WISCONSIN TAX BULLETIN

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NEW LAW - CURRENT SALES TAX AND CIGARETTE TAX RATES CONTINUED

As of March 15, 1983 the only new tax law enacted this year was Wisconsin Act 1. This new law continues the Wisconsin sales and use tax rate of 5% and the cigarette tax of 25¢ per pack. Without enactment of this new law, the sales and use tax rate would have reverted to 4% on July 1, 1983, the cigarette tax to 20¢ per pack on October 1, 1983.

Other new tax laws enacted into law in 1983 will be explained in future issues of the Wisconsin Tax Bulletin.

NEW SECRETARY OF REVENUE

On January 3, 1983 Michael Ley became Secretary of the Department of Revenue, succeeding Mark E. Musolf. Prior to his appointment to this cabinet level post, Ley served as Deputy Secretary of the Department of Development from 1980 to 1982. Before that he spent two years as Executive Assistant to the Secretary in the Department of Natural Resources. Ley is a past member of the Madison City Council (1972-77).

Eileen D. Mershart has been appointed as Deputy Secretary of Revenue. From 1979 to 1982 she was Director of ENCORE (Adult Education) and Assistant Professor in the Department of Sociology and Social Work at the College of St. Scholastica in Duluth, Minnesota.

John M. Laabs was appointed Executive Assistant to Michael Ley. Laabs most recently served as Acting Director of the Wisconsin Counties Association, having also served there as Assistant Executive Director and Transportation Director.

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NEW BUREAU CREATED

On January 10, 1983 the Excise Tax Bureau and the Fiduciary, Inheritance and Gift Tax Bureau of the ISI&E Division were merged to form the Inheritance and Excise Tax Bureau.

The new Inheritance and Excise Tax Bureau has 80 employees. The bureau is responsible for administering the state's motor fuel, special fuel, general aviation fuel, inheritance, fiduciary, gift, cigarette, tobacco products and alcohol beverage taxes. In addition, employees of the bureau enforce the state's alcohol and tobacco laws and monitor and approve local government retail alcohol beverage licensing activities.

Howard Lynch, previous Director of the Fiduciary, Inheritance and Gift Tax Bureau retired from state service on January 7, 1983. Lee Cheaney, previous Director of the Excise Tax Bureau, became director of the new bureau on January 10, 1983.

FILING DEADLINES FOR 1982 HOMESTEAD AND FARMLAND PRESERVATION CREDIT CLAIMS

December 31, 1983 is the deadline for filing a 1982 Wisconsin Homestead Credit claim. Farmland Preservation Credit claims for 1982 must be filed no later than 12 months after the farmland owner's 1982 taxable year ends (e.g., December 31, 1983 for calendar year taxpayers).

No extensions of time are available for filing claims for these two credits.

QUESTIONS CONCERNING REFUNDS

Persons who wish to inquire about their income tax or Homestead Credit refund should wait at least 10 weeks after the filing of their 1982 return. Questions about refunds for Schedule H, Form 1 and Form 1A may be directed to: Wisconsin Department of Revenue, P.O. Box 8903, Madison, Wisconsin 53708, (608) 266-8100.

DUE DATES OF 1983 ESTIMATED TAX PAYMENTS

Every individual, whether or not a resident of Wisconsin, is required to file a 1983 declaration of Wisconsin estimated tax (Form 1-ES) if the individual expects his or her Wisconsin income tax liability to exceed withholding upon wages, if any, by $100 or more.

Individuals required to file a 1983 declaration during the first quarter of

1983 must do so on or before April 15, 1983. Installment payments are also due on June 15, 1983, September 15, 1983, and January 16, 1984 for calendar year taxpayers.

Every corporation subject to Wisconsin income/franchise taxes is required to file a 1983 declaration of estimated corporation franchise or income tax (Form 4-ES) if it expects to have a tax liability of $2,000 or more. Installment payments are due on the fifteenth day of the third month, sixth month, and ninth month of the taxable year and the fifteenth day of the first month after the close of the taxable year.

A trust or estate is not required to file a declaration.

GIFT TAX RETURNS DUE APRIL 15

With the exception of gifts of real estate and tangible personal property located outside of Wisconsin, all gifts made by Wisconsin residents are taxable. It does not matter whether the donee lives in Wisconsin or in another state; a gift received from a Wisconsin resident is still taxable.

Also taxable are gifts made by nonresidents of Wisconsin of property (both real estate and tangible personal property) located in Wisconsin. Such gifts are taxable regardless of where the donee resides.

Wisconsin gift tax reports must be filed for any calendar year in which the total value of taxable gifts made by one donor (person giving the gift) to one donee (person receiving the gift) in that year exceeds $3,000. Gift tax reports of the donee and donor for 1982 must be filed by April 15, 1983.

The donor reports gifts made on Form 7. On this form the donor enters the description and value of the gifts made to each donee.

The donee reports the gifts he or she received on Form 6, and includes the description and value of the gifts received from one donor. If the donee received gifts from more than one donor during that year, the donee must file a separate report of gifts received from each donor.

The computation of the gift tax due must be made on Form 6. In determining the gift tax due, an annual exemption of $3,000 is allowed for all gifts made during a calendar year by one donor to one donee. Until June 30, 1982 there is a lifetime exemption of $100,000 for gifts between spouses. Gifts made between spouses on or after July 1, 1982 will be completely exempt from Wisconsin gift tax. A lifetime personal exemption of $10,000 is allowed for gifts between donors and their lineal issue (children, grandchildren), lineal ancestor (parents, grandparents), wife or widow of a son, husband or widower of a daughter, adopted or mutually acknowledged child, and mutually acknowledged parent. There is no lifetime exemption allowed to other donees.

COMMUNITY DEVELOPMENT FINANCE AUTHORITY DEDUCTION AND CREDIT

The Community Development Finance Authority, which was created by the Legislature in Chapter 371, Laws of 1981, is a nonprofit public corporation formed to develop or redevelop blighted or impoverished areas in Wisconsin. The program is under the direction of the Department of Development.

This law in Chapter 371 provides for a deduction for contributions which individuals and corporations make to the Authority (ss. 71.02(2)(f) and 71.04(5m), Wis. Stats.). The deduction is an itemized deduction for individuals. For corporations it is a deduction from gross income. A tax credit is also allowed for individuals and corporations making a contribution to the Community Development Finance Authority and, in the same year, purchasing common stock or a partnership interest in a Community Development Finance Company.

The Department of Development indicates they did not receive any contributions nor did they offer stock or partnership interests in Community Development Finance Companies in the calendar year 1982.

ATTORNEY CONVICTED FOR FAILURE TO FILE

A Princeton attorney has been ordered to pay $500 in fines for criminal violations of the Wisconsin state income tax laws.

Spencer A. Markham, 102 West Water Street, Princeton, Wisconsin, was convicted in January, 1983 in Dane County Circuit Court, after he entered no contest pleas to two counts of failing to file state income tax returns. He was ordered to pay a $250 fine on each count or serve 30 days in jail.

Criminal charges were filed against Markham by the Dane County District Attorney's Office after an investigation by the Intelligence Section of the Wisconsin Department of Revenue. Markham was charged with failing to file state income tax returns on gross income of more than $23,000 for 1978 and $28,000 for 1979.

REMINDER! NOTIFY DEPARTMENT OF FEDERAL ADJUSTMENTS AND AMENDED RETURNS

If a taxpayer's federal income tax return is adjusted by the Internal Revenue Service (IRS), and the adjustments affect the amount of Wisconsin income reportable or tax payable, such adjustments must be reported to the Wisconsin Department of Revenue within 90 days after they become final. In addition, taxpayers filing an amended return with the IRS or another state must also notify the department within 90 days of filing if information in the amended return affects the amount of Wisconsin income reportable or tax payable.

Administrative Rule Tax 2.105 provides additional information regarding this reporting requirement and indicates when adjustments made by the IRS are considered final.

An amended Wisconsin return or copy of the federal audit report should be sent to: Wisconsin Department of Revenue, Audit Bureau, P.O. Box 8906, Madison, Wisconsin 53708.

SUGGESTIONS FOR 1983 TAX FORMS

Do you have suggestions to improve the Wisconsin income tax forms? If so, send your suggestions to the Wisconsin Department of Revenue, Director of Technical Services, P.O. Box 8910, Madison, Wisconsin 53708. Please submit your suggestions by July 1, 1983.

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 March 1, 1983. Part D lists new rules and amendments which have been adopted in 1983.

("A" means amendment, "NR" means new rule, "R" means repealed and "R & R" means repealed and recreated.)

A. Rules at Legislative Council Rules Clearinghouse

2.82 Nexus-A
4.50 Assignment, use and reporting of Wisconsin state tax number-A
7.21 Labeling-A
7.22 Tied house law; volume and quantity discounts-R
7.23 Activities of brewers, bottlers and wholesalers-A
8.02 Revenue stamps-occupational tax-A
8.11 Reports-A
8.21 Purchases by the retailer-A
8.22 Purchases made outside of state-A
8.35 Interstate shipments-A
8.42 Wine containers-R
8.43 Empty containers-A
8.66 Merchandise on collateral-A
8.76 Salesperson-A
8.81 Transfer of retail liquor stocks-A
8.85 Procedure for apportionment of cost of administration of s. 176.05 (23), Stats.-A
8.86 Tied house law; volume and quantity discounts-R
9.12 Refunds-military-A
11.71 Automatic data processing-NR

B. Rules at Legislative Standing Committees

11.03 Elementary and secondary schools and related organizations-A
11.05(3) Governmental units-A
11.10 Occasional sales-A
11.12 Farming, agriculture, horticulture and floriculture-A
11.14 Exemption certificates (including resale certificates)-A
11.15 Containers and other packaging and shipping materials-A
11.16 Common or contract carriers-A
11.19 Printed material exemptions-A
11.26 Other taxes in taxable gross receipts and sales price-A
11.32(3) "Gross receipts" and "sales price"-A
11.39 Manufacturing-A
11.48 Landlords, hotels and motels-A
11.49 Service station and fuel oil dealers-A
11.50 Auctions-A
11.51 Grocers' guidelist-A
11.52 Coin-operated vending machines and amusement devices-A
11.57 Public utilities-A
11.65 Admissions-A
11.67 Service enterprises-A
11.68 Construction contractors-A
11.84 Aircraft-A
11.87 Meals, food, food products and beverages-A
11.96 Interest rates-A
11.98 Reduction of delinquent interest rate under s. 77.62(1), Stats.-A

C. Rule Approved by Legislature But Not Effective

11.56 Printing industry-NR

D. Rules Adopted in 1983 (in parentheses is the date the rule was adopted)

2.081(5) Indexed income tax rate schedule for 1982-NR, (1/1/83)
2.945 Spousal individual retirement contributions-NR, (1/1/83)
11.001 Definitions and use of terms-A, (2/1/83)
11.01 Sales and use tax return forms-A, (2/1/83)
11.05(2) and(3) Governmental units-A, (2/1/83)
11.08 Medical appliances, prosthetic devices and aids-A, (2/1/83)
11.10 Occasional sales-A, (2/1/83)
11.16 Common or contract carriers-A, (2/1/83)
11.17 Hospitals, clinics and medical professions-A, (2/1/83)
11.26 Other taxes in taxable gross receipts and sales price-A, (2/1/83)
11.32(4) and(5) "Gross receipts" and "sales price"-A, (2/1/83)
11.38 Fabricating and processing-A, (2/1/83)
11.49 Service station and fuel oil dealers-A, (2/1/83)
11.57 Public utilities-A, (2/1/83)
11.66 Communications and CATV services-A, (2/1/83)
11.69 Financial institutions-A, (2/1/83)
11.84 Aircraft-A, (2/1/83)
11.85 Boats, vessels and barges-A, (2/1/83)
11.87 Meals, food, food products and beverages-A, (2/1/83)
11.93 Annual filing of sales tax returns-A, (2/1/83)
11.97 "Engaged in business" in Wisconsin-A, (2/1/83)

NOTE: The proposed new rules tax 16.01, 16.02, 16.03 and 16.04 relating to the property tax deferral program and the proposed revisions to rules tax 2.39 and 2.40 have been withdrawn and will not be adopted.

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 last paragraph of each WTAC decision in which the department's determination has been reversed will indicate one of the following: 1) "the department appealed", 2) "the department has not appealed but has filed a notice of nonacquiescence" or 3) "the department has not appealed" (in this case the department has acquiesced to Commission's decision).

The following decisions are included:

INCOME AND FRANCHISE TAXES

Edwin F. Gordon vs. Wisconsin Department of Revenue

John Kavalunas vs. Wisconsin Department of Revenue

Ronald D. Stelson, et.al. vs. Wisconsin Department of Revenue

Alfred L. Wenger and Laura E. Wenger vs. Wisconsin Department of Revenue

SALES/USE TAXES

A.F. Gelhar Co., Inc. vs. Wisconsin Department of Revenue

Security Savings and Loan Association vs. Wisconsin Department of Revenue

Senior Golf Association of Wisconsin, Inc. vs. Wisconsin Department of Revenue

Jan R. Toubl d/b/a Toubl Game Bird Farms vs. Wisconsin Department of Revenue

INCOME AND FRANCHISE TAXES

Edwin F. Gordon vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, November 3, 1982). Edwin Gordon is a nonresident of Wisconsin and for the year 1979 filed a timely Wisconsin nonresident income tax return reporting income from Geuder, Paeschke & Frey Co., a federal "tax-option corporation" as defined in s. 71.042, Wis. Stats. Gordon was, during the entire fiscal year of Geuder, Paeschke & Frey Co., ended July 31, 1979, the owner of 100% of all classes of the outstanding stock of such corporation.

The issue in this case is whether the taxpayer's claimed credit against Wisconsin individual income taxes in the amount of $26,945.83 representing the sales or use tax credit allowable for such year to Geuder, Paeschke & Frey Co. on fuel and electricity consumed in manufacturing tangible personal property in Wisconsin under s. 71.043(2), Wis. Stats., is allowable. Such amount represents the sales or use tax credit under Chapter 77, Wis. Stats., which would have been allowable to Geuder, Paeschke & Frey Co. for the year 1979 on the franchise or income tax liability of that corporation. However, the income of Geuder, Paeschke & Frey Co. for 1979 was included in the taxpayer's individual income for 1979, because of the tax-option corporation status of that corporation. The department's August 25, 1980 assessment disallowed the taxpayer's sales and use tax credit and imposed the underpayment of estimated tax penalty. On September 16, 1980, Gordon filed a timely petition for redetermination with the department objecting to the disallowance of the sales or use tax credit plus the interest thereon and the underpayment of estimated tax penalty attributable thereto.

The Commission held that the credit provided by s. 71.043(2), Wis. Stats., is available to the taxpayer as an individual because he is the sole shareholder in a corporation, the income of which is reportable by the taxpayer pursuant to s. 71.01(1), Wis. Stats., by virtue of s. 71.042(1), Wis. Stats.

The department has appealed this decision to the Circuit Court.

John Kavalunas vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, September 30, 1982). John Kavalunas was a legal resident of Illinois until September 1, 1978, when he moved and changed his domicile to Wisconsin. Kavalunas was employed by the Quaker Oats Company, at an Illinois location, in the accounting department until August 12, 1978 when he terminated that employment. As an employee of Quaker, taxpayer was a participant in an employer-sponsored qualified profit sharing plan. Quaker made periodic contributions to Kavalunas' profit sharing account. The plan had a fiscal year running from July 1 to June 30 of successive calendar years.

The plan provided for a cash distribution to Kavalunas upon termination of his employment, to commence as soon as practicable thereafter, but no later than 60 days after the end of the fiscal year in which the distribution first became payable. The employer construed this 60 day period to commence with the date of termination. Generally, it takes the employer three to four weeks to process such a termination payment. As a matter of the employer's administrative practice, however, taxpayer upon termination of his employment could have made a written request to receive his payment immediately, and received a prepayment of the balance requested within a few days of termination. However, Kavalunas did not make such written request.

Taxpayer received a distribution of $3,422 from the Quaker profit sharing plan in October 1978. Kavalunas filed a 1978 Wisconsin individual income tax return claiming part-year Wisconsin residency from September 1 to December 31, 1978, but subtracted as a modification to federal adjusted gross income the $3,422 profit sharing distribution. Taxpayer also filed an Illinois income tax return for the period January 1, 1978 to September 1, 1978, reporting the profit sharing distribution as Illinois income not subject to taxation. The department audited Kavalunas' 1978 Wisconsin income tax return and disallowed the subtract modification claimed for the profit sharing distribution. Kavalunas was a cash basis taxpayer for the calendar year 1978.

Taxpayer contended he constructively received the profit sharing distribution while still a legal resident of Illinois and that such income is not subject to Wisconsin income taxation.

The Commission held that Kavalunas was a legal resident of Wisconsin in October 1978 when he received a $3,422 distribution and such income is subject to Wisconsin income taxation. The distribution was not constructively received prior to September 1, 1978.

The taxpayer has not appealed this decision.

Ronald D. Stelson, et.al. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, November 12, 1982). This is an appeal of the department's disallowance of meal expenses claimed by the taxpayers as employee business expenses for the calendar years 1977, 1978 and 1979. The taxpayers were, during the period involved, employees of Prince Corporation of Marshfield, Wisconsin, working as truck drivers.

Taxpayers worked four days per week, in 12 - 12½ hour days, depending on their trip destination, averaging between 48 - 53 hours per week. They would receive their daily truck driving assignment from their employer's dispatcher, starting as early as 5:00 a.m., and returned home as late as 8:30 p.m., the same day. During the years involved, they *were not* away from home overnight.

The taxpayers received cash meal reimbursements from their employer, Prince Corporation, for the meals they consumed away from their employer's place of business on their daily travels. They accounted to their employer for their claimed meal reimbursements by submitting a weekly expense account. Both their employer and the United States Interstate Commerce Commission required the taxpayers to maintain a daily log of their travels. The taxpayers' employer, Prince Corporation, included the meal reimbursement it paid the taxpayers on its Form 1099. The taxpayers deducted same as an employee business expense on their 1977, 1978 and 1979 Wisconsin individual income tax returns.

The taxpayers maintain that because of their irregular work schedule and their accountability to their employer, the meals in question should be construed to be for the "convenience of their employer", and thus, deductible under Section 119 of the Internal Revenue Code.

The Commission held that the cash meal reimbursements received by the taxpayers during the years 1977, 1978 and 1979 were not meals furnished on the employer's business premises, or meals furnished "while away from home", and also were not furnished for the "convenience of the employer", as those phrases are utilized in the Internal Revenue Code, and defined in the cases interpreting the Code; and thus, are not deductible employee business expenses, under I.R.C., Sec. 119.

The taxpayers have not appealed this decision.

Alfred L. Wenger and Laura E. Wenger vs. Wisconsin Department of Revenue (Court of Appeals, District II, November 23, 1982). Alfred and Laura Wenger appealed from a judgment upholding a determination by the Wisconsin Tax Appeals Commission that the department correctly denied the Wengers' petition for redetermination of income tax assessments made against them for the years 1974-77 and correctly assessed a twenty-five percent negligence penalty against the Wengers for the year 1977. The issues on appeal are whether the income from property and lifetime services assigned by the Wengers to a family trust is taxable to the Wengers as individuals and whether the department properly assessed a negligence penalty for the year 1977.

In January 1973, Alfred Wenger owned a fifty percent partnership interest in the Millard Machine Shop. The other fifty percent interest was held by R. Logan Wenger, Alfred's son. On June 25, 1973, the elder Wenger set up a trust called the Alfred L. Wenger Family Estate. A Trust. The trust instrument was signed by Alfred Wenger as grantor-creator and by his wife, Laura, and his son as trustees. The trust instrument gives the trustees virtually unlimited power over the trust and does not identify any beneficiaries.

On July 2, 1973, Alfred Wenger conveyed both real and personal property and leased two automobiles to the trust. The following month, Wenger conveyed "the exclusive use" of his "lifetime services and all the currently earned remuneration therefrom" to the trust. Laura Wenger, an employee of Walworth County, also transferred her property to the trust. After creation of the trust, the Wengers retained complete control over all of their income and assets.

In 1974, the trust paid the elder Wenger's personal deductible expenses, such as medications and medical care; it also paid the Wengers' nondeductible living expenses, such as housing, transportation and clothing.

The trust filed 1974 through 1976 returns reporting Alfred Wenger's partnership income and the wages that Laura Wenger received from Walworth County. The Wengers filed returns reporting only the income received as trust manager and secretary and some interest income.

On January 12, 1976, the department made adjustments to the Wengers' individual returns for 1974, transferring the income reported by the trust to the Wengers individually. When the trust and the Wengers submitted returns for 1977 that followed the pattern of the three previous years, the department assessed a twenty-five percent negligence penalty against the Wengers for filing incorrect 1977 returns.

The Court of Appeals held that income is taxed to the persons who earn it and the income of a grantor trust is taxable to the grantors, 26 U.S.C. secs. 672(a) and (b), 674(a) and 677(a). Where an assignment of lifetime services has been made to an entity, identification of the proper taxpayer depends on whether it is the person or the entity that in fact controls the earning of the income. Alfred Wenger has complete control over his work as a machinist. Wenger's partnership income was, therefore, taxable to him rather than to the trust. Laura Wenger did not even formally convey her lifetime services to the trust. Her wages were properly taxable to her.

The Court of Appeals also held that the department properly assessed the twenty-five percent negligence penalty against the Wengers for the year 1977. The Wengers did not show good cause for the filing of an incorrect 1977 return. The Wengers were aware that both the department and the Tax Appeals Commission regarded their trust arrangement as ineffective to shift their burden of taxation onto the trust.

The taxpayers have not appealed this decision.

SALES/USE TAXES

A. F. Gelhar Co., Inc. vs. Wisconsin Department of Revenue (Circuit Court of Dane County, Branch 10, December 15, 1982). The issue in this case is whether mining and processing foundry sand is "manufacturing" as defined in s. 77.51(27), Wis. Stats., so that a company engaged in this business is exempt from the sales and use tax under s. 77.54(6)(a), Wis. Stats., on its purchases. The Court concluded that under these statutes, and based on the facts presented, purchases made by the taxpayer are exempt from the sales and use tax.

The taxpayer, A.F. Gelhar Co., Inc., a Wisconsin corporation, and its predecessor sole proprietorship, have been in the business of mining and processing foundry sand since 1919. The taxpayer's operation is a three-step process. The first step is the blasting of the sand pit to loosen material so that it may be removed by the use of a front-end loader. The sand is then transported to a hopper, where by agitation it is then broken up according to size by a process using belts and screens. The material in excess of one-half to one-quarter inch is rejected.

Since 1977 the material from the hopper screens has been run through washing equipment which removes extraneous materials and impurities, such as wood chips, dirt, stones and trace elements of calcium oxide, titanium oxide, magnesium oxide, iron oxide and clays. After screening and washing, the sand is dried and further screened into bins, according to grain fineness. The taxpayer's finished product is graded and blended according to specifications published by the American Foundryman's Society, a national trade organization.

All of the equipment used by the taxpayer in its operation is located and operated within the confines of its pits. The Standard Industrial Classification of the U.S. Office of Management and Budget classifies the taxpayer's business as "mining".

The Circuit Court supported the findings of the Wisconsin Tax Appeals Commission in its April 23, 1982 decision.

The Court concluded that the taxpayer's finished product is a new article with a different form, use and name, produced by a process regarded as manufacturing. It also ruled the taxpayer's sand operation is considered "manufacturing" as defined in s. 77.51(27), Wis. Stats., so it is entitled to an exemption from tax under s. 77.54(6)(a), Wis. Stats., for its purchases of machines, supplies and repairs.

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

Security Savings and Loan Association vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, December 22, 1982). The issues in this case are (1) whether the taxpayer is liable for use tax on items purchased from both out-of-state suppliers and in-state suppliers for give away as premiums on savings deposits; (2) whether the taxpayer is liable for use tax on items (both premium items and non-premium items) purchased from in-state vendors, i.e., whether the vendor or the vendee is responsible for the sales and use tax due on these purchases and (3) whether the negligence penalties assessed by the department are proper.

The premium items are items which the taxpayer gave away to its customers for savings deposits as part of its promotional campaigns. During this period the taxpayer never provided vendors with resale certificates on its purchases from in-state vendors. This association was subject to federal guidelines establishing ceilings on the cost of items that could be given away. If the cost of an item was above the federal ceiling, it would charge for the portion above the ceiling at cost, the invoice price. The taxpayer had no seller's permit because it was not selling items above cost.

The in-state vendors from whom the taxpayer purchased items upon which the use tax herein is imposed never informed the taxpayer that they were not collecting or paying sales tax on these purchases.

Due to the commencement of this audit, along with information being disseminated to savings & loans generally concerning the department's policies on use tax liability for give away premiums purchased, in 1976, the taxpayer began filing use tax returns, although it began purchasing items for give away prior to 1972.

The Commission held that the association was the user of premium items purchased to give away to customers making deposits as part of its promotional campaigns and such purchases are subject to the use tax under s. 77.53(1), Wis. Stats., whether purchased from out-of-state or in-state vendors. The Commission also found that pursuant to s. 77.53(2), Wis. Stats., the association is subject to use tax on purchases (of both premium and non-premium items) from in-state vendors for which it is unable to provide receipts with the sales tax separately stated.

The Commission also found that the negligence penalties in both assessments did not apply, because the taxpayer has shown by satisfactory evidence that its failure to file required use tax returns was due to reasonable cause and not due to neglect.

The taxpayer has appealed this decision to the Circuit Court. The department will not appeal this decision.

Senior Golf Association of Wisconsin, Inc. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, December 16, 1982). The issue in this case is whether the golf association's membership fees and annual dues are subject to the sales tax under s. 77.52(2)(a)2, Wis. Stats.

The association is a non-stock nonprofit Wisconsin corporation organized under Chapter 181 of the Wisconsin Statutes. The purpose of the organization is to conduct golf outings of its members. It has approximately 500 members, and the requisite for membership is that the applicant must be a resident of the State of Wisconsin, must be an amateur golfer, and must be at least 55 years of age.

The association conducts seven golf outings a year and 170 to 190 members attend each event. Six of these are one-day golf outings and one of the events is a two-day outing that extends over a two-day period. The taxpayer owns no golf facilities of any kind, such as a clubhouse or a golf course. They hold these outings at private country clubs.

The members of the association during the years 1977 through 1980, paid an initiation fee of $25 when they were elected to membership. They also must pay annual dues to belong to the association. In 1977, the annual dues were $12.50, and in 1978, 1979, and 1980, the annual dues were $15.00. Members are notified of planned outings by mail and asked to register if they plan to attend. The Senior Golf Association states the per person price for each outing and collects the money from its members. The price ordinarily covers the cost of the outing and includes lunch, dinner, trophies, golf cart rentals, etc. The outing fees collected by the association are paid to the private country club hosting that event.

The Commission ruled that the association's membership fees and dues are subject to the sales tax under s. 77.52(2)(a)2, Wis. Stats., and Rule Sec. Tax 11.65(1)(b) of the Wisconsin Administrative Code.

The taxpayer has appealed this decision to the Circuit Court.

Jan R. Toubl d/b/a Toubl Game Bird Farms vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, November 12, 1982). Toubl Game Bird Farms was a partnership between Jan R. Toubl and his father, Raymond F. Toubl, during the period under review. Jan Toubl was the operator of the business. The taxpayer's main business activity was to raise and sell live game birds, including ring-necked pheasants, chukar partridge, wild turkeys and Hungarian partridge. The taxpayer keeps the breeders; gathers and incubates eggs; raises the newly hatched chicks; and sells both chicks and older birds as needed.

Jan Toubl testified that about 78% of his gross sales were live pheasants to hunting clubs for the hunting clubs' customers to shoot (some customers would retain and eat the shot pheasant); no more than 5% were killed and dressed birds sold to individuals, and none were sold to restaurants; about 2% were sold to dog kennels for training dogs; and the remaining 15% of gross sales were "chicks and eggs" to purchasers who had licenses from their states, including Wisconsin, en-

titling them to obtain birds and eggs. In addition, a very small number of birds was sold to taxidermists.

During this period the taxpayer did not have a seller's permit and did not collect sales tax on any of its sales nor file sales and use tax returns with the department. In addition the taxpayer did not request nor receive sales and use tax exemption certificates from its customers. The taxpayer did not contact any representative of the department to inquire into the sales tax status of its sales, nor review the Wisconsin Statutes. In April, 1981 the department sent Jan Toubl a 2-page memorandum, captioned "To: Operators of Shooting Preserves and Game Farms", which summarized the application of the sales tax law to the gross receipts of these types of businesses.

The Tax Appeals Commission indicated that the first issue for determination was whether the taxpayer's sales of pheasants and other game birds were exempt under s. 77.54(20), Wis. Stats., from the Wisconsin sales tax as sales of food, food products, and beverages for human consumption. The Commission found that the taxpayer's sales of pheasants and other game birds to hunting clubs, dog kennels, taxidermists, and its sales of eggs and chicks were not exempt from the Wisconsin sales tax as sales of food, food products, and beverages for human consumption. The taxpayer had not met its burden of proof in providing exemption certificates covering these sales as required by ss. 77.52(13) and (14), Wis. Stats., or by showing in some other way, by clear and convincing evidence, what measure of tax is exempt.

The Tax Appeals Commission also held the taxpayer was not relieved of its tax liability on the basis of equitable estoppel, and the taxpayer has not shown that it has been denied equal protection of the laws under Amendment XIV, sec. 1 of the U.S. Constitution by the imposition of sales and use tax on its sales of game birds.

The fourth issue was whether references in the assessment notice to Wisconsin Statutes not applicable to the assessment invalidate the assessment. The Commission found that such references do not invalidate the assessment for the years 1974 and 1975.

The last issue was whether the department's imposition of delinquent interest rates was in accordance with the law and the Commission held that it was.

The taxpayer has not appealed this decision.

TAX RELEASES

("Tax Releases" are designed to provide answers to the specific tax questions covered, based on the facts indicated. However, the answer 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 adjusiment. All references to section numbers are to the Wisconsin Statutes unless otherwise noted.)

INDIVIDUAL INCOME TAXES

CORPORATION FRANCHISE/INCOME TAXES

SALES/USE TAXES

HOMESTEAD CREDIT

INDIVIDUAL INCOME TAXES

1. Is Interest Income Received From Bonds Issued by the Wisconsin Housing Finance Authority Taxable?

Facts and Question: Is interest income which an individual receives from bonds issued by the Wisconsin Housing Finance Authority excludable from his or her Wisconsin taxable income under the provisions of s. 234.28, Wis. Stats.?

Answer: No. Interest received from a bond issued by the Wisconsin Housing Finance Authority is subject to Wisconsin income tax. Section 234.28 of the Wisconsin Statutes provides that the Wisconsin Housing Finance Authority (which is a corporate public body created by the Legislature) *itself* is exempt from taxation on income it receives. The tax exemption provided by s. 234.28, Wis. Stats., does not extend to interest which is received by individuals who invest in Wisconsin Housing Finance Authority bonds.

(The bonds which are the subject of this Tax Release should be distinguished from bonds which may be issued by a *municipal* public housing authority. Interest on public housing authority bonds of Wisconsin municipalities is exempt from Wisconsin income tax under s. 66.40(14), Wis. Stats. See Administrative rule Tax 3.095(4).)

2. Stock Dividend From a Dividend Reinvestment Plan of a Qualified Public Utility

Question: An individual received a stock dividend from a dividend reinvestment plan of a qualified public utility. This dividend has been excluded from federal taxable income but must be added back (per s. 71.05(1)(a)12, Wis. Stats.) in determining his or her Wisconsin taxable income. If this individual did not use any (or used only a portion) of the $100 dividend exclusion provided by the Internal Revenue Code when determining the amount of dividend income reported on line 8 of his or her Wisconsin Form 1, can the

unused portion of the $100 federal dividend exclusion be used to reduce the amount of public utility dividend income which must be added back for Wisconsin purposes?

Answer: Yes, any portion of the $100 federal dividend exclusion which is not used in determining the amount of dividend income reported on line 8 of Wisconsin Form 1 may be used to reduce the amount of public utility dividend required to be added back on line 29c of Form 1.

Example: During 1982 a single individual received stock dividends of $500 from a dividend reinvestment plan of a qualified public utility. No other dividends were received during 1982.

On line 8 of Wisconsin Form 1 no dividend income was reported and no portion of the $100 federal dividend exclusion was used. On line 29c, $400 would be entered as an addition to federal income ($500 public utility stock dividend less $100 dividend exclusion).

CORPORATION FRANCHISE/INCOME TAXES

1. Deductibility of Motor Carriers' Operating Authorities

Facts and Questions: The Motor Carrier Act of 1980 liberalized the requirements for obtaining interstate motor carrier operating authorities, and as a result existing interstate operating authorities declined in value. By a directive dated February 13, 1981 (ICC Accounting Series Circular No. 188), motor carriers who received their operating authorities from the Interstate Commerce Commission (ICC) were ordered by the ICC to write off against income of the year ending in December 1980 the cost (adjusted basis) of their interstate operating authorities owned on July 1, 1980 or acquired substantially under binding contracts on that date. On November 20, 1981 motor carriers also were ordered (ICC Accounting Series Circular No. 188 Revised) to recognize on their books the deferred tax effect of such write-off, since the federal Economic Recovery Tax Act of 1981 provided an ordinary deduction to be taken ratably over 60 months for the adjusted basis of such rights.

Example: Motor Carrier Corporation "A" has an interstate operating authority with an adjusted cost basis of $500,000 capitalized on its books as of July 1, 1980. It files Wisconsin franchise/income tax returns on a calendar year basis.

Questions:

1. May Corporation "A" deduct as depreciation or amortization pursuant to s. 71.04(15), Wis. Stats., ratably over a period of 60 months, the adjusted basis of $500,000?
2. May Corporation "A" deduct the entire $500,000 in one year as a write-off ordered by "any state or federal regulatory authority, body, agency or commission having power to make such demand or order. . ." pursuant to s. 71.04(8), Wis. Stats.?
3. Is the deduction pursuant to s. 71.04(8), Wis. Stats., a mandatory deduction required by all motor carriers with operating authorities, or is it a deduction which may, or may not, be elected by the motor carrier?
4. In what year, or years, may the deduction be taken?
5. How is the election to claim a deduction pursuant to s. 71.04(8), Wis. Stats., to be made?
6. May a 1981 return be amended or adjusted to allow the full $500,000 deduction?
7. If the deduction is not taken pursuant to s. 71.04(8), Wis. Stats., is the basis of the authority reduced to zero?
8. May the election to claim the full deduction in 1981 be subsequently revoked?

Answers:

1. No. Corporation "A" may not deduct as depreciation or amortization over 60 months the adjusted basis of its operating authority, pursuant to s. 71.04(15). The authority is not depreciable property, therefore the provisions of the Internal Revenue Code relating to this item do not apply for Wisconsin corporation franchise/income tax purposes.
2. Yes. Corporation "A" may deduct the entire adjusted basis of $500,000, pursuant to s. 71.04(8).
3. The deduction under s. 71.04(8) is not mandatory, but may be elected.
4. The deduction may be taken on a corporation's Wisconsin franchise/income return for taxable year 1981. The write-off was ordered by the ICC on February 13, 1981, to be booked in the year ended December 31, 1980. Section 71.04(8) states the write-off is to be made in the "return covering the first income year *in which* the charge down or write-off is demanded or ordered." The charge down or write-off was ordered in 1981.
5. The election is made by taking a deduction for the adjusted basis of the authority on a 1981 Wisconsin corporation franchise/income tax return. Section 71.04 provides in part that "Every corporation, joint stock company or association shall be allowed to make from its gross income the following deductions: . . .(8) The amount any asset has been charged down or off by any corporation upon the demand or order of any state or federal regulatory authority, body, agency or commission having power to make such demand or order. . . provided all the requirements of this subsection have been complied with: the corporation must elect to make deduction under this subsection by claiming a charge down or write-off of such asset, in an amount consistent with the terms of the demand or order, in its return covering the first income year in which the charge down or write-off is demanded or ordered."
6. Yes, either a timely or late return can be amended or adjusted (within the statute of limitations provided in Chapter 71) to claim or allow the full deduction. If a deduction or amortization was claimed incorrectly on a return, amended returns should be filed as appropriate.
7. No. If a deduction is not taken, the cost basis of the authority remains a capital asset. Upon a subsequent sale, exchange, or other disposition of either the authority or the business to which it relates, the remaining adjusted cost basis of the authority is deductible in determining any recognized gain or loss, pursuant to s. 71.03(1)(g), Wis. Stats.
8. No. The election to claim the full deduction in 1981 once made, cannot be revoked, since s. 71.04(8) provides in part, "An election to claim or not claim a deduction under this subsection with respect to any such order shall be irrevocable".

SALES/USE TAXES

1. Construction and Leasing Grain Storage Bins and Silos to Farmers

Facts and Questions: A financial institution has a grain storage bin or silo constructed on a farmer's land after the farmer selects the size of the unit desired. Upon completion of the unit to the farmer's satisfaction, the financial institution, as the owner, leases the bin or silo to the farmer for a period of 5, 7 or 10 years. During the period of the lease the farmer is responsible for all upkeep and repairs, as well as the cost of insuring the item. At the end of the lease term, the farmer is *required* to purchase the item for a predetermined amount, at which point ownership would pass to the farmer. The farmer intends to make the item a permanent improvement to the farm.

In the event of a default on the part of the farmer, the financial institution has the right to demand full payment on the contract. In other words, all lease payments including the buyout amount would be due and payable. If the farmer is unable to pay, as owners of the unit, the financial institution may take possesson of it and either sell or release it to another party.

The lease is structured so that it may qualify under the new federal safe harbor provisions which allow for fixed buyout amounts and the tax benefits of ownership to accrue to the owner (lessor).

The questions are: (1) Is the person who constructs the grain bin or silo required to pay a sales or use tax on the cost of the materials used to construct the unit, and (2) Are the gross receipts received by the financial institution from the farmer subject to the sales tax?

Answers: (1) The building materials used by the person constructing the grain storage bin or silo are subject to tax because the person performing this construction is constructing or installing a realty improvement, and (2) The gross receipts received from the farmer by the financial institution are not taxable, because this is considered a conditional sale of a realty improvement to the farmer. Although this transaction qualifies for the 'safe harbor' lease provisions of the federal Internal Revenue Code, the transaction is not a rental or lease for Wisconsin sales/use tax purposes. Rather, it is a conditional sale.

2. Governmental Unit's Receipts From Shrub and Tree Services and Charges for Trees

Facts and Questions: Chapter 317, Laws of 1981, effective May 1, 1982, imposed the 5% sales tax on the gross receipts of persons (including cities and other governmental units) providing landscaping and lawn maintenance services. The imposition language in s. 77.52(2)(a)20. Wis. Stats., includes "shrub and tree services". These services include the planting, bracing, fertilizing, spraying, pruning, trimming, surgery and removal of shrubs, stumps and trees.

Questions concern the amounts a governmental unit collects from builder/developers and property owners for trees to be planted in terraces, and whether any of these receipts are subject to the sales tax.

1. Removal of Trees A governmental unit notifies a property owner that a diseased tree must be removed. If the property owner does not remove the tree by a specific date, the governmental unit either removes it or has it done by a subcontractor. The governmental unit then bills the property owner for the removal of the tree, and this charge may appear on the person's property tax bill.
2. Builder/Developer Deposits Funds for Trees A governmental unit also may require each builder/developer to deposit an amount with it prior to the issuance of a building permit in a new subdivision, so that when the development is completed the governmental unit will have the funds necessary to plant trees along the terrace in front of the development.
3. Property Owner Deposits One-Half the Cost of a Tree Property owners located in established areas are required to deposit with the city one-half the cost of a tree the property owner requests the governmental unit plant in a terrace. The city then matches this amount and delivers a tree to the property owner, who is responsible for planting the tree.

Answers:

1. A governmental unit's gross receipts from removing trees in lawn and garden areas are subject to the sales tax under s. 77.52(2)(a)20, Wis. Stats., effective May 1, 1982, even though the charge may appear on the property owner's property tax bill. The amount a subcontractor charges the governmental unit to do the work is not taxable under the resale exemption provided under s. 77.52(13), Wis. Stats., and under the exemption provided under s. 77.54(9a), Wis. Stats.
2. The collection of a deposit from a builder/developer is not a taxable transaction, but when trees are planted by the governmental unit it is providing a tree service, which includes the charge for the tree, subject to the tax under s. 77.52(2)(a)20, Wis. Stats., effective May 1, 1982.
3. The collection of the deposit is not taxable. However, when the governmental unit delivers a tree to the property owner it is making a sale of tangible personal property. Such sales have been taxable since 1969.

3. Landscaping or Lawn Maintenance on a Utility's Right-of-Way

Facts and Question: Various types of work are performed on a utility's right-of-way. Are these services subject to the sales tax under s. 77.52(2)(a)20, Wis. Stats., as taxable landscaping services, effective May 1, 1982?

1. Right-of-Way Work, Including Tree Trimming Rights-of-way are easements over land owned by others and are used by utilities for their transmission and distribution lines. Before the right-of-way can be used by the utility, it must be cleared of trees, brush, rock, etc., to provide access and safety in the construction of power lines. Then annually, rights-of-way are sprayed or otherwise treated to prevent brush and weed growth that would hamper access to the lines or create safety problems. Trees on rights-of-way also are trimmed periodically to prevent interference with overhead distribution lines or as a result of storm damage where limbs have fallen on power lines.
2. Restoration Work Restoration work may involve 2 types of activities:

   (a) the installation of new underground lines when a utility extends its gas service or underground electrical service. A trench is dug and then covered. Since the land is being developed, little more than refilling and compacting occurs; and

(b) the repair or replacement of existing underground lines. After digging the trench, refilling and compacting, the utility is obligated by law to restore the property to its usual condition. This may entail spreading grass seed or laying sod after refilling and compacting. In some cases bushes and shrubs are replaced.

Answer: The taxability of a utility's right-of-way and restoration work depends upon the type of service involved and whether it is performed on lawn or garden areas. Landscaping services which are taxable when performed on lawn or garden areas include: (1) planting, sodding, mowing, raking, weeding, thatching, spraying and fertjlizing lawns; (2) plowing, rototilling, planting, spraying, fertilizing and weeding gardens; (3) planting, bracing, fertilizing, spraying, pruning, trimming, surgery and removal of shrubs, stumps and trees; (4) filling, leveling and grading topsoil; and (5) installing rocks, stone, boulders, wood bark, wood chips, wood timber or wood ties for decorative or ornamental purposes. "Lawn and garden areas" include developed areas found in residential, business, commercial and industrial areas, cemeteries, golf courses, athletic fields and stadiums as well as parking lot areas near or adjacent to buildings or other residential areas, and lawns and gardens associated with farm residences. Therefore, the answers to the questions are:

1. Right-of-way work described in the example performed for a utility in rural undeveloped areas is not taxable. Therefore, the clearing of trees, brush and rocks, the spraying to prevent brush and weed growth and tree trimming in rural undeveloped areas is not subject to sales tax. However, if any of these services to lawns, gardens, trees or shrubs are performed for a utility in lawn or garden areas, the charge for the service is taxable under s. 77.52(2)(a)20, Wis. Stats.
2. The digging of trenches, refilling and compacting of soil in the installation, removal or repair of underground utility lines described in the example is not taxable. However, the charge for grading of topsoil, spreading grass seed, laying sod and replacing bushes and shrubs in lawn or garden areas is taxable under s. 77.52(2)(a)20, Wis. Stats.

HOMESTEAD CREDIT

1. $5,000 Write-off for Section 179 Property Not Considered Depreciation for Homestead Credit and Farmland Credit

Facts and Question: Section 202 of the Federal Economic Recovery Tax Act of 1981 amended Section 179 of the Internal Revenue Code to permit taxpayers (other than trusts, estates, and certain noncorporate lessors) the election to expense certain property, called Section 179 property, rather than depreciate it. Qualifying taxpayers may elect for federal purposes to expense amounts ranging from a maximum of $5,000 in 1982 and 1983 to $10,000 in 1986 and thereafter.

Question: How does this code Section 179 expense provision affect the computation of household income for Homestead Credit and Farmland Preservation Credit purposes, that is, is this considered as depreciation for purposes of adding depreciation back to income as provided by ss. 71.09(7)(a)1 and 71.09(11)(a)6a, Wis. Stats.?

Answer: Since code Section 179 is an expense and not depreciation, the expense would not be included in household income as part of the depreciation add back provisions.