WISCONSIN TAX BULLETIN

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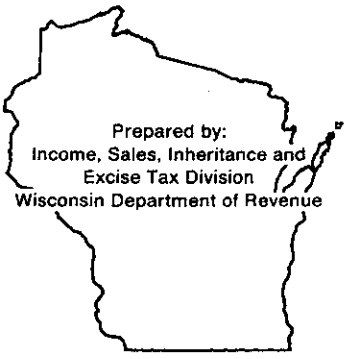

TAX AMNESTY IN EFFECT

As reported in *Wisconsin Tax Bulletin* Number 43, a tax amnesty program was enacted by the legislature and is effective for the period September 15, 1985 through November 22, 1985. Listed below is a brief description of which taxpayers are eligible for amnesty and what obligations are ineligible for amnesty. On pages 25 through 28 are copies of the Amnesty Brochure and Application for Amnesty, which provide additional information about the tax amnesty program. You may obtain additional copies of the brochure and application from any Department of Revenue office. You may write to the Wisconsin Department of Revenue, P.O. Box 7887, Madison, WI 53708, or call (toll-free) 1-800-IOU-WISC.

1. Eligible Taxpayers and Benefits of Amnesty.

Amnesty applies to all taxes administered by the Department under Chapters 71, 72, 77 (Subchapter III), 78 and 139 of the Wisconsin Statutes. This includes income, franchise, withholding, gift, inheritance, sales and use, motor fuel, cigarette, tobacco, liquor, wine and beer taxes.

Amnesty extends to the following taxpayers, including individuals, corporations, partnerships and fiduciaries. (See the exceptions in Part 2.)

a. For a taxpayer who, during the amnesty period, has a tax liability that was delinquent on the Department's records as of May 15, 1985, 20% of the amount due as of the date of payment shall be forgiven. The maximum reduction allowable is $5,000.

b. For a taxpayer who, during the amnesty period, files late or amended returns, along with an application for amnesty, reporting a tax liability that had not been reported or established previously, the Department shall not impose civil penalties and late filing fees or pursue criminal prosecution. In addition, the Department shall reduce delinquent interest due to 1% per month. The addition to the tax for underpayment of taxes may be assessed.

c. For a taxpayer who, during the amnesty period, has a tax liability that was not delinquent on the Department's records as of May 15, 1985 and is based on an assessment, determination or notice of amount due issued by the Department before or during the amnesty period, the Department shall waive civil penalties (with the exceptions listed in the Application for Amnesty) and late filing fees. Also, the Department shall reduce delinquent interest due to 1% per month.

2. Ineligible Obligations.

The amnesty program is not available for any tax liability involved in

a. A civil collection action.

b. An appeal before the Appellate Bureau, the Tax Appeals Commission or any court unless that appeal is withdrawn by the taxpayer.

c. An adverse decision of the taxpayer's appeal from the Tax Appeals Commission or any court during the amnesty period.

d. A criminal tax investigation or pending criminal tax litigation provided the taxpayer has been notified by the date of application for amnesty that he or she is a party to such action.

IN THIS ISSUE

TAXPAYERS TO RECEIVE FORMS 1099-G IN JANUARY 1986

An information return, Form 1099-G, will be mailed to taxpayers who received a Wisconsin income tax refund in 1985. Section 6050E of the Internal Revenue Code requires the

Department of Revenue to send this 1985 information return to taxpayers.

Only those taxpayers who claimed itemized deductions on their 1984 federal income tax returns should receive Forms 1099-G.

If a married person had offset part or all of his or her refund against tax owed by his or her spouse on a combined return, the full amount of the refund (amount before the offset) will be reported on Form 1099-G. For example, on their 1984 return spouse A had a refund of $400 which was applied against spouse B's tax due of $150. A refund check of $250 ($400 − $150 = $250) was issued to spouse A in 1985. The full amount of refund ($400 in this example) will be reported on the 1985 Form 1099-G for spouse A.

If both a husband and wife receive a refund when filing a combined return, a separate Form 1099-G will be prepared for each spouse showing that spouse's refund. For example, on their 1984 combined return spouse A showed a refund of $75 and spouse B a refund of $125. One refund check of $200 was sent to them in 1985. The Form 1099-G for spouse A will show a $75 refund. The Form 1099-G for spouse B will show a $125 refund.

ADVANCE NOTICE: JOINT RETURNS AND JOINT DECLARATIONS OF ESTIMATED TAX FOR 1986 TAXABLE YEAR

As reported in *Wisconsin Tax Bulletin* Number 37, 1983 Wisconsin Act 186 created a marital property system for Wisconsin. As part of the new marital property system, married persons will be permitted to file joint Wisconsin income tax returns, beginning with the 1986 taxable year. Income tax returns for the 1986 taxable year would be filed in 1987.

Beginning with the 1986 taxable year, married persons may file a joint declaration of estimated tax. To be considered a joint declaration, both the husband's and the wife's name and social security number must be entered on the declaration voucher, and both spouses must sign the voucher. If only one spouse's name, social security number or signature appears on the declaration voucher, the payment will be treated as that spouse's separate estimated tax payment.

The 1986 declaration of Wisconsin estimated tax (Form 1-ES) will be available in January 1986.

FEDERAL TAX LAWS ENACTED IN 1985 DO NOT APPLY FOR WISCONSIN

Federal tax laws enacted during 1985 may not be used in determining Wisconsin taxable income for 1985. This will result in certain income and deduction items being different on 1985 Wisconsin and federal income tax returns. As in prior years, Wisconsin Schedule I should be used to adjust for these differences. The only federal law enacted during 1985 (as of October 1, 1985) which may result in a difference between Wisconsin and federal income for 1985 is Public Law 99-44. This law limits depreciation deductions for luxury automobiles placed in service or leased after April 2, 1985 in taxable years ending after that date. Depreciation in the first taxable year the automobile is placed in service is limited to $3,200. Depreciation in any subsequent taxable year is limited to $4,800. This change will not apply for Wisconsin for 1985.

The 1985 Wisconsin Schedule I will contain more information about federal tax laws which do not apply for Wisconsin for 1985. Schedule I will be available at Department offices in January 1986.

TAX RETURN STATISTICS FOR 1984

During the past year 2,220,000 Wisconsin income tax returns were filed for 1984. In addition, 275,000 Homestead Credit claims for 1984 and 16,000 Farmland Preservation Credit claims were filed for the year.

The 2,220,000 income tax returns for 1984 were filed by 3,130,000 individuals. (The combined return of a husband and wife is considered one return.) Itemized deductions were claimed by 25% of the individuals, and the standard deduction was claimed by 75%.

Taxpayers were issued a total of 1,800,000 income tax refunds on 1984 returns, averaging $267 each. The average refund for 1983 returns was $216.

Homestead Credit refunds averaged $360 per claimant, an increase from the average refund of $325 issued last year. About 43% of the claimants were age 65 or older. Of the individuals claiming Homestead Credit, 40% were renters and 60% were homeowners.

An average payment of $1,666 was issued to each Farmland Preservation Credit claimant. The average payment for 1983 claims was $1,575.

As a result of Wisconsin's 5% minimum tax, 13,300 persons made an average payment of $1,490 each.

REMINDER: FILING DEADLINES FOR 1984 HOMESTEAD AND FARMLAND PRESERVATION CREDIT CLAIMS

December 31, 1985 is the deadline for filing a 1984 Homestead Credit claim. Farmland Preservation Credit claims for 1984 must be filed no later than 12 months after the farmland owner's 1984 taxable year ends. December 31, 1985 is the deadline for filing a 1984 Farmland Preservation Credit claim for farmland owners who are calendar year taxpayers.

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

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

Wisconsin law requires employers to submit copies of employe withholding exemption certificates to the Department whenever they are required to provide such information to the Internal Revenue Service (IRS). The copies must be submitted to the Department within 15 days after they are filed with the IRS. For both federal and Wisconsin purposes, employers are required to submit copies of any employe's withholding exemption certificate if (1) the number of exemptions claimed is more than 14 or (2) the employe is claiming complete exemption from withholding and he or she earns more than $200 per week.

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.

Wisconsin Administrative Code section 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 the Wisconsin Department of Revenue, Audit Bureau, P.O. Box 8906, Madison, WI 53708.

REMINDER: NONRESIDENT ENTERTAINERS REQUIRED TO FILE SURETY BOND OR CASH DEPOSIT

A "nonresident" entertainer who performs in Wisconsin for a contract price that exceeds $3,200 is required to file a surety bond or cash deposit with the Department of Revenue in an amount of 6% of his or her total contract price.

If the bond or deposit is not filed, the "employer" at the event is required to withhold the 6% from the nonresident entertainer's payment. If the employer fails to withhold the required amount, the employer will be held liable for the amount that should have been withheld.

A "nonresident entertainer" is a nonresident person who furnishes amusement, entertainment or public speaking services, or performs in one or more sporting events, and includes a foreign corporation (one not organized under the laws of Wisconsin) not regularly engaged in business in Wisconsin which derives income from any of these activities or from these services performed by a nonresident person.

An "employer" is any Wisconsin resident person or firm which contracts for the services of a nonresident entertainer. In the absence of such resident contracting person, the employer is the last resident person or firm to have receipt, custody or control of the proceeds of the event. If there is neither a resident contracting person nor a resident with control of the proceeds, the employer is any nonresident person or firm who contracts for or has control of the proceeds of the event.

Amounts of cash deposited with the Department of Revenue with Form WT-10 and amounts withheld by employers and reported on Form WT-11 may be claimed as a credit by the nonresident entertainer on his or her Wisconsin income tax return for the year in which his or her appearance was made. Any amounts deposited or withheld that are in excess of the nonresident entertainer's Wisconsin tax liability will be refunded without interest.

Surety bonds filed with the Department of Revenue with Form WT-10 will be released when the nonresident entertainer's tax liability for the year involved has been satisfied.

Additional information may be obtained by requesting Publication 508, entitled *Wisconsin Tax Requirements Relating to Nonresident Entertainers.*

Copies of Publication 508, Form WT-10, Form WT-11 and the Nonresident Entertainer's Surety Bond may be obtained from the Wisconsin Department of Revenue, Central Services Section, P.O. Box 8903, Madison, WI 53708.

Any questions about the requirements of this law may be directed to Edward Pelner, Wisconsin Department of Revenue, P.O. Box 8906, Madison, WI 53708, telephone (608) 266-3627.

FARMLAND SELLERS MAY CLAIM FARMLAND CREDIT

Beginning with the 1984 taxable year, the seller of farmland may claim farmland preservation credit as well as the buyer of the farmland. Prior to 1984, only the owner at the end of the taxable year was eligible to claim the credit. The seller and buyer must prorate the farmland real estate taxes between them based on the closing agreement pertaining to the sale of the farmland or, if the closing agreement does not specify a proration, according to their periods of ownership.

Sellers and buyers must each attach the following documents to their farmland preservation credit claims:

1. Attach a copy of your farmland preservation agreement or a 1984 zoning certificate showing the farmland is covered by a qualified farmland preservation program.
2. Attach a copy of the closing statement from the sale of the farmland showing the prorated real estate taxes. If the closing statement does not show the prorated real estate taxes, submit a schedule showing an equitable proration of the 1984 real estate taxes based on your period of ownership.
3. Attach copies of the 1984 real estate tax bills showing the total taxes eligible for farmland preservation credit. The seller of the farmland can obtain copies of the real estate tax bills from the township treasurer or the county treasurer.

1985 INCOME AND FRANCHISE TAX FORMS

For tax practitioners and others who wish to print their own supplies of Wisconsin tax forms, camera copy of the 1985 Wisconsin income and franchise tax forms and the 1986 declaration of estimated tax forms may be purchased from the WISCOMP Center. The cost is $15 per side of a page which includes the 5% Wisconsin sales tax, handling and shipping. The camera copy of 1985 corporation forms is available immediately. Camera copy for most of the other tax forms is expected to be available about November 1, 1985. A clip out order form is located on the last page of this Bulletin. Address orders to WISCOMP, One West Wilson Street, Room B345, Madison, WI 53702. Make your remittance payable to WISCOMP. Your remittance must accompany your order. Orders are processed on a 24 hour basis.

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 1985 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 1984 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, P.O. Box 8903, Madison, WI 53708.

MOTOR FUEL AND SPECIAL FUEL TAX REFUNDS

Refunds of Wisconsin motor fuel or special fuel tax may be obtained for purchases of fuel consumed for the purposes other than operating a motor vehicle on the public highways. Examples of allowable refunds include taxes paid on fuel used in nonhighway equipment for recreation, farming, construction, logging or lawn work. Taxes paid on fuel used in snowmobiles is not refundable. Refunds will not be available on purchases made on or after January 1, 1986 for fuel consumed in motorboats. Also, no refund will be allowed for purchases made after July 1, 1986 for fuel consumed in all-terrain vehicles unless the all-terrain vehicle is registered for private use under section 23.33(2)(d).

Refund claims must be filed with the Department of Revenue within 12 months from the date gasoline is purchased and consumed. For example, if gasoline is purchased for use in a farm tractor on June 4, 1985, a refund claim must be filed on or before June 4, 1986. Extensions of time for filing refund claims are not available.

There are no limitations as to the number of refund claims that may be filed within a year. If a claimant makes numerous purchases throughout the year, he or she may wish to file a claim every 3 or 4 months or at any convenient interval.

A claim must be filed on Form 3 "Claim for Motor Fuel Tax Refund". Form 3 is available at any Wisconsin Department of Revenue office and each county clerk's office, or it may be obtained by contacting the Department as follows: Wisconsin Department of Revenue, P.O. Box 8900, Madison, WI 53708, telephone (608) 266-1231.

Claims require a listing of the vehicles or equipment that qualify for refund, the number of gallons of fuel used in each vehicle and a description of the work performed. In addition, claims must be supported by original purchase invoices reflecting the fuel purchase and payment of the Wisconsin motor fuel or special fuel tax.

TAXPAYER CONVICTED FOR FAILURE TO FILE RETURNS

A Dodge County man has been ordered to serve probation and pay court costs for criminal violations of the Wisconsin state income tax law. Loyal H. Evans of Horicon, Wisconsin was convicted in Dodge County Circuit Court, Branch 3, after he pleaded no contest to three counts of failing to file state income tax returns. Circuit Judge Thomas W. Wells withheld sentence and ordered Evans to serve three years probation on each of the three counts, to run concurrently. Under the conditions of probation, Evans must file Wisconsin income tax returns for 1980, 1981, 1982, 1983 and 1984 and pay the back taxes, penalties and interest for 1981, 1982 and 1983.

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, 1985. Part C lists new rules and amendments which have been adopted in 1985.

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

A. Rules at Legislative Council Rules Clearinghouse

11.03 Elementary and secondary schools-A
11.05 Governmental units-A
11.65 Admissions-A
11.71 Computer industry-NR
11.83 Motor vehicles-A

B. Rules at Legislative Standing Committees

2.045 Information returns; form 9c for employers of nonresident entertainers, entertainment corporations or athletes-R
3.22 Real estate and personal property taxes of corporations-R
3.30 Depreciation and amortization, leasehold improvements: corporations-R
3.31 Depreciation of personal property of corporations-R
3.61 Mobile home monthly parking permit fees-R

C. Rules Adopted in 1985 (in parentheses is the date the rule became effective)

8.51 Labels-A (9/1/85)
8.61 Advertising-A (9/1/85)
8.76 Salesperson-A (9/1/85)
8.81 Transfer of retail liquor stocks-A (9/1/85)
11.002 Permits, application, department determination-NR (9/1/85)
11.10 Occasional sales-A (5/1/85, 9/1/85)
11.16 Common or contract carriers-A (9/1/85)
11.17 Hospitals, clinics and medical professions-A (9/1/85)
11.50 Auctions-A (5/1/85)
11.52 Coin-operated vending machines and amusement devices-A (9/1/85)
11.53 Temporary events-A (9/1/85)
11.54 Temporary amusement, entertainment, or recreational events or places-A (9/1/85)
11.62 Barbers and beauty shop operators-A (9/1/85)
11.67 Service enterprises-A (9/1/85)
11.68 Construction contractors-A (9/1/85)
11.69 Financial institutions-A (9/1/85)
11.97 "Engaged in business" in Wisconsin-A (9/1/85)

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:

Individual Income Taxes

Chris Culver
Splitting of income- husband/wife
Joyce A. Gregg
Individual retirement account
Dennis R. Hough
Auto expenses
Ervin F. Koenig
Auto expenses
William E. Korrer
Splitting of income- husband/wife
Thomas R. Krueger
Gain or loss- property transferred pursuant to divorce
Jeanne F. Polan
Corporation liquidations
Joseph F. Schissler Estate
Income in respect of a decedent
Richard P. Singer
Penalty- underpayment of taxes

Corporation Franchise/Income Taxes

Lake Wisconsin Country Club
Gross income- membership dues
Wisconsin Railroad Services Corp.
Accounting-cash method

Sales/Use Taxes

Artex Corporation
Manufacturing exemption
First National Leasing Corporation
Claims for refund
F.W. Boelter Co., Inc.
Claims for refund
Iverson, Rundell and Stewart, a partnership
Successor's liability
Security Savings and Loan Association
Gifts and advertising specialties
Estoppel
Wisconsin Telphone Company, et al.
Telecommunication services

INDIVIDUAL INCOME TAXES

Chris Culver vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, May 13, 1985). The sole issue for the Commission to determine is whether, during 1979, the taxpayer may properly deduct $21,556.01 in 1979 Schedule F farm expenses for amounts deposited from his individual funds into the joint checking account he maintained with his wife, as "payment" for services performed for his farm.

The taxpayer was engaged, together with his brother, in a fairly large dairy and beef cattle farm operation. He and his brother owned, as tenants in common, all farmland including acreage purchased from their father, as well as from several third parties located conveniently nearby. Most of the other farm assets were owned by the brothers together. Gross farm profits, such as milk checks, were deposited in the brothers' joint checking account. The brothers assigned twenty-five percent of the milk checks to their father. There was no formal partnership agreement, oral or written, between the taxpayer and his brother, and each attempted to treat his "share" of the overall farm operation as a separate business.

In conjunction with implementing the farm operation, the taxpayer and his brother adopted an arrangement wherein they would employ their wives to perform two functions, bookkeeping and farm chores, for pay. The bookkeeping and farm chores were divided relatively equally between the two according to their training, ability and preference to perform certain tasks.

The taxpayer's wife, Linda, maintained the brothers' books with the assistance of her sister-in-law; maintained and signed checks from the brothers' joint checking account; and performed work supportive of tax return preparation. She also performed her primary duties of farm chores, principally related to caring for calves and milking.

For 1979, the taxpayer had contracted with his wife, Linda, to pay her $6,000 yearly for bookkeeping work based on an estimate of twenty hours per week. In addition, she was to be paid $6 per hour for farm chores. A yearly incentive payment was to be made in the amount of twenty-five percent of net farm profit from the joint farm operation of the taxpayer and his brother. The taxpayer and his wife recorded her hours spent performing farm chores.

The taxpayer's wife, Linda, received her "compensation" in the following manner. The taxpayer received checks from the Culver Brothers checking account representing his "share" of milk payments, less expenses. She was authorized to, and did, endorse those checks in his name. She then deposited them, less cash withdrawals in many instances, into the joint checking account maintained by her and the taxpayer. The taxpayer signed documents relating to these deposits which stated that they were considered to be her compensation under the services agreement. Although the taxpayer's wife claimed to be free to use the joint checking account money as she saw fit, she was responsible for most of her family's personal living expenses.

There were no payroll checks issued to the taxpayer's wife. No taxes were withheld from amounts representing bookkeeping or farm chore "earnings" nor was any social security withheld. No self-employment returns were filed by his wife. No other payments such as unemployment compensation or worker's compensation were made. The funds she received remained legally at his disposal in their joint checking account and were used, at least in part, for payment of his family living expenses.

The Commission held that the record does not establish that the taxpayer had established an employer-employe relationship with his wife. The relationship was too informally structured; there was no employment agreement established at the outset of or during the period under review. Amounts deducted by the taxpayer as wages or salary paid to his wife are not properly so characterized. Transfers of the taxpayer's individual funds respecting his wife's performance of services in his farm business to a joint checking account shared with her under the circumstances did not constitute deductible payment of "wages" under Wisconsin law.

The taxpayer has appealed this decision to the Circuit Court.

Joyce A. Gregg vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, May 31, 1985). The issue in this case is whether the taxpayer may take a deduction in 1981 for her contribution to an Individual Retirement Account (IRA). The department disallowed her deduction because she had also contributed to a qualified pension plan during 1981.

During 1981, the taxpayer worked for Kohls Corporation. At the time she was hired, she was hired on a part-time basis with no benefits. She was told that she never had a pension plan. Subsequent to her leaving her employment with Kohls, the taxpayer learned that during her employment, in certain months if she worked extra hours, payments were made on her behalf by Kohls into the United Food and Commercial Workers Union and Wisconsin Meat and Allied Industry Pension Plan.

The Commission concluded that although the taxpayer's contribution to the qualified pension plan in 1981 was small, in order to qualify for the IRA deduction, the taxpayer must not have been an active participant in a pension plan "for any part" of 1981. The taxpayer was an "active participant" in a qualified pension plan during part of 1981. The taxpayer is not entitled to an IRA deduction for 1981.

The taxpayer has not appealed this decision.

Dennis R. Hough vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, June 28, 1985). The sole issue in this case is whether the taxpayer's mileage expense for traveling from his home in Janesville, Wisconsin to a job site in Byron, Illinois is a nondeductible commuting expense or a deductible transportation expense. The taxpayer's home is located approximately 67 miles from Byron, Illinois.

The taxpayer was a welder and a member of Local 214 of the National Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry located in Janesville, Wisconsin. Ordinarily he received his job assignments from Local 214 in Janesville. However, because of the shortage of work in the Janesville area, the taxpayer requested a "travel card" to enable him to receive work assignments from Union Local 23 of Rockford, Illinois. The job in Byron, Illinois was a job assignment from Local 23 in Rockford, Illinois.

During 1979 the taxpayer worked at the Byron Nuclear Power Plant in Byron, Illinois for the Hunter Corporation, except for a few weeks in January and in October or November. In January, he worked briefly for two other employers. In the fall, he was laid off during a "jurisdictional dispute". The taxpayer worked at the Byron, Illinois job site for Hunter Corporation during all of 1980 and most of 1981. The taxpayer commuted on a daily basis from his home in Janesville, Wisconsin to the job site in Byron, Illinois.

When the taxpayer accepted a job assigned to him through Local 23 in Rockford, Illinois, he did not know how long it would last. He was ready to return to his own Local 214 as soon as work in that area became available. He had no seniority rights at his job in Byron, Illinois and could be relieved of his position at any time if a Local 23 member was without work.

The Commission held that the taxpayer's travel expenses were nondeductible personal expenses incurred by him in commuting from his home to his place of employment and back home. Commuting expenses are not allowable as deductions under the provisions of Section 212 IRC (1954) as interpreted by IRC Regulation 1.212-1(f).

The taxpayer has appealed this decision to the Circuit Court.

Ervin F. Koenig vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, June 28, 1985). The sole issue for the Commission to determine is whether the taxpayer's mileage expense for traveling from his home in Beaver Dam to various job sites located more than ten miles from his home is a nondeductible commuting expense or a deductible transportation expense. The taxpayer's home in Beaver Dam is located approximately 26 miles from Watertown, 10 miles from Horicon, 15 miles from Waupun, 9 miles from Juneau and 32 miles from Johnson Creek. He worked at various job sites in the above communities during the years under review and commuted on a daily basis from his home. The taxpayer was a carpenter and a member of 2064 Carpenters Local in Beaver Dam, Wisconsin, from which he received his job assignments.

The taxpayer contended that his employment was temporary and that he should be allowed mileage deductions if the job site is beyond ten miles from his home, is a temporary job, and if he is required to carry his tools with him for the job.

The Commission concluded that the taxpayer's travel expenses were nondeductible personal expenses incurred by him in commuting from his home to his place of employment and back home. Commuting expenses are not allowable as deductions under the provisions of Section 212 IRC (1954) as interpreted by IRC Regulation 1.212-1(f).

The taxpayer has not appealed this decision.

William E. Korrer vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, June 19, 1985). The sole issue for the Commission to determine is whether during the tax years 1978 through 1981 a bona fide partnership existed between the taxpayer and his wife, which would permit the income derived from a motel tavern business to be split between the taxpayer and his wife as equal partners.

The taxpayer and his wife purchased the combination motel tavern business with funds from the sale of a jointly owned personal residence, the sale of a business Mr. Korrer had owned and some inherited monies of his wife. Business and personal funds were commingled in a checking account in the name of Little Minocqua Motel, William E. and Isabel M. Korrer. Neither the taxpayer nor his wife had a separate checking or savings account.

The taxpayer and his wife both worked full time, seven days a week and year-round in the business. Neither was employed outside of the business.

It appeared that both the taxpayer and his wife had an equal voice in the management of the business. Each had distinct areas of responsibility, including supervisory roles, which allowed them to contract or transact business individually or after consultation with one another.

Many of the bills were in the name of the business and/or the name of both the taxpayer and his wife. The

taxpayer and his wife maintained property insurance, liability insurance, worker's compensation insurance and loss of earnings insurance with both parties named as the insured. Both the taxpayer and his wife were named as makers doing business as Little Minocqua Motel in promissory notes for money loaned in the operation of the business.

According to Isabel Korrer's testimony, the liquor license was in the taxpayer's name alone, which kept open the option to switch the license to her name should that be necessary because of license violations resulting in the taxpayer's license revocation. The seller's permit was also in the taxpayer's name alone because the permit was from his previous vending business and, therefore, had been in his name alone.

The tax forms filed from 1978 through 1981 were consistent in their treatment of the business income, allocating equal amounts to the taxpayer and his wife.

Social security taxes were filed and paid for both individuals for all the years under review, again based on equal division of the business income.

The taxpayer and his wife did not file any Wisconsin or federal partnership tax returns for the years under review. There was no formal partnership agreement, oral or written, between the taxpayer and his wife, although each agreed that they would share all gains and losses equally.

The Commission held that during the taxable years 1978 through 1981 a bona fide partnership did exist between the taxpayer and his wife regarding their combination motel tavern business. The relationship between the taxpayer and his wife met all four elements of the *Skaar* requirement to find a valid partnership.

The department has not appealed this decision.

Thomas R. Krueger vs. Wisconsin Department of Revenue (Wisconsin Supreme Court, June 24, 1985). The issue on appeal is whether the transfer, pursuant to a divorce property division agreement, by a husband to his wife of full title in appreciated real property held as tenants in common during the marriage together with appreciated personal property titled solely in the husband's name, in exchange for a promissory note and retention of other solely owned property when the property is of approximately equal value, is a taxable event for Wisconsin income tax purposes.

Krueger and his wife were divorced in 1980. Prior to their divorce, the couple had owned farm real property as tenants in common. Krueger was the sole owner of farm machinery and equipment.

Pursuant to a divorce agreement entered in January of 1980, the couple divided their property. Krueger transferred his one-half undivided interest as a tenant in common in the farm real property to his wife. His one-half interest had a fair market value of $125,000 and an adjusted basis of $41,815.40 at the time of the transfer. This real property was subject to a jointly-held debt of $136,162. Krueger also transferred farm equipment and machinery to his wife, along with its indebtedness. At the time of this transfer, this personal property had a fair market value of $32,000, an adjusted basis of $26,205.82 and a jointly-held debt of $4,188.

In exchange for these transfers, Krueger received a promissory note from his wife in the amount of $60,000. This note was secured by a lien against the farm real property. Krueger also retained some land, a business and some personal property that he had held in his own name during the marriage. The net fair market value of all of the property received by Krueger in the divorce property division was approximately equal to the net fair market value of the property received by his wife.

The Department of Revenue determined that Krueger's transfer of appreciated property to his wife, pursuant to a divorce settlement, was a taxable event. The department's decision was affirmed by the Wisconsin Tax Appeals Commission which in turn was affirmed by the Circuit Court. (See WