership's services, it provided a truck driver and paid the partnership for the use of the truck. There was no written lease agreement between the partnership and the corporation.

On November 9, 1977, the truck involved in this appeal received a citation for carrying an overweight load from an inspector employed by the Wisconsin Department of Transportation's Division of Motor Vehicles. The citation indicated that the haul consisted of rock salt, that the consigner was Domtar, Inc. of La-Crosse, Wisconsin, that the consignee was the taxpayer. At the hearing before the Commission, taxpayer provided written documents proving that on November 9, 1977, its truck was hauling rock salt sold by Domtar, Inc. to Peterson Bros., Inc., and not rock salt owned by the taxpayer.

Was taxpayer's purchase of the 1975 Mack truck exempt from the sales and use taxes under s. 77.54 (5) (b), Wis. Stats., on the basis that it was purchased by a common or contract carrier for exclusive use as a common or contract carrier? The Commission concluded that the hauling arrangements constituted a "lease" of tangible personal property under s. 77.52 (1), Wis. Stats. Taxpayer's purchase of the truck was not exempt under s. 77.54 (5) (b), Wis. Stats., exempting purchases of motor trucks by common or contract carriers for exclusive use in common or contract carriage. Taxpayer had no employes and did not fall under this sales and use tax exemption.

If taxpayer's purchase of the 1975 Mack truck involved herein was exempt from sales and use taxation under s. 77.54 (5) (b), Wis. Stats., as a purchase for exclusive use in common or contract carriage, did taxpayer's November 9, 1977 haul constitute a private haul violating the exclusive use standard of that statute and subject the taxpayer to use tax on the truck? Because of conclusion of law 1, the second issue was moot.

The taxpayer has not appealed this decision.

Carl Schroeder, Jr., vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, April 29, 1981). Taxpayer, Carl Schroeder, Jr., operates a proprietorship

which carries on a debarking and wood curing operation. The sole issue was whether certain machinery, equipment, and repair parts were subject to Wisconsin sales or use tax or were exempt from tax under sections 77.54 (6) (a) and 77.51 (27) of the Wisconsin Statutes. The machinery in question was a truck scale, Barko loader, 2 Prentice hydraulic loaders, Manitowoc debarker, Manitowoc portable debarker, 20 foot slab elevator, dump box, Barko hydraulic loader, Prentice loader, slab elevator, bulldozer, Franklin skidder, miscellaneous repair parts, and a Husky loader mounted on a Mack truck.

Taxpayer purchases rough wood. He then peels the bark from this wood using debarking machines. After debarking, the wood is aged for a period of up to one year. The wood aging process is critical to the manufacture of high quality paper products. A chemical change in the resins within the wood takes place during aging. They change from a gel state to a crystalline state through oxidation making the resins to be more easily extractable in the pulping process when paper is produced. The debarking process removes the dirt and mud from the wood. During the period involved herein, the taxpayer sold virtually all of his debarked wood to Proctor and Gamble Paper Products Company for the production of high quality paper.

Debarkers such as the taxpayer used are the type of debarker which would be used only to debark wood for use by a paper mill. Taxpayer's operation cut the wood into 100 inch lengths. His contract with Procter and Gamble had stringent specifications regarding the amount of bark that Procter and Gamble would accept and stringent specifications regarding the amount of aging that had to take place before the wood could be delivered. If the debarker machine was a stationary machine on site in the production line of a paper manufacturing process and the resulting end product of the manufacturing was paper or paper products, the machinery would be considered exempt from sales and use tax.

Under taxpayer's arrangement with Procter and Gamble, Procter and Gamble advanced taxpayer the money to buy the logs. The logs were the property of Procter and Gamble and were reported by Proctor and Gamble as raw materials inventory for property tax purposes.

The Commission ruled that the taxpayer produces by machinery a new article with a different form, use and name from existing materials. The taxpayer's process is popularly regarded among persons familiar with the industry in which the taxpayer is engaged as "manufacturing." Therefore, the taxpayer is entitled to the manufacturing exemption in s. 77.54 (6) (a), Wis. Stats., for the machinery, equipment and repair parts described in the first paragraph.

The department has not appealed this decision.

Shopper Advertiser, Inc., d/b/a Shopper Advertiser-Walworth County, and Shopping News, Inc., d/b/a Greater Beloit Shopping News vs. Wisconsin Department of Revenue (Circuit Court of Dane County, May 21, 1981). This case involves a sales tax assessment against Shopper Advertiser, Inc. for the sale of a publication known as the Greater Beloit Shopping News, and a use tax assessment against both Shopper Advertiser, Inc. and Shopping News, Inc. for the use of materials used in the process of publishing the Walworth County Shopper Advertiser and the Greater Beloit Shopping News. The issues before the Court were: (1) Are the publications exempt from the sales and use tax under s. 77.54 (15), Wis. Stats., on the ground that they qualify as newspapers or periodicals? (2) Are the publications exempt from the sales or use tax pursuant to s. 77.54 (2), Wis. Stats.? and (3) Did the department's interpretation and application of s. 77.54 (15), Wis. Stats., deny the taxpayers equal protection of the law? The Tax Appeals Commission held that the publications were not exempt from taxation under s. 77.54 (15) or 77.54 (2), Wis. Stats. The Commission also found that the department's interpretation and application of s. 77.54 (15), Wis. Stats., did not deny the taxpayers equal protection of the law.

Taxpayers' first argument was that their publications are exempt from taxation pursuant to s. 77.54 (15), Wis. Stats., which provides an exemption for:

> "The gross receipts from the sale of and the storage, use or other consumption of newspapers and periodicals regularly issued at average intervals not exceeding 3 months."

Under Technical Information Memorandum S-15.3, dated July 14, 1974, the department defined "newspapers" as "those publications which are commonly understood to be newspapers and which are printed and distributed periodically at daily, weekly or other short intervals for the dissemination of news of a general character and of a general interest." This memorandum defines "periodical" as "those publications which appear at stated intervals, each issue of which contains news or information of general interest to the public, or to some particular organization or group of persons. Each issue must bear a relationship to prior or subsequent issues in respect to continuity of literary character or similarity of subject matter, and there must be some connection between the different issues of the series in the nature of the articles appearing in them. . . . The term does not include . . . shopping guides or other publications of which the advertising portion, including product publicity, exceeds 90% of the printed area of the entire issue in more than one-half of the issues during any 12 month period."

The Court concluded that the definitions of "newspaper" and "periodical" incorporated in the department's memorandum adequately reflects the ordinary and accepted meaning of the terms "newspaper" and "periodical." The Court also agreed with the department that the exemption for newspapers and periodicals does not apply here.

To qualify as a publication that is "commonly understood to be" a newspaper, the publication must contain reports of current events of a varied character. The Walworth County Shopper Advertiser is 100% advertising. The Greater Beloit Shopping News contains non-advertising material, but none that constitutes reports of current events of a varied character.

The publications also failed to meet the requirements for periodicals. The Court agreed with the Commission that a publication composed entirely of advertising (Walworth County Shopper Advertiser) does

not fall within the ordinary and accepted meaning of a periodical.

On the other hand, the Greater Beloit Shopper News (which is distributed on a regular basis) averages about 88% advertising. Consequently, some of the requirements for a periodical, as established by the department's memorandum, are met. However, to constitute a periodical each issue of a publication must contain news or information of general interest to the public, each issue must bear a relationship to prior or subsequent issues in respect to continuity of literary character or similarity of subject matter, and there must be some connection between the different issues in the nature of articles appear in them. The latter requirements were derived from Houghton v. Payne, 194 US 88, 97 (1904), the leading case on the subject of what constitutes a periodical.

The remaining 12% of the Beloit publication consists of a variety of items including articles submitted by freelance writers on such topics as antiques, ecology, recipes, area school menus and notices of local activities sponsored by organizations such as the PTA and church groups. The publication consists of miscellaneous articles received without charge from county agents and business organizations. Some columns, such as a column on antiques and the column on the outdoors, appear somewhat regularly, but even these appear only if the writers choose to submit them. Articles and notices are not solicited, although the owner had told churches and other organizations that she would print notices submitted. During the period involved, the publication did not subscribe to any news services or syndicated columns. The publication does not include national or local news items or articles related to politics.

The Court determined that the Beloit publication does not contain sufficient continuity and connection as to the nature of its contents to constitute a periodical. The non-advertising materials in the Beloit publication do not seem to be narrowly enough confined to the same class of subjects from edition to edition to justify labeling it a periodical as that term is ordinarily used. The Court agreed that the hodge podge nature of the articles published, combined with the extensive amount of advertising included in each publication rendered reasonable basis for the Commission's conclusion that the Beloit publication is not a periodical as that term was defined in the department's memorandum, in Houghton v. Payne, supra, and as it is ordinarily used.

The next issue was whether the distribution of shopping guides constitute a "sale" within the meaning of s. 77.54 (2), Wis. Stats. Most of the publications are distributed free of charge to homeowners in both Walworth County and Rock County, although some subscriptions are sold. The Court agreed with the Commission that distribution of the publications does not constitute a "sale" within the meaning of s. 77.54 (2), Wis. Stats.

The final issue was whether the department's construction and application of s. 77.54 (15), Wis. Stats., denied the taxpayers equal protection under the law. The Court disagreed with this assertion by the taxpayers. The distinction is not between shopper guides on one side and newspapers and other publications on the other. Rather, the law distinguishes newspapers and periodicals from materials whose primary purpose is advertising. Newspapers and other periodicals are used primarily to inform people of current events, literature, etc. Advertising is used primarily to sell products.

The taxpayers have appealed this decision to Court of Appeals.

EXCISE TAXES

State of Wisconsin vs. Black Steer Steak House, Inc. (Court of Appeals, District III, May 26, 1981). This case is an appeal from an order of the Circuit Court for Eau Claire county.

The State of Wisconsin appealed the dismissal of its criminal complaint against Black Steer Steak House, Inc., for Black Steer's violation of the credit restrictions imposed by s. 176.05 (23) (c), Wis. Stats., on retail liquor licensees. The parties stipulated that there is a factual basis for the charge, and the only issue was whether s. 176.05 (23) (c), Wis. Stats., violates the equal protection clause of the fourteenth amendment to the United States Constitution.

Section 176.05 (23) (c), Wis. Stats., limits the right of retail liquor licensees to purchase intoxicating liquors on credit from liquor wholesalers. A licensee who has been indebted for more than thirty days for intoxicants purchased from any wholesaler may not make any liquor purchases. A violation subjects the licensee to license suspension or revocation and a fine of up to $500.

Because s. 176.05 (23) (c), Wis. Stats., is presumptively constitutional, Black Steer has the burden of proving that it is unconstitutional beyond a reasonable doubt. Where doubt exists, it must be resolved in favor of constitutionality. If any fact can be conceived in the mind of the court to provide a reasonable basis for the legislative classification, the court will attribute to the legislature the requisite diacritical reliance on that fact in passing the statute.

The fact providing the reasonable basis for the passage of s. 176.05 (23) (c), Wis. Stats., is that particular evils may be associated with monopolistic practices in the liquor industry. Credit is a financial inducement that may lead to monopolistic control. The limitation of credit reasonably furthers the statutory goal of deterring monopolistic control.

The mere fact that other states and Congress have enacted similar laws does not make s. 176.05 (23) (c), Wis. Stats., constitutional. The court accepted, however, as a logical assumption from recognized historical fact, that there are particular evils associated with monopolistic practices in the liquor industry. The state is not required to verify a logical assumption with statistical evidence. In addition, because the court cannot try the legislature, the court must consider any fact necessary to uphold the statute to have been conclusively found by the legislature. The court must therefore assume that the legislature conclusively found particular evils associated with liquor industry monopolies. Since Black Steer has not shown the nonexistence of this fact, Black Steer has not proven beyond a reasonable doubt that the statute violates the equal protection clause of the fourteenth amendment.

The taxpayer has not appealed this decision.

WITHHOLDING

William A. Mitchell vs. Secretary of Revenue, Mark E. Musolf, and Chief, Central Compliance Section, W. H. Wescott; and Automation Engineering Company, Inc., AA Electric Division, 1220 Highway 143, Cedarburg, WI 53012, General Manager, Neil Stein. (Dane County Circuit Court). On March 6, 1981, the taxpayer completed and filed with his employer, Automation Engineering Company, Inc., a Wisconsin Withholding Exemption Certificate (Form WT-4) certifying that he was "exempt" from Wisconsin withholding tax. On March 12, 1981, Automation Engineering Company, Inc. mailed a copy of the taxpayer's Wisconsin withholding exemption certificate to the Department of Revenue as required by s. 71.20 (8) (f), Wis. Stats.

The department reviewed the taxpayer's withholding exemption certificate and on March 18, 1981 notified Automation Engineering Company, Inc. and the taxpayer that it had been determined that the certificate was incorrect, and instructed Automation Engineering Company, Inc. to start to withhold tax from the taxpayer's wages on the basis of five exemptions. As a result of this action by the department, the taxpayer filed a claim for declaratory judgment and injunctive relief with the Dane County Circuit Court.

The taxpayer has asked the Court to grant a preliminary injunction, enjoining and restraining the department from collecting withholding tax from his wages. He has also asked that the Court grant a permanent injunction, enjoining and restraining the department from collecting withholding tax from his wages as long as he has on file with his employer a current Wisconsin Withholding Exemption Certificate, Form WT-4, wherein he has certified that he is exempt from withholding tax.

On June 5, 1981 the Circuit Court of Dane County dismissed the taxpayer's request for a declaratory judgment.

TAX RELEASES

("Tax Releases" are designed to provide answers to the specific tax questions covered, based on the facts indicated. However, the answers may not apply to all questions of a similar nature. In situations where the facts vary from those given herein, it is recommended that advice be sought from the Department. Unless otherwise indicated, Tax Releases apply for all periods open to adjustment. All references to section numbers are to the Wisconsin Statutes unless otherwise noted.)

INCOME TAXES

I. Interest Paid by Financial Institutions

Facts & Question: A resident individual has several small savings accounts with a single financial institution located in Wisconsin. The interest income received from each of these accounts is less than $100 for the calendar year; however, in the aggregate the interest income received from all of the accounts is in excess of $100. Is the financial institution required to file an information return (Wisconsin Form 9b or federal Form 1099-INT) with the Department of Revenue regarding interest paid to this individual? If so, must a separate information return be filed for each account?

Answer: Under s. 71.10 (15), Wis. Stats., the financial institution is required to report to the department interest paid to a Wisconsin resident whenever the total paid during a calendar year to the person is $100 or more. It does not matter whether the interest is paid on a single account or multiple accounts.

The financial institution must either file (a) one information return showing the total interest paid on all accounts, or (b) separate information returns for each account.

II. Installment Sale Qualifies for Capital Gain Treatment in 1982

Facts & Question: In 1981 a Wisconsin resident sells a cottage at a gain. The sale is a deferred payment sale which qualifies for installment reporting. Payments will be received equally in the years 1981, 1982, 1983, 1984 and 1985. Will the amounts of gain which are reportable in 1982 and subsequent years qualify for the long-term capital gain exclusion provided by Wisconsin law (s. 71.05 (1) (a) 2, as amended by Chapter 20, Laws of 1981) for those years, even though the sale took place in 1981?

Answer: Yes. The gain reportable in each of the years 1982, 1983, 1984 and 1985 will qualify for the long-term capital gain exclusion available under Wisconsin law for such years.

