WISCONSIN TAX BULLETIN

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CHANGES IN INCOME TAX FORMS FOR 1983

Included in the last 4 pages of this issue are preliminary proof copies of the 1983 Wisconsin Form 1 and 1A. Although still subject to change before printing, these proofs will give you an idea of how the 1983 forms will appear.

Some of the major changes which have been made for 1983 include the following:

Minnesota Income Question Added (line 5b, Form 1; line 5, Form 1A) — Taxpayers are requested to indicate whether or not they earned wages or other compensation for working in Minnesota in 1983 during a time while they were a resident of Wisconsin. The amount of any Minnesota income is to be entered in the spaces provided. This information is needed for purposes of the Wisconsin-Minnesota income tax reciprocity agreement.

Interest and Dividend Income (line 7, Form 1A) — The ceiling on the amount of interest and dividend income which may be reported on the Wisconsin short-form return has been removed. Taxpayers having more than $400 of interest income or $400 of dividends will be required to complete a schedule which appears on page 2 of Form 1A to provide information about the payers and amounts of interest and dividend income received.

Endangered Resources Donation (line 54, Form 1; line 19, Form 1A) — A line is provided for taxpayers to make donations to Wisconsin's new endangered and nongame wildlife program which will be administered by the Department of Natural Resources. Amounts donated will reduce a taxpayer's refund or increase the balance due with the return.

10% Surtax (line 47, Form 1; line 12, Form 1A) — The 10% surtax which is imposed for 1983 will be included in the Tax Table which appears in the instructions for the income tax forms. A separate computation will not be required for the surtax.

IN THIS ISSUE

PAYMENTS OF 1983 ESTIMATED TAX MAY HAVE TO BE INCREASED

As a result of the two law changes described below it may be necessary to increase Wisconsin estimated tax payments for 1983.

10% Surtax Added

The 1983-85 budget bill (1983 Wisconsin Act 27) which became law July 2, 1983 added a 10% surtax to the Wisconsin income tax rates for individuals. The 10% surtax applies to the tax on income received during 1983 and 1984.

The surtax will add 10% to an individual's gross tax for 1983 and 1984. The surtax will be computed before gross tax is reduced by any tax credits (for example, personal exemption credits and property tax and rent credits). For married persons, the surtax will be determined separately for each spouse.

The statutes require that the 10% surtax payable for 1983 is to be prorated equally among, and paid with, any installment payments of estimated tax that are due after July 1, 1983. However, it should be noted that the 12% penalty for underpayment of estimated tax will *not* apply if total timely payments of 1983 estimated tax are equal to the tax shown on a taxpayer's 1982 return (line 53 minus credits allowable on lines 58, 59 and 60). This exception to the underpayment penalty is provided by s. 71.21(14)(a), Wis. Stats.

Property Tax And Rent Credits Reduced

Another law change in the 1983-85 budget bill which may affect estimated tax payments for 1983 is a reduction in the Wisconsin property tax and rent credits from 12% to 10%. Also, in computing the property tax credit, only property taxes paid on a person's "principal dwelling"

may be used. Property taxes on nonbusiness property other than an individual's principal dwelling (e.g., summer cottage or hunting land) may no longer be used in computing the credit.

In late August the Department of Revenue sent a notice to individuals who had made a first or second installment payment of 1983 Wisconsin estimated tax alerting them that it may be necessary to adjust the amount of their remaining installment payments.

WISCONSIN TAX BRACKETS WILL NOT BE INDEXED FOR 1983

As a result of a provision in 1983 Wisconsin Act 27 (the 1983-85 budget bill), the Wisconsin income tax brackets will not be indexed for the 1983, 1984 and 1985 tax years. The brackets which applied for 1982 will continue to apply for each of the tax years 1983 through 1985. The 1982 brackets were as follows:

$ 0 - 3,900	3.4% *
3,900 - 7,700	5.2%
7,700 - 11,700	7.0%
11,700 - 15,500	8.2%
15,500 - 19,400	8.7%
19,400 - 25,800	9.1%
25,800 - 51,600	9.5%
51,600 and over	10.0%

*For tax years 1983 and 1984 a 10% surtax applies in addition to these percentage rates.

IRC PROVISIONS RELATING TO PIK PROGRAM COMMODITY PAYMENTS APPLY FOR WISCONSIN

Many Wisconsin farmers are participating in the federal payment-in-kind (PIK) program during 1983. The federal Internal Revenue Code provides that agricultural commodities received under PIK are to be included in the recipient's taxable income in the year in which the commodity is sold (which may not be the year in which it is received), or if the commodity is fed to livestock owned by the farmer, in the year the livestock is sold. As a result of provisions enacted in Wisconsin Act 27 (the 1983-85 budget bill), the federal treatment will apply for Wisconsin for both individuals and corporations.

NEW LAW: EFFECTIVE DATE CHANGED TO NOVEMBER 1, 1983 FOR MOTOR FUEL TAX PROVISION

One of the provisions enacted in the 1983-85 budget bill (1983 Wisconsin Act 27) was an amendment to s. 78.07(1)(b). This provision was explained in WTB #33 (July, 1983 issue) on p. 32 as follows:

> "Motor Fuel Tax Imposed on First Sale (Amend s. 78.07(1)(b), effective July 2, 1983) Motor fuel tax will be paid by the first licensed wholesaler receiving motor fuel from a Wisconsin terminal.
>
> Prior to this law change, the motor fuel tax was paid by a licensed wholesaler when the product was unloaded into the wholesaler's storage facilities or delivered into the storage facilities of one of the wholesaler's customers. For example, if motor fuel was withdrawn from a terminal and sold to licensee A and licensee A then sold it licensee B, the tax was paid by licensee B.
>
> The change places the responsibility for payment of the tax on the first person (licensee A) withdrawing motor fuel from a refinery or terminal.
>
> In addition, it will no longer be required that tax-free withdrawals by a licensed wholesaler from a Wisconsin terminal be withdrawn in 4,000 gallon lots or more."

After the budget bill was enacted, the legislature in a special session enacted 1983 Wisconsin Act 28. This act changed the effective date of the amendment to s. 78.07(1)(b) from July 2, 1983 to November 1, 1983. The language in 1983 Wisconsin Act 28 reads as follows:

> "SECTION 1. Effective date. Notwithstanding 1983 Wisconsin Act 27, section 2204(intro.), the treatment of section 78.07(1)(b) of the statutes by that act takes effect on November 1, 1983. From July 2, 1983, to October 31, 1983, section 78.07(1)(b) of the 1981 statutes is in effect."

6 MONTH EXTENSION OF TIME TO FILE AVAILABLE TO CORPORATIONS

Federal law provides that corporations can receive from IRS a 6-month extension of time to file their federal corporate income tax returns (federal Form 1120 series) by filing Form 7004, "Application for Automatic Extension of Time to File Corporate Income Tax Return".

Section 71.10(5)(a), Wis. Stats., provides that any extension of time granted by IRS for filing a federal return will also extend the time for filing the corresponding Wisconsin return. Therefore, corporations allowed a 6-month extension by IRS will also be allowed a 6-month extension to file their Wisconsin income/franchise tax return (Form 4 or 5). A copy of the federal extension must be attached to the Wisconsin return when it is filed.

REMINDER: LANDSCAPING AND LAWN MAINTENANCE SERVICES ARE TAXABLE

Beginning May 1982, landscaping and lawn maintenance services became subject to the 5% sales tax.

The gross receipts from providing the following services are taxable under s. 77.52(2)(a)20, Wis. Stats., when performed on lawn or garden areas, including residential, business, commercial and industrial areas, cemeteries, golf courses, athletic fields and stadiums as well as when performed in parking lot areas, near or adjacent to buildings or other developed areas.

a. Landscaping services, including landscape planning and landscape counseling.
b. Lawn maintenance services and other lawn services, including planting, sodding, mowing, raking, weeding, thatching, spraying, and fertilizing lawns.
c. Garden services, including plowing, rototilling, planting, spraying, pruning, trimming, surgery and removal of shrubs, stumps and trees.
d. Shrub and tree services, including planting, bracing, fertilizing, spraying, pruning, trimming, surgery and removal of shrubs, stumps and trees.

Although some of these services also involve realty improvements, the services are still taxable. For example,

the sale and laying of sod for $1,000 involves both a taxable service and a realty improvement. The total charge of $1,000 is considered a taxable service and is subject to the 5% Wisconsin sales/use tax under s. 77.52(2)(a)20.

The above services are taxable, regardless of whether performed by landscapers, architects, construction contractors or any other persons.

PERSONS CONVICTED FOR FAILURE TO FILE

Merle Griesbach of Appleton, Wisconsin was sentenced March 2, 1983 in Outagamie County Circuit Court by Reserve Circuit Judge Frederick P. Kessler on 19 counts of operating as a seller after his Wisconsin seller's permit had been revoked and on 10 counts of failing to file Wisconsin sales tax returns.

Judge Kessler ordered Griesbach to serve 30 days in the Outagamie County jail on each of the first 4 counts to run consecutively for a total of 120 days and ordered probation for 2 years on each of the next 3 counts to run consecutively for a period of 6 years. Under the conditions of probation, Griesbach must file all missing sales tax returns within 60 days and make restitution of state sales taxes of at least $3,700 within 6 months. Griesbach must also terminate any connections with the Universal Life Church and recover any property he has previously deeded over to the Universal Life Church. Judge Kessler also ordered Griesbach to serve 2 years probation on the next 13 counts and then suspended sentencing on the remaining 9 counts.

A Princeton attorney has been ordered to pay $500 in fines for criminal violations of the Wisconsin 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 2 counts of failing to file Wisconsin income tax returns. He was ordered to pay a $250 fine on each count or serve 30 days in jail. 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.

Ronald L. Goss, 4666 Markgraff Road, Fall Creek, Wisconsin, was convicted in Eau Claire County Circuit Court after he entered guilty pleas to 2 counts of failing to file Wisconsin income tax returns. Goss has been ordered to pay $1,000 in fines or serve 100 days in jail for criminal violations of the Wisconsin state income tax laws. Circuit Judge Karl F. Peplau ordered Goss to pay a $500 fine on each count by April 18, 1983 or serve 100 days in the Eau Claire County jail. Goss was charged with failing to file state income tax returns on gross income of more than $30,000 for 1979 and $30,000 for 1980.

On April 29, 1983 James B. Udelhoven from Edgerton, Wisconsin was convicted on three counts of failure to file Wisconsin income tax returns. Dane County Circuit Judge Mark A. Frankel ordered Udelhoven to serve 2 years probation on each of the 3 counts to run consecutively and pay a $500 fine. Under the conditions of probation, Udelhoven must pay the $500 fine plus a $60 penalty assessment and $20 court costs, pay all taxes and interest due for the years 1979, 1980, and 1981 and file all income taxes due while on probation.

Udelhoven was charged with failing to file state income tax returns on gross income of more than $24,000 for 1979, $33,000 for 1980 and $42,000 for 1981.

Richard K. Sattler was convicted in Milwaukee County Intake Court and ordered to pay a fine of $1,000 plus costs and serve 30 days in Milwaukee County House of Corrections for filing a false cigarette inventory return. Charges were brought against Sattler after an investigation by the Intelligence Section of the Wisconsin Department of Revenue. Sattler, Vice-President of the D. Kurman Company of Milwaukee was found guilty of filing a false inventory return in June 1982 when he reported having approximately 9,500 cartons of stamped cigarettes on hand when the company actually had more than 28,000 cartons on hand. The inventory return was required because the per package cigarette tax increased from 20¢ to 25¢ effective May 1, 1982.

Urban P. Van Susteren of Appleton, Wisconsin was convicted July 26, 1983 in Dane County Circuit Court on three counts of failing to timely file individual state income tax returns and two counts of failing to timely file state corporation franchise tax returns. He was ordered to pay a $500 fine on each count within 60 days or serve a 60 day jail sentence. Van Susteren was charged with failing to file individual income tax returns on gross income of more than $74,000 for 1979, $85,000 for 1980 and $75,000 for 1981. He was also charged with failing to file corporation franchise tax returns, as president of Westgate Motel Corporation, on corporation net income of more than $3,400 for 1979 and $2,900 for 1980.

BULK ORDERS OF TAX FORMS

In 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 1983 Wisconsin income tax forms. As in past years, professional tax preparers are subject to a handling charge on their orders. No charge is made for forms used for distribution to the general public (for example, in a bank, library or post office).

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 1982 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.

NEW ISI&E DIVISION RULES AND RULE AMENDMENTS IN PROCESS

Listed below, under parts A and B 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 October 1, 1983. Part C 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
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
11.15 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
11.48 Landlords, hotels and motels-A
11.50 Auctions-A
11.52 Coin-operated vending machines and amusement devices-A
11.65 Admissions-A
11.68 Construction contractors-A

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

1.001 Definition-A, (10-1-83)
1.01 Assessment districts-A, (10-1-83)
1.10 Depository bank requirements for withholding tax deposit reports-A, (10-1-83)
1.11 Requirements for examination of returns-A, (10-1-83)
1.13 Power of attorney-A, (10-1-83)
2.03 Corporation returns-A, (10-1-83)
2.04 Information returns; forms WT-9, 9b, and 9X for corporations-A, (10-1-83)
2.045 Information returns; form 9c for employers of nonresident entertainers, entertainment corporations or athletes-A, (10-1-83)
2.05 Information returns, forms 8 for corporations-A, (10-1-83)
2.06 Information returns required of partnerships and persons other than corporations-A, (10-1-83)
2.081(5) Indexed income tax rate schedule for 1982-NR, (1/1/83)
2.085 Claim for refund on behalf of a deceased taxpayer-A, (10-1-83)
2.09 Reproduction of income tax forms-A, (10-1-83)
2.11 Credit for sales and use tax paid on fuel and electricity-A, (10-1-83)
2.12 Amended income and franchise tax returns-A, (10-1-83)
2.13 Moving expenses-A, (10-1-83)
2.16 Change in method of accounting for corporations-A, (10-1-83)
2.19 Installment method of accounting for corporations-A, (10-1-83)
2.26 "Last in, first out" method of inventorying for corporations-A, (10-1-83)
2.42 Apportionment method-R, (10-1-83)
2.43 Nonapportionment method-R, (10-1-83)
2.44 Permission to change basis of allocation-A, (10-1-83)
2.45 Apportionment in special cases-A, (10-1-83)
2.73 Involuntary conversion by corporations-A, (10-1-83)
2.83 Requirements for written elections as to recognition of gain in certain corporation liquidations-A, (10-1-83)
2.87 Reduction of delinquent interest rate under s. 71.13 (1)(b), Stats.-A, (10-1-83)
2.88 Interest rates-A, (10-1-83)
2.89 Penalty for underpayment of estimated tax-A, (10-1-83)
2.92 Withholding tax exemptions-A, (10-1-83)
2.935 Reduction of delinquent interest rate under s. 71.20 (5)(c), Stats.-A, (10-1-83)
2.945 Spousal individual retirement contributions-NR, (1/1/83)
2.95 Reporting of installment sales-A, (10-1-83)
2.955 Credit for income taxes paid to other states-A, (10-1-83)
2.96 Extension of time to file corporation franchise or income tax returns-A, (10-1-83)
2.98 Disaster area losses-R, (10-1-83)
2.99 Computing 1975 Wisconsin net taxable income with reference to the internal revenue code in effect on December 31, 1974-R, (10-1-83)
2.991 Computing 1976 Wisconsin net taxable income with reference to the internal revenue code in effect on December 31, 1975-R, (10-1-83)
2.992 Computing 1977 Wisconsin net taxable income with reference to the internal revenue code in effect on December 31, 1976-R, (10-1-83)
4.50 Assignment, use and reporting of Wisconsin state tax number-A, (7/1/83)
7.21 Labeling-A, (7/1/83)
7.22 Tied house law; volume and quantity discounts-R, (7/1/83)
7.23 Activities of brewers, bottlers and wholesalers-A, (7/1/83)
8.02 Revenue stamps-occupational tax-A, (7/1/83)
8.11 Reports-A (7/1/83)
8.21 Purchases by the retailer-A, (7/1/83)
8.22 Purchases made outside of state-A, (7/1/83)
8.35 Interstate shipments-A, (7/1/83)
8.42 Wine containers-A, (7/1/83)
8.43 Empty containers-A, (7/1/83)
8.66 Merchandise on collateral-A, (7/1/83)
8.76 Salesperson-A, (7/1/83)
8.81 Transfer of retail liquor stocks-A, (7/1/83)
8.85 Procedure for apportionment of cost of administration of s. 176.05 (23), Stats.-A, (7/1/83)
8.86 Tied house law; volume and quantity discounts-R, (7/1/83)
9.12 Refunds-military-A, (7/1/83)
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, (6/1/83)
11.12	Farming, agriculture, horticulture, and floriculture-A, (7-1-83)
11.14	Exemption certificates (including resale certificates)-A, (6/1/83)
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)
11.39	Manufacturing-A, (7-1-83)
11.49	Service station and fuel oil dealers-A, (6/1/83)
11.51	Grocers' guidelist-A, (6/1/83)
11.57	Public utilities-A, (6/1/83)
11.66	Communications and CATV services-A, (2/1/83)
11.67	Service enterprises-A, (6/1/83)
11.69	Financial institutions-A, (2/1/83)
11.84	Aircraft-A, (6/1/83)
11.85	Boats, vessels, and barges-A, (2/1/83)
11.87	Meals, food, food products and beverages-A, (6/1/83)
11.93	Annual filing of sales tax returns-A, (2/1/83)
11.96	Interest rates-A, (6/1/83)
11.97	"Engaged in business" in Wisconsin-A, (2/1/83)
11.98	Reduction of delinquent interest rate under s. 77.62 (1), Stats.-A, (6/1/83)

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

John Gamerdinger vs. Wisconsin Department of Revenue

Edward Kraemer & Sons, Inc. vs. Wisconsin Department of Revenue

Joseph V. Lemberger, Jr. vs. Wisconsin Department of Revenue

NCR Corporation vs. Wisconsin Department of Revenue

Overly, Inc. vs. Wisconsin Department of Revenue

Topp Corporation vs. Wisconsin Department of Revenue

SALES/USE TAXES

Ibtisam Ahmad vs. Wisconsin Department of Revenue

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

Wisconsin Department of Revenue vs. Gene E. Greiling

Wisconsin Department of Revenue vs. Edward Kraemer & Sons, Inc.

Lerman Tire Service vs. Wisconsin Department of Revenue

Wisconsin Department of Revenue vs. Milwaukee Brewers Baseball Club

County of Racine, c/o Nick R. DeMark vs. Wisconsin Department of Revenue, and Grant Fuhrman, Custodian d/b/a Racine County Jail Concession Fund vs. Wisconsin Department of Revenue

HOMESTEAD CREDIT

Avis L. Blasch vs. Wisconsin Department of Revenue

INCOME AND FRANCHISE TAXES

John Gamerdinger vs. Wisconsin Department Of Revenue (Wisconsin Tax Appeals Commission, June 10, 1983). The issue in this case is the department's disallowance of taxpayer's 1974 through 1977 farm losses, based upon the determination that the taxpayer's farming operation was not an activity engaged in for profit within the meaning of section 183(a) of the Internal Revenue Code. The department allowed deductions of farm expenses only to the extent of income. The taxpayer, John Gamerdinger, asserted that his farming operation was engaged in for profit and that he should be permitted to deduct his farm expenses in their entirety.

Taxpayer acquired his farm in 1967. The farm consists of twenty acres; ten acres are suitable for planting crops. Prior to moving to the farm Gamerdinger and his family lived in an urban location. Taxpayer had no farming background.

During the years involved (1974-1977) the taxpayer planted oats, timothy and alfalfa. Gamerdinger made no sales of crops during these years. The grains raised were used to feed and bed his livestock. Taxpayer employed no outside services to help him with planting and taking care of his crops.

Gamerdinger raised cattle during the years involved. In 1975 he owned a total of 3 holsteins and 2 angus. In 1976 one holstein was butchered, and Gamerdinger and his family consumed the meat themselves. He then sold the remaining holsteins for cash and traded the 2 angus for 2 horses.

In 1974 it was the taxpayer's intention to begin breeding holsteins rather than angus. His decision was based on advice from his neighbor that he could get more money for holsteins and holsteins were more tame than angus.

In 1976 he decided to change from holsteins to horses. Taxpayer planned to sell the horses for $500 in a year or one and a half years. At the time of the hearing before the Commission, Gamerdinger still had the same three horses, a pony and one boarded horse.

Taxpayer purchased, updated, repaired and added extensively to the farm improvements and equipment.

He had the concrete in the barn redone, updated the water system in the barn, reroofed the milk house, replaced siding, replaced ramp for barn cleaner, constructed a 40' by 90' pole building used as a machine shop, purchased a new baler, crimper and hay rake, repaired fencing, etc.

During the years involved Gamerdinger was employed full-time as a supervisor at Evinrude Motors. He worked on his farm after work, 25-30 hours per week. He took no extended vacations, using his vacation time to work on the farm.

The Commission held that during the years 1974 through 1977, Gamerdinger's farming operation was an activity not engaged in for profit within the meaning of section 183 of the Internal Revenue Code. Taxpayer was allowed to take a deduction of his farming expenses only to the extent of the income derived from the farming operation.

The taxpayer has not appealed this decision.

Edward Kraemer & Sons, Inc. vs. Wisconsin Department Of Revenue (Circuit Court of Sauk County, January 4, 1983). Edward Kraemer & Sons, Inc. is a Wisconsin corporation with its principal offices in Plain, Wisconsin. It is engaged principally in road and bridge construction and rock crushing operations, both in and out of Wisconsin. For its fiscal years ending March 31, 1969, and March 31, 1970, Kraemer sustained a Wisconsin net business loss for each year. These Wisconsin losses were computed using the separate accounting method, as authorized by s. 71.07(2), Wis. Stats. (1969). Beginning with its taxable year ending March 31, 1971, Kraemer changed its method of computing Wisconsin income from the separate accounting method to the apportionment method, permitted by s. 71.07(2), Wis. Stats. (1971).

The issue in this case is whether Kraemer's 1969 and 1970 net business losses, computed under the separate accounting method, can be used to offset Kraemer's 1971 and 1972 net business income, computed under the apportionment method. In other words, may a taxpayer change its method of reporting for franchise tax purposes and still carry forward its net business losses?