CORPORATION INCOME/FRANCHISE TAX

I. Cost Depletion Recognized in Property Factor for Apportionment Purposes

Facts & Question: Corporations which are operating owners or owners of an economic interest in properties such as mines, oil and gas wells, other natural deposits and timber, are allowed by federal and Wisconsin income tax laws to account for the consumption or exhaustion of such asset interest by a reasonable charge against revenues produced. This is recognized by a charge to depletion expense of which there are two methods: (1) Cost depletion, and (2) Percentage depletion. Cost depletion is generally calculated on the unit-of-production basis, while percentage depletion is based upon a certain percentage of gross income from the property during the tax year. Wisconsin Administrative Code sections Tax 3.35 through 3.38 provide rules regarding the depletion allowance for Wisconsin purposes.

A corporation which operates both within and outside Wisconsin and whose business in Wisconsin is an integral part of a unitary business is required to report its income to Wisconsin under the apportionment method which uses three factors: property, payroll and sales. Property is valued at original cost. In regard to oil companies, exploration and development costs of corporations involved in extracting products from depletable assets are often capitalized and subsequently depleted.

For the purposes of the property factor, shall original costs of depletable property, including capitalized exploration and development costs, be reduced by depletion deducted?

Answer: Yes, the original cost of the depletable asset, including capitalized exploration and development expenses, shall be reduced by cost depletion in determining the property factor of the apportionment formula.

Wisconsin Administrative Code section Tax 2.39 (3) (b) provides as follows: "As a general rule 'original cost' is deemed to be the basis of the property for federal income tax purposes (prior to any federal adjustments) at the time of acquisition by the taxpayer and adjusted by subsequent capital additions or improvements thereto and partial disposition thereof, by reason of sale, exchange, abandonment, etc."

Most authorities recognize "depletion" as an expense deduction representing the diminution of the quantity remaining of a natural resource through the removal of such resource from its natural reservoir until it is finally exhausted. Depletable assets are often referred to as "exhaustable" or "wasting" assets. Kohler (A Dictionary for Accountants) defines wasting assets as "An asset that diminishes in value by reason of and commensurately with the extraction or removal of a natural product such as ores, oil, and timber, which it contains." The Internal Revenue Code regards depletion as a deduction from gross income that represents loss of value of such assets as mines, oil and gas wells, other natural deposits, and timber brought about by a reduction in the quantity of these assets as a result of extraction operations. Depletion differs from depreciation in that the former implies removal of a natural resources, i.e., a physical shrinkage or lessening of an estimated available quantity, while the latter implies a reduction in the service capacity of an asset through use, obsolescence, or inadequacy.

Since depletion accounts for the gradual exhaustion of the asset, such exhaustion is considered equivalent to a "partial disposition" as indicated in Administrative Code section Tax 2.39 (3) (b). Assets for which depletion has been recorded are no longer considered to be whole, or entire. Therefore, only the cost of the remaining portion may be used in the property factor for apportionment purposes.

II. Taxability of Federal Income Tax Refund to a Surviving Corporation in a Nontaxable Reorganization

Facts & Question: Two corporations (A and B) merged in a tax-free reorganization under sections 71.354 and 71.368 (1) (a) 1, Wis. Stats. The merged corporation "A" had recorded on its books a receivable for a refund claim of federal income taxes previously paid. The right to this refund was transferred to the surviving corporation "B" upon the merger. (1) When the refund is subsequently received by the survivor "B", is it taxable to "B"? (2) If the refund received by the survivor "B" in (1) exceeds the amount recorded on the books of the merged corporation "A", is the excess taxable to "B"? (3) Should the refund be allocated to the assets acquired in the merger to reduce the basis of those assets? (4) Should a portion of the refund be allocated to inventory and taxed currently? (5) If a receivable is not recorded on the books of the merged corporation "A" prior to merger, is the refund taxable to the survivor corporation "B" upon receipt?

Answer: (1) No, since the claim for refund had been recorded as a receivable on the books of the merged coporation "A", any consideration which passed to "A" upon the merger is attributable in part to the refund claim. The survivor "B", therefore, has a basis in the claim equal to the amount of the claim. Upon receipt of payment it merely represents liquidation of the receivable and as such is not taxable. (2) Yes, if an account receivable for the refund claim was recorded on the books of the merged corportation "A", but a greater amount was subsequently paid to the survivor corporation "B", the excess is taxable to "B" under s. 71.03 (1) (k), Wis. Stats. (3) and (4) No, there is no provision in Wisconsin law to allocate the refund to the assets acquired in the merger. The basis of assets acquired is not reduced by the refund received, nor is any amount allocated to inventory and taxed currently. (5) Yes, if a receivable for the federal income tax refund was not considered in the merger as evidenced by being recorded on the books of the merged corporation "A" prior to the merger, such refund subsequently received by the surviving corporation "B" is taxable to "B" as other income under s. 71.03 (1) (k), Wis. Stats.

III. Nexus Not Created by Delivery of Goods With a Freight Charge

Facts & Question: A corporation, incorporated outside of Wisconsin, which operates as a wholesale distributor, distributes products with its own trucks to retailers located in Wisconsin. The company owns no real or tangible personal property permanently located in Wisconsin. The company's only Wisconsin activities are the solicitation of sales and the daily delivery of goods from outside Wisconsin by company drivers in company trucks. The company does, however, add a freight charge to customer bills. Does delivery, for which a freight charge is made, represent a separate and distinct activity beyond the protection of Public Law 86-272? Is the corporation required to file Wisconsin franchise/income tax returns?

Answer: No, the corporation is not required to file Wisconsin franchise/income tax returns. Public Law 86-272 protects companies involved in interstate commerce from taxation in a state where the only business activities are the mere solicitation of orders for sales of tangible personal property which orders are sent outside the state for approval, or rejection, and if approved, are filled by shipment or delivery from a point outside the state (15 USC § 381).

The distributor in this case is not in the transportation business, and does not provide shipping services that are separate from its operation as a wholesale distributor. The freight charge is added to the cost of goods sold to compensate the company for the expense of delivery.

In view of the above, the distributor is protected by federal law from the imposition of a Wisconsin franchise tax. The charge for delivery does not imply a separate service beyond the protected activity.

SALES/USE TAXES

I. Manufacturing - Chemically Treating Wood

Facts & Question: A person is engaged in the process of chemically treating wood to produce "flame proof fire retardant" wood. Lumber is placed in a tank having a partial vacuum and chemicals are released in the tank and the chemicals penetrate the wood. In some cases it is also necessary to kiln dry the treated lumber. The person treats his or her own lumber and also provides this service

to other retailers of lumber. Is this person a manufacturer for sales tax purposes under s. 77.51 (27), Wis. Stats.?

Answer: Yes, this person is considered a manufacturer under s. 71.51 (27), Wis. Stats., and is able to claim the exemptions provided in ss. 77.54 (6) (a) and 77.54 (2).

II. Boarding Animals

Facts & Question: A kennel trains dogs which the kennel also boards for 6 to 8 weeks until such time as the dogs are properly trained. The customer is billed a monthly training fee of $150 to $200, depending on the type of dog, which fee includes the cost of boarding the dog. The normal boarding fee is $3.75 per day. Is any part of the $150 - $200 training fee taxable as a charge for boarding the dog under s. 77.52 (2) (a) 10, Wis. Stats.?

Answer: Yes, the portion of the monthly training fee equal to the normal boarding fee for the dogs ($3.75 per day) is a taxable service even though it is not separately itemized on the customer's bill.

III. Municipal Waste Treatment Facility Exemption Under s. 77.54 (26)

Facts & Question: A Solid Waste Recycling Authority is constructing a building and will have a private operator own and operate the equipment in the authority's building. The equipment consists of a conveyor and baler. The refuse is compacted into bales to make it easier to haul to a landfill site. There is no sorting of the refuse, merely baling. The operator is paid so much a ton for the refuse that goes through the baler and at the end of ten years the baler belongs to the County. Is the purchase of the conveyor and baler by the private operator exempt under s. 77.54 (26), Wis. Stats.?

Answer: No. Without addressing the question of whether a conveyor and baler constitute waste treatment equipment, the exemption for municipal waste treatment facilities does not apply to a private operator's purchases of equipment it will own and operate in providing a service for the recycling authority.

IV. Realty vs. Personal Property — Central Air Conditioning Unit

Facts & Question: The central air conditioning unit for a residence consists of an outdoor unit (containing the condensor, motor, fan and condensing coil), and evaporator and blower coils which are placed in the furnace, and connecting refrigerant lines. Is the replacement of the entire outdoor unit considered a taxable repair of personal property or a real property construction activity?

Answer: The replacement of the entire outdoor unit constitutes a real property construction activity, and the contractor must pay the tax on the cost of the materials used in this construction activity.

V. Auto Manufacturer's Promotional CASH Rebate Program

Facts & Question: An auto manufacturer's rebate program involved the manufacturer making a $500 or $700 cash bonus payment (depending on the price of the car purchased) to the retail purchaser of the car. Dealers were required to share in funding this cash bonus, and their cost was $200 or $300 per car, again depending on the price of the car. The manufacturer forwarded the customer's check to the dealer for presentation to the customer. However, at the option of the customer and the dealer, the check could be assigned to the dealer and become part of the customer's down payment. Is the dealer's portion ($200 or $300 per car) a cash discount or price adjustment under s. 77.51 (11) (b) 1 or 2, Wis. Stats., which would reduce the gross receipts of the dealer which are subject to the tax?

Answer: No. The dealer's portion of the cash bonus paid the customer is not a reduction of its taxable gross receipts. Instead it is a portion of the promotional cost of selling motor vehicles which is passed along to the dealer. The customer may use the cash bonus (including the dealer's portion) for any purpose, including application toward the purchase price of the car. When applied toward the purchase price of the car, the bonus is the same as any other money received by the dealer and this part of the dealer's gross receipts is subject to tax.

VI. Is a Boat a Motor Vehicle Under the Exemption in s. 77.53 (18), Wis. Stats., for New Residents?

Facts & Question: Household goods for personal use, including motor vehicles, purchased outside this state by a nondomiciliary of this state 90 days or more before bringing the property into this state, in connection with a change of domicile to this state, are exempt from the use tax. Does this exemption apply to boats?

Answer: No. Household goods for personal use, including motor vehicles, under s. 77.53 (18), Wis. Stats., do not include boats.

VII. Farmer's Livestock Feeders

Facts & Question: A feeder used to move feed to farm animals consists of a powered conveying unit (feeder) located in a platform, trough or bunk that supports the moving parts of the feeder. The platform, trough or bunk is usually constructed at the farm from ordinary building materials, such as concrete; but it may also be prefabricated in a factory and sold to the farmer. What is the scope of the farmer's exemption for such purchases in subsections (4) (a) 3 and 4 of rule Tax 11.12, titled "Farming, agriculture, horticulture and floriculture"?

Answer: Subsection (4) (a) 3 of rule Tax 11.12 provides that farmers may purchase machines such as powered feeders without tax, but not ordinary building materials used to construct platforms or troughs. Subsection (4) (a) 4 provides that farmers also may purchase without tax machines such as automated livestock feeder bunks (but not ordinary building materials), even though the machine becomes a part of realty after installation.

Fixed platforms, troughs or bunks which are not machines do not qualify for the farm machine exemption. However, an automated feeder bunk sold as one unit by a retailer to a farmer qualifies for the farm machine exemption.

VIII. Farmer's Purchase of Trail Bike

Facts & Question: A farmer purchased a 3-wheel trail bike, an all-terrain vehicle, which cannot be licensed for highway use. The farmer uses it exclusively to check on calves being born in remote pastures. This is done several times a day because the calves must be attended to shortly after they are born. Is this farmer's purchase exempt under s. 77.54 (3), Wis. Stats.?

Answer: Yes, is exempt under s. 77.54 (3), Wis. Stats.