The Tax Appeals Commission held that s. 71.06, Wis. Stats., does not provide for a corporate taxpayer on the apportionment method of reporting income to carry forward Wisconsin losses and offset them against Wisconsin income. Losses, if any, must be applied forward on a company-wide basis subtracted from company-wide income before the apportionment ratio is applied in determining Wisconsin taxable income. (See WTB #30).

The Circuit Court held in favor of the taxpayer. The Court found no language in the statute to suggest that a net business loss, which is otherwise entitled to be carried forward, is no longer a net business loss because the taxpayer changes its method of reporting. Nor is there language in the statute which would require a taxpayer who changes its method of reporting to recompute its taxes for the prior years to determine whether a business loss exists under both methods of reporting. Further, the statute does not provide that if a taxpayer computes its income under one method it cannot then offset its income with losses computed under another method.

The department has not appealed this decision.

Joseph V. Lemberger, Jr. vs. Wisconsin Department Of Revenue (Wisconsin Tax Appeals Commission, June 10, 1983). The issue in this case is the department's disallowance of the taxpayer's 1978 and 1979 federal Schedule C deductions for wages he paid to his wife. Mrs. Lemberger worked in her husband's appraisal business on the average of 15 to 16 hours a week, 52 weeks a year. Her duties were basically secretarial. The business was operated in the Lembergers' home. There was a separate office area, the fourth bedroom of their home which was used as an office. There was no special business phone. The family had one telephone. During the time, the couple had a joint checking account, and all receipts and checks that they received from the business and otherwise went into this joint checking account.

There were no checks made out directly to Mrs. Lemberger for her services nor regular payroll checks. There was no written or oral agreement for the number of hours worked or the amount to be paid. There were no payroll deductions, no social security, federal or state withholding, worker's compensation, or unemployment taxes. There were no estimated payments made for Mrs. Lemberger. The amount deducted as wages each year was determined by their accountant, Bob Dahlman, after the tax year closed. They determined what the amounts would be based on about $5 an hour for 800 hours in 1978 and $5 an hour for 900 hours in 1979.

Mrs. Lemberger stated she was compensated through checks made out to cash from the joint checking account. There were checks made out by Mr. and Mrs. Lemberger to cash which were cashed whenever they needed cash and generally cashed at the bank or grocery store.They did not keep a separate tally or record of the amount of checks that were made out to cash. Both before and after she did work for her husband in his business, she had the same sort of arrangement with the checking account, i.e., it was joint, she would make out checks for cash, and the checks were used basically for living expenses.

The Commission held that the taxpayer had not established an employer-employe relationship with his wife. The relationship was too informally structured; there was no employment agreement established; no employe-type deductions were taken from Mrs. Lemberger's "wages"; and the amounts which she received in each year were estimated at the end of each year. Therefore, the amounts deducted by the taxpayer as wages or salary paid to Mrs. Lemberger are not properly so characterized and the department was correct in denying the deductions.

The taxpayer has not appealed this decision.

NCR Corporation, vs. Wisconsin Department Of Revenue (Court of Appeals, District IV, March 28, 1983). The issue in this case is whether Appleton Papers' deduction from its gross income on its Wisconsin franchise tax return was properly taken in 1972. Appleton Papers, a Delaware corporation, was merged into NCR Corporation, a Maryland corporation. The articles of merger provide that the merger was effective January 1, 1973. Section 71.04(15)(c), Wis. Stats., provides that if a corporation's Wisconsin adjusted basis for depreciable assets exceeds its federal adjusted basis for

depreciable assets as of the end of its 1971 taxable year, the difference may be amortized over five years beginning in 1972. If the corporation is dissolved, merged or consolidated before the end of the five-year period, the remaining balance of that difference "shall be deducted from gross income or used to reduce otherwise allowable deductions from gross income, as the case may be, in the year of dissolution, merger or consolidation."

Appleton Papers reported its income on a calendar year basis. As of December 31, 1972 the remaining balance of the amount of the deduction available to the company under s. 71.04(15)(c), Wis. Stats., was $1,947,303. Appleton Papers deducted the entire balance from its gross income for 1972 in its state franchise tax return for that year.

The Circuit Court held in favor of the taxpayer (see WTB #29 for a summary of the decision). The Circuit Court held that s. 71.04(15)(c), Wis. Stats., contemplates mergers taking place within some taxable or income year. The Court held that "year of . . . merger" in the statute means the year of the final tax return, in this case 1972.

The Court of Appeals held in favor of the department. The Court held that the year of merger was 1973 and the deduction allowable under s. 71.01(15)(c), Wis. Stats., may only be deducted in 1973.

The taxpayer has not appealed this decision.

Overly, Inc. vs. Wisconsin Department Of Revenue (Wisconsin Tax Appeals Commission, March 10, 1983). The issue in this case is whether life insurance policy proceeds received by Overly, Inc. constitute "other items of Wisconsin income" (as that term is used in s. 71.06(1), Wis. Stats.) which must be applied to reduce a net business loss carryforward.

The Commission concluded that life insurance proceeds do not constitute "other items of Wisconsin income" within the intent and meaning of s. 71.06(1), Wis. Stats., and are not required to be setoff against a net business loss.

The department has appealed this decision to the Circuit Court.

Topp Corporation vs. Wisconsin Department Of Revenue (Court of Appeals, District I, February 17, 1983). The Wisconsin Department of Revenue appealed a judgment and an order which were entered by the Circuit Court on February 25, 1982, and March 18, 1982, respectively, reversing an order of the Wisconsin Tax Appeals Commission and awarding costs and attorney fees to Topp Corporation.

The issues presented on appeal are: (1) whether the Circuit Court erred in holding that the department was estopped from assessing an additional franchise tax and interest thereon against Topp based on its agreement to hold Topp's redetermination request in abeyance pending resolution of another case; (2) whether Topp was entitled to carry forward losses incurred in 1970 by Topp Oil and Chemical Company for purposes of determining the tax liability of T.F.E., Inc. for 1971; and (3) whether the trial court erred in awarding costs, disbursements and attorney fees against the department.

The Court of Appeals held that the department was not estopped from assessing franchise tax and interest against Topp. The defense of equitable estoppel requires action or inaction on the part of the one against whom estoppel is asserted which induces reliance thereon by another. The reliance must be reasonable and must cause detriment to the person asserting the estoppel. These elements are not present in this case. Pursuant to the terms of a stipulation and agreement signed by the department and Topp, the department simply agreed to postpone a decision on Topp's petition for redetermination pending a decision in Hall Chevrolet Co. v. Department of Revenue, 81 Wis. 2d 477, 260 N.W.2d 706 (1978), a case involving a similar legal issue. The extension agreement was made following receipt of a letter from Topp which argued that no assessment should be made pending resolution of the Hall Chevrolet case. It did not constitute a unilateral decision by the department. Since the agreement was nothing more than an extension agreement and since its terms were fulfilled by the department, Topp could not reasonably rely on it as an inducement to alter its position in a way that was harmful to it. Moreover, Topp failed to demonstrate that it suffered any legal detriment as a result of entering into the agreement. Legal expenses would have been incurred in challenging the assessment regardless of when the petition for redetermination was considered by the department. Since Topp had the use of the assessed tax money during the period the agreement was in effect, assessment of interest thereon does not constitute a detriment for purposes of estoppel.

The Court of Appeals reversed the Circuit Court's judgment and remanded the matter with instructions to the Circuit Court to address the merits of the case.

SALES/USE TAXES

Ibtisam Ahmad vs. Wisconsin Department Of Revenue (Wisconsin Tax Appeals Commission, June 10, 1983). This is an appeal of the department's notice to the taxpayer that she was a successor under s. 77.52(18), Wis. Stats., to a tavern business previously operated on the same premises by Virginia Erdmann.

On July 20, 1980, the taxpayer purchased and was a successor to the business of Virginia Erdmann of operating a tavern in Milwaukee, Wisconsin. The purchase price of the business was $13,500. This amount was in excess of the sales tax assessment at issue, which is $3,194.54.

On June 30, 1980, prior to consummating the purchase of the Erdmann tavern, the taxpayer, on the advice of her attorney, and Mrs. Erdmann came to the offices of the department to file an application for a seller's permit. At that time, the new owner paid $1,700 as a security deposit with the seller's permit application. A discussion was then held with the taxpayer, Mrs. Erdmann and an employe of the department concerning a sales tax delinquency against Mrs. Erdmann for the period June 1979 to September 1979.

The taxpayer testified that the department employe indicated Mrs. Erdmann had a $900 sales tax delinquency, not specifying the period of time it related to. The taxpayer understood this to be the total amount of all delinquent sales taxes owed by Mrs. Erdmann, although additional taxes were owing because certain returns had not been filed. The taxpayer's husband then presented a check for $900 to the department, supposedly to eliminate Mrs. Erdmann's sales tax delinquency.

The taxpayer indicated that the department employe did not say Mrs. Erdmann had any additional sales tax liability. She also did not recall if he had said that certain other sales tax returns had not been filed, though he may have said so; and that she did not remember if any department employe said anything about sales tax returns not having been filed by Mrs. Erdmann.

The taxpayer had another meeting in her attorney's office for the closing on the tavern purchase, at which time all money that she believed to be due on the purchase price was paid to Mrs. Erdmann, after deducting the $900 which her husband had paid to the department. As far as the taxpayer was concerned, she felt that her obligation to the department for delinquent sales taxes of the previous owner was fulfilled.

At the time of the taxpayer's purchase of the tavern from Mrs. Erdmann, on July 20, 1981, she did not obtain a receipt from Mrs. Erdmann issued by the department indicating that no sales taxes were due. Neither did she file a written request with the department for a certificate issued under s. 77.52(18), Wis. Stats., saying that there was no sales tax owed by Mrs. Erdmann pertaining to the business purchased. The taxpayer did not withhold from the purchase price at closing any amount to cover the then remaining sales tax liability of the former owner.

The sole issue for the Commission to decide was whether under the facts presented, the taxpayer was a successor under s. 77.52(18), Wis. Stats., so that the sales tax liability of the prior owner, Mrs. Erdmann, is the liability of the taxpayer. The Commission found that:

1. The taxpayer was a successor to the seller's business under s. 77.52(18), Wis. Stats., and section Tax 11.91(1)(a), Wis. Adm. Code.

2. At the time of sale of the business to the taxpayer, the seller was liable for additional sales tax for the period October 1979 to June 1980. Not having received from the seller a receipt from the department that all amounts of sales tax had been paid, or a certificate stating that no amount was due pursuant to s. 77.52(18), Wis. Stats., taxpayer's failure to withhold from the purchase price an amount sufficient to cover this liability renders her liable for that amount.

3. Absent a "written" request from the taxpayer for a certificate stating that no amount was due from the seller, the department was not required under s. 77.52(18)(a), Wis. Stats., to either issue the certificate or mail notice to the purchaser of the amount which must be paid as a condition of issuing the certificate within 90 days. Taxpayer was not released by the department's failure to issue a notice of potential liability until January 1981 from further obligation to withhold the purchase price, under s. 77.52(18), Wis. Stats.

4. The department's action in assessing taxpayer for the former owner's sales tax liability as a successor under s. 77.52(18), Wis. Stats., is timely, within 4 years of the time the seller sells out its business, and is correct.

The taxpayer has not appealed this decision.

A.F. Gelhar Co., Inc. vs. Wisconsin Department Of Revenue (Circuit Court of Dane County, December 15, 1982). In WTB #32 it was indicated that the department appealed the Circuit Court's December 15, 1982 decision on A.F. Gelhar Co., Inc. vs. Wisconsin Department of Revenue to the Court of Appeals. The department has since withdrawn this appeal.

Wisconsin Department Of Revenue vs. Gene E. Greiling (Wisconsin Supreme Court, June 1, 1983). The issue in this case is whether a greenhouse with shading, irrigation and ventilation systems is a machine used in floriculture thereby qualifying its components for an exemption from the use tax under s. 77.54(3), Wis. Stats. The taxpayer, Gene E. Greiling, contended that a modern, commercial greenhouse is a machine and therefore, his purchases of shaped metal tubing and polyethylene film from out-of-state retailers to construct a greenhouse are exempt from the use tax under the farm machine exemption (s. 77.54(3), Wis. Stats.).

Greiling owns and operates a wholesale bedding and potted plant business in Wisconsin. He produces potted plants and bedding plants, both flower and vegetable, which are then sold to other greenhouses, commercial farmers or retailers.

The plant material sold by the taxpayer is produced in a commercial greenhouse which extends over an area of approximately nine acres of land. The greenhouse consists of an enclosure constructed out of metal tubing and polyethylene film with shading, irrigation and ventilation systems which operate together to provide the optimum environment for plant production. It closely monitors and controls the temperature, humidity, airflow and sunlight to enable maximum plant growth. No retail selling is done out of the greenhouse and employe work areas and storage areas are located in the permanent buildings which are adjacent to the greenhouse.

The department issued a use tax assessment against the taxpayer based on the precut, shaped metal tubing and polyethylene film (that formed the framework for the greenhouse) purchased from out-of-state retailers during the years 1972 through 1976. The Court of Appeals upheld the department's assessment and concluded that Greiling did not clearly establish that the farm machine exemption applies to his greenhouse. (See WTB #31 for a summary of the Court of Appeals' decision.)

The Supreme Court applied the following definitions of "machine" and concluded that Greiling's greenhouse is a machine:

1. "a structure consisting of a framework and various fixed and moving parts, for doing some kind of work." Webster's New World Dictionary Second College Edition (1980).

2. "every mechanical device or combination of devices to perform some function and produce a certain effect or result." 69 C.J.S. *Patents*, sec. 10 at 183 (1951).

The greenhouse actively produces the artificial environment necessary to produce plants for commercial use and as such the Court considered it a machine.

Since the Court found that the greenhouse is a machine under s. 77.54(3), Wis. Stats., and since the parts of an exempted machine are also exempted from the use tax, the polyethylene film and metal tubing

used in the greenhouse's construction are exempted.

Wisconsin Department Of Revenue vs. Edward Kraemer & Sons, Inc. (Circuit Court of Dane County, March 17, 1983). The issue in this case is whether the taxpayer's purchases of equipment and machinery, including repair parts and replacement parts thereof, used in its plant production of rock-based products are exempt from the use tax under the terms of the manufacturing exemption provided in s. 77.54(6)(a), Wis. Stats. The Wisconsin Tax Appeals Commission held that the taxpayer did produce, by the use of machinery, a new article with a different form, use and name, from existing materials by a process popularly regarded as manufacturing. (See WTB #30 for a summary of the Commission's decision.)

The Circuit Court reversed in part and affirmed in part the Commission's decision. The Circuit Court held that the extracting of stone from the ground is not manufacturing. The Court concluded that mining ceases when, and only if, the raw materials mined by Kraemer are processed via activities which satisfy all the elements of "manufacturing" within the meaning of ss. 77.54(6)(a) and 77.51(27), Wis. Stats.

The department has not appealed this decision.

Lerman Tire Service vs. Wisconsin Department Of Revenue (Wisconsin Tax Appeals Commission, June 2, 1983). Taxpayer, Lerman Tire Service, is in the business of tire retreading. Taxpayer's retreading process begins with a worn out but useable tire carcass. Excess rubber is buffed off the tire carcass. Rubber and cement are applied with a heat application to vulcanize the new rubber to the old tire carcass and imprint the desired tread design thereon. The tire is then cleaned, trimmed, painted, tested, and sold as a retreaded tire. Taxpayer contended that the process of retreading tires constitutes manufacturing and therefore, it is entitled to the exemption from sales and use tax provided in s. 77.54(6)(a), Wis. Stats., on its machinery used in the retreading process.

Lerman Tire Service contended that the retreading operation constitutes the production by machinery of a new article with a different form, use and name. Taxpayer further indicated that the federal government considers taxpayers manufacturers for federal excise tax purposes.

The Tax Appeals Commission held that the taxpayer's retreading process constitutes manufacturing under s. 77.51(27), Wis. Stats., and therefore, the taxpayers qualify for the manufacturing exemption provided in s. 77.54(6)(a), Wis. Stats.

The department has not appealed this decision.

Wisconsin Department Of Revenue vs. Milwaukee Brewers Baseball Club (Wisconsin Supreme Court, March 29, 1983). This case involves two issues: (1) Does the sales or use tax apply to the purchase by the Milwaukee Brewers Baseball Club of the tickets which when purchased by the customer give him or her the right to enter the stadium to view the game? and (2) Does the sales or use tax apply to the baseball club's purchase of promotional items distributed to a class of ticket holders on special occasions?

The Court of Appeals held that the club's purchase and use of the tickets is subject to the use tax and the promotional items distributed are subject to the sales tax. (See WTB #31 for a summary of the decision.)

The Supreme Court affirmed the Court of Appeal's decision. The tickets are transferred for use of consumption but not for resale, the tickets are not included in the admission price charged customers and therefore, the club's purchase and use of tickets is subject to the use tax under s. 77.51(24), Wis. Stats. The promotional items are taxable under s. 77.51(4)(k), Wis. Stats., which provides that a sale to a purchaser who distributes an article "gratuitously apart from the sale of other tangible personal property or service" is taxable as a sale.

County Of Racine, c/o Nick R. DeMark vs. Wisconsin Department Of Revenue, And Grant Fuhrman, Custodian d/b/a Racine County Jail Concession Fund vs. Wisconsin Department Of Revenue (Circuit Court of Racine County, Branch 7, July 1, 1983). The County asked for judicial review of orders of the Wisconsin Tax Appeals Commission entered on January 14, 1983 in each of the above cases. The first assessment of sales tax resulted from an audit of the County's sales of merchandise, charges for golf, and similar charges collected by the County's Park Department for use of its facilities. The County had filed returns and paid sales taxes as computed by it on these charges. The Department of Revenue determined that taxes had not been paid on gross sales as required by statute. It was the County's practice to charge a flat fee for merchandise and charges for use of the park privileges. It then paid 4% of those charges as sales taxes. This did not comport with the statutory requirement that tax be added to the gross sale amount.

The second assessment resulted from the fact that the jail's concession fund had sold cigarettes, candy and toiletries to inmates in the Racine County Jail, and had not reported or paid sales tax on these sales.

The County's primary concern upon appeal in these cases has to do with the State's insistence that it receive interest for the period commencing September 25, 1980 and continuing to January 1983. The Commission hearing was held on September 25, 1980 and its decision was rendered January 14, 1983, more than two years later. It is the County's assertion that they should not be penalized by payment of interest for this substantial period during which the Commission failed to act on the question before it. The argument advanced is that it is unjust for the Commission to hold captive a decision for a period of over two years, and then require that interest be paid for the long period resulting from its failure to act promptly on the issue before it.

The Commission has responded by asserting that it has no authority under the statutory provisions to do other than require payment of interest for the period in question. Sec. 77.60(1), Wis. Stats., governs interest and penalties on delinquent sales taxes. This statutory provision can only be read as a mandatory direction that interest such as here concerned, must be paid.

The County further asserts that it offends a sense of justice that it be required to pay interest for this long period of time when in fact it had no control over the matter. The Circuit Court noted, however, that the County was not without control. A taxpayer may make a deposit of the amounts assessed while awaiting a

determination. This will stay the recovery of interest if the ruling is against the taxpayer. If the taxpayer prevails on the requested redetermination, it is entitled to receive repayment of his or her money with interest at the rate of 9% for the period during which those funds were on deposit. For reasons not explained, the County did not make such deposit. Under the statutory requirement the Circuit Court determined that the interest for the period in question is a proper charge in each of the above cases.

The taxpayer has appealed this decision.

HOMESTEAD CREDIT

Avis L. Blasch vs. Wisconsin Department Of Revenue (Wisconsin Tax Appeals Commission, October 15, 1982). On June 16, 1980 the department issued an income tax assessment against the taxpayer, disallowing the amounts of Homestead Credit issued to Avis Blasch in the years 1976, 1977, and 1978 on the grounds that by including the gross amount of Blasch's pension income in total household income in those years, Blasch's total income was over the allowable income levels for eligibility for homestead credit. On the original returns Avis Blasch filed for the years involved, she did not include in total household income on her Homestead Credit Claim, Schedule H, amounts she had received as a disability retiree under a Federal Civil Service pension.

Blasch filed amended returns for 1977 and 1978. For 1977 Blasch added to her Wisconsin total income $1,681 representing her employer's contribution to the gross amount of disability pension she received in that year. For 1978 she added to her Wisconsin total income $5,445 representing the gross amount of disability pension, includable because she had attained age 65. Blasch did not claim homestead credit on these amended returns.

The Commission held in favor of the department. Section 71.09(7)(a)1, Wis. Stats., provides that the term "income" for purposes of homestead credit includes "the gross amount of any pension of annuity." The gross amount of disability pension payments received by Avis Blasch in the years at issue should have been included in her total household income. Blasch's total household income was over the limit for each of the years at issue and, therefore, she was not entitled to homestead credit for the years at issue.

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 adjustment. All references to section numbers are to the Wisconsin Statutes unless otherwise noted.)

INDIVIDUAL INCOME TAXES

1. Treatment for Capital Gain Portion of a Lump-Sum Distribution from a Retirement Plan or Profit Sharing Plan

FRANCHISE TAXES

1. Wisconsin Corporate Tax Treatment of Foreign Dividend Gross-Up
2. Does a Certificate of Authority Create Wisconsin Nexus?
3. Effect of a Certificate of Authority on Apportionment

SALES/USE TAXES

1. Interstate Telephone Service
2. New 12% U.S. Retail Excise Tax on Heavy Trucks And Trailers
3. Burglar And Fire Alarm Systems

INDIVIDUAL INCOME TAXES

1. Treatment for capital gain portion of a lump-sum distribution from a retirement plan or profit sharing plan

Facts and Question: A taxpayer receives a lump-sum distribution from a qualified retirement plan. Under the provisions of the Internal Revenue Code (IRC) the taxable part of this distribution is divided into two parts (1) income taxable as a long-term capital gain, and (2) income taxable as ordinary income. For purposes of computing federal income tax under a special 10-year averaging method, section 402(e)(4)(L) of the IRC permits a taxpayer to elect to treat the entire taxable part of a lump-sum distribution as ordinary income. When this election is made, the entire taxable portion of the lump-sum distribution is computed on Form 4972. The tax payable on the lump-sum distribution is computed on Form 4972 and then the amount of tax is transferred to line 39 of a federal 1982 Form 1040.

Section 71.05(1)(a)8 of the Wisconsin Statutes provides that any portion of a lump-sum distribution which is excluded from federal adjusted gross income under section 402(e) of the IRC must be added back for purposes of determining a taxpayer's Wisconsin taxable income.

If the amount of lump-sum distribution excluded from federal adjusted gross income is added back (pursuant to s. 71.05(1)(a)8) to determine Wisconsin taxable income, does the portion of the distribution which is identified as capital gain income retain its character for purposes of qualifying for the capital gain exclusion in s. 71.05(1)(a)2, Wis. Stats.?

Answer: Yes. Even though a taxpayer has elected for federal income tax purposes to treat the capital gain portion of a lump-sum retirement plan distribution as ordinary income in computing tax under the federal 10-year averaging method, a different election may be made for Wisconsin purposes. Wisconsin law does not allow the use of the 10-year averaging method of computing tax provided by section 402(e) of the IRC. Therefore, for Wisconsin purposes there is no tax advantage to treating the capital gain portion of a lump-sum distribution as ordinary income.

The manner in which the federal-Wisconsin difference in the treatment of a lump-sum distribution should be accounted for on the Wisconsin return depends on whether or not the taxpayer has other capital gain and loss income

for such year. The proper reporting on the Wisconsin return is as follows:

1. Taxpayer has no capital gain or loss income other than the lump-sum distribution. In computing the amount to enter as an addition to federal income on line 30 of Wisconsin Form 1 (to include in Wisconsin income the lump-sum distribution income reported on federal Form 4972), the appropriate percentage of the capital gain portion of such distribution may be excluded. For the 1982 taxable year the capital gain exclusion percentage for Wisconsin is 20%, for 1983 it is 40% and in 1984 and thereafter it will be 60%.

   Example: Taxpayer receives a lump-sum distribution totaling $20,000 during 1982. The full amount of the distribution represents taxable income with $8,000 classified as capital gain income and $12,000 as ordinary income. For federal income tax purposes, the tax on this income is computed by using the 10-year averaging method and an election is made to treat the entire distribution as ordinary income. For Wisconsin the taxpayer does not elect to treat the entire distribution as ordinary income. Rather, the taxpayer wants to report the $12,000 as ordinary income and $8,000 as capital gain income on the Wisconsin return. No other capital gains or losses are reportable for 1982.

   On line 30 of a 1982 Wisconsin Form 1, the taxpayer would enter $18,400, computed as follows:

$ 8,000	Capital gain portion of lump-sum distribution
(1,600)	Capital gain exclusion allowable for 1982 on Wisconsin return ($8,000 x 20% = $1,600)
$ 6,400	Net amount of capital gain portion taxable by Wisconsin
12,000	Ordinary income portion of lump-sum distribution
$18,400	Total to be entered on line 30, Form 1 as an addition to federal income

   A schedule showing how the amount entered on line 30 of Form 1 was calculated should be included with the Form 1 filed.

2. Taxpayer has capital gains or losses other than the lump-sum distribution. A revised federal Schedule D should be prepared to determine the amount of capital gain or loss which is reportable on line 11 of the Wisconsin Form 1 as capital gain or loss. The amount calculated on the revised Schedule D will also affect the amount of capital gain deduction which is required to be added to Wisconsin income on line 27 of Form 1.

   Example: Assume the same facts as in the above example, except that the taxpayer also has a short-term capital loss incurred in 1982 of $5,000 and the taxpayer is married. The amounts which would be reportable on lines 11, 27 and 30 in Column B of Form 1 would be determined as follows:

$ 8,000	Capital gain portion of lump-sum distribution
(5,000)	Capital loss incurred in 1982
$ 3,000*	Net gain reportable on revised Schedule D
(1,800)	60% federal exclusion
$ 1,200*	Amount of gain reportable on line 11 Form 1
1,200*	Amount reportable on line 27, Form 1 as an add-back for capital gains (2/3 of $1,800 federal exclusion)
12,000	Ordinary income portion of lump-sum distribution reportable on line 30, Form 1 as an addition to federal income
$14,400	Total amount of lump-sum distribution includable in Wisconsin taxable income for 1982

   *Wisconsin taxes 80% of long-term capital gains for 1982. Therefore, $2,400 (80% of $3,000) of the gain is taxable for Wisconsin. The $2,400 is reported on the Wisconsin return by entering $1,200 on line 11, Form 1 and $1,200 on line 27, Form 1.

   The revised Schedule D, which shows how the amounts entered on lines 11 and 27 of Form 1 were calculated, should be included with the Form 1 filed.

FRANCHISE TAXES

1. Wisconsin Corporate Tax Treatment Of Foreign Dividend Gross-Up

Under section 902(a) of the Internal Revenue Code (IRC), a U.S. domestic corporation which receives a dividend from a foreign corporation in which it owns 10% or more of the voting stock may elect to take credit for the foreign tax levied upon the foreign subsidiary's accumulated profits that are the basis of the dividend received. The domestic company is deemed to have paid a share of the foreign tax based on the proportion that the dividends received bears to net earnings of the foreign subsidiary. Under section 78 of the IRC, taxes deemed paid must be included in federal taxable income if the tax credit is claimed. This is referred to as "Foreign Dividend Gross-Up".

For Wisconsin franchise/income tax purposes, since the credit is not permitted and the gross-up is income created under the Internal Revenue Code, the gross-up is not properly includable in the computation of Wisconsin net income. (Note: The U.S. Supreme Court, in its June 20, 1982 decision in F.W. Woolworth Co. v. Taxation and Revenue Department of the State of New Mexico (73L Ed 2nd 819), held that New Mexico's efforts to tax the "gross-up" income contravenes the Due Process Clause.)

Example: Throughout 1982, domestic corporation D owns all the stock of foreign corporation F. Both corporations use the calendar year as the taxable year. Corporation F has accumulated profits, pays foreign income taxes, and pays dividends for 1982 as summarized below. For 1982, corporation D is deemed to have paid $20 of foreign income taxes paid by corporation F for 1982 and includes such amount in federal gross income under section 78 as a dividend, determined as follows:

Gains, profits and income of F Corporation $100

Foreign income taxes imposed on or with respect to gains, profits and income 40
Accumulated profits 100
Foreign income taxes paid on or with respect to accumulated profits (total foreign income taxes) 40
Accumulated profits in excess of foreign income taxes 60
Dividends paid to D Corporation 30
Foreign income taxes of F Corporation deemed paid by D Corporation under sec. 902(a) ($40 x $30/$60) 20

This $20 deemed paid tax (sec. 78 gross-up) is required to be included in federal taxable income when a foreign tax credit is claimed. The $20 will appear on federal Schedule M-1 as an addition to income. For Wisconsin franchise/income tax purposes, this federal Schedule M-1 add-adjustment should be reversed and not be included in Wisconsin net income.

2. Does a Certificate of Authority Create Wisconsin Nexus?

Facts and Question: Section 180.801, Wis. Stats., requires a foreign corporation to procure a Certificate of Authority from the Secretary of State before it transacts business in Wisconsin. Wis. Adm. Code section Tax 2.82(2) requires a "licensed" foreign corporation to file a franchise/income tax return.

Foreign Corporation X manufactures property in Illinois, some of which it ships to Wisconsin customers by common carrier to fill orders received by telephone or mail at the Illinois sales office. Corporation X obtains a Wisconsin Certificate of Authority, but has no Wisconsin property or payroll, or other connection with Wisconsin except these destination sales.

Does Corporation X include in the numerator of its Wisconsin sales factor the above described destination sales?

Answer: No. Wisconsin destination sales are not included if Corporation X transacts no other business in Wisconsin, because of the protection of Public Law 86-272. Instead of filing a complete Wisconsin franchise/income tax return, Corporation X may file its annual returns (Form 4 or Form 5) stating only "No business transacted in Wisconsin". Because Corporation X does transact business outside Wisconsin it may not file a Declaration of Inactivity (Form 4H).

3. Effect of Certificate of Authority on Apportionment

Facts: Section 71.07(2)(c)2, Wis. Stats., provides: "Sales of tangible personal property are in this state if . . . the property is shipped from an office, store, warehouse, factory or other place of storage in this state and the purchaser is the United States government or the taxpayer is not within the jurisdiction, for income tax purposes of the destination state." Wis. Adm. Code section Tax 2.39(2) provides: "In order to use the apportionment method the taxpayer must have income from business activity subject to taxation by this state and at least one other state or foreign country."

Section 71.07(2)(c)1, Wis. Stats., provides that the numerator of the sales factor includes sales to customers in this state "plus 50% of the sales deemed to be in this state because the taxpayer is not within the jurisdiction of the destination state for income tax purposes".

Question 1: Corporation Y manufactures property in Wisconsin, some of which it ships to Minnesota customers by common carrier to fill orders received by telephone or mail at the Wisconsin sales office. Corporation Y obtains a Minnesota Certificate of Authority, but has no payroll or property outside of Wisconsin, or other connection with Minnesota except these destination sales. May Corporation Y apportion less than 100% if its income to Wisconsin?

Answer 1: Corporation Y may not apportion its income, but must report 100% to Wisconsin because it does not have business activities subject to taxation by Minnesota. Corporation Y is not taxable in Minnesota if it just has a Minnesota Certificate of Authority, destination sales, and no other business activity. (Kelvinator Commerical Products, Inc. vs. Wisconsin Department of Revenue, WTAC March 10, 1981).

Question 2: Corporation Z manufactures property in Wisconsin, some of which it mails to customers in Michigan, Minnesota and Iowa. Corporation Z obtains Certificates of Authority in both Minnesota and Iowa. It has no payroll or property in Michigan or Iowa, but it maintains an office in Minnesota. How are destination sales into Michigan, Iowa, and Minnesota reported in Corporation Z's Wisconsin franchise/income tax return?

Answer 2: Corporation Z may file its Wisconsin returns on the apportionment method, excluding Minnesota sales, payroll and property from the numerators of its apportionment factors because the office there gives Minnesota jurisdiction to tax. Although it has a Certificate of Authority in Iowa, 50% of both Iowa and Michigan sales are "thrown-back" to the Wisconsin numerator because Corporation Z has no other business activities in either state.

SALES/USE TAXES

1. Interstate Telephone Service

Facts and Questions: Chapter 317, Laws of 1981, effective May 1, 1982 imposed the 5% sales tax on interstate telephone services originating from and charged to a telephone located in this state. Several types of telephone services are provided across state lines including the following:

a) In-Wats This Wide Area Telephone Service coming into Wisconsin from out-of-state is a switched message telephone service using a dedicated access line between a customer's premises and the telephone company exchange.

b) Out-Wats This involves providing an access line between the customer's premises and a telephone company exchange. These calls originate in Wisconsin and terminate out-of-state.

c) Tie Line, FX (Foreign Exchange) and Private Line Service A Tie line is a single or multiple line dedicated to a single user connecting 2 switching systems. FX service is a direct line from a distant exchange to a local exchange which is set aside for the use of one customer. Private line service is dedicated to the use of a single customer. For example, a private line may connect a manufacturer's plant in Wisconsin with another plant located in a neighboring state. All of these private line services are billed in advance according to the milage involved, not based on usage of the line. There is no accurate means of determining the origin of any of the

telephone messages transmitted on any of these circuits dedicated to the use of a single customer.

Are in-Wats, out-Wats and private line services which involve telephone messages in interstate commerce subject to the sales tax?

Answer: In-Wats service which originates in another state is not a service subject to the sales tax under the imposition language in s. 77.52(2)(a)4, Wis. Stats. However, the gross receipts from providing out-Wats interstate telephone service, which originates in this state, are taxable, effective May 1, 1982.

The gross receipts from interstate tie line, FX and other private line services, which consist of a circuit or circuits dedicated to the use of customer are not taxable under s. 77.52(2)(a)4, Wis. Stats.

2. New 12% U.S. Retail Excise Tax on Heavy Trucks and Trailers

Facts and Question: Effective April 1, 1983 the federal manufacturer's excise tax on trucks and trailers was repealed and replaced by a new 12% federal excise tax imposed on the first retail sale of heavy trucks and trailers. See 26 USC 4051.

Question: Is the new 12% federal excise tax on heavy trucks and trailers includable in either the gross receipts or sales price which is the measure of the Wisconsin sales or use tax?

Answer: The new 12% federal excise tax is imposed upon the retail sale and is measured by a stated percentage of the amount for which the article is sold. Therefore, under ss. 77.51(11)(a)4a and 77.51(12)(a)4, Wis. Stats., and Rule Tax 11.26(3)(b) the retailer's 12% U.S. excise tax is not includable in taxable gross receipts or sales price for Wisconsin sales or use tax purposes, because Wisconsin law specifically excludes any federal tax "measured by a stated percentage of sales price or gross receipts."

3. Burglar And Fire Alarm Systems

Facts and Question: Burglar and fire alarm systems are usually sold or leased. They are connected with the electrical system that is within the walls of the building. Installation requires cutting holes in the walls to place metal sleeves and metal encased wiring along and through the walls and fastening sensors and other alarm devices to the walls and ceilings. There are some systems which are directly connected to a local police station or fire department station. Other alarm systems are directly connected to a central monitoring station maintained by a private party who provides a protection service. Three types of systems, designated as A, B and C, are as follows:

a) The "local" (private) alarm system is a self-contained system within a building which sounds a bell or other alarm on the customer's premises only when an unauthorized entry is made on the premises or a fire is detected. This system is not connected to a central monitoring system and the person installing the burglar or fire alarm fixtures does not provide any "protection service" subsequent to the installation.

b) The "direct connect" alarm system is also a self-contained system installed on a customer's premises, which is connected by telephone wire to either a local police or fire station where the alarm sounds. These "direct connect" systems are similar to the local alarm systems in that the person installing the system does not provide any "protection service" subsequent to the installation.

c) A "central station" alarm system is a system which is installed on a customer's premises and connected to a central monitoring station maintained by the person providing the protection service. When there is an unauthorized entry or fire, a signal is received at the central station and the person providing the protection service notifies the police or fire department and/or dispatches some of its own armed guards or employes to the customer's premises.

The question is whether the sale and installation of each type of system is subject to the sales or use tax and whether the gross receipts from providing a protection service are taxable.

Answers:

a) The *sale* and installation of a local alarm system is considered a real property improvement activity under the 3 criteria standard established by the Wisconsin Supreme Court in the A.O. Smith Harvestore Products, Inc. decision (72 Wis. 2d 60). The seller-installer is deemed the consumer of all tangible personal property used in such activity and the tax applies to its purchases of materials, fixtures, etc. However, burglar and fire alarm fixtures retain their identity as tangible personal property (s. 77.52(2)(a)10, Wisconsin Statutes) after installation and the gross receipts derived from the repair, service, and maintenance of such fixtures are taxable. The gross receipts received from the *lease* and installation of a local alarm system are subject to the tax, if the lessor has the right of removal at the expiration or breach of the lease.

b) The sale and installation or lease and installation of a direct connect alarm system are treated the same as the local alarm system in "A" above.

c) The person providing the protection service is the consumer of all the materials and equipment used in the system and the tax applies to service provider's purchases of such equipment and materials. The gross receipts received from providing this protection service are not taxable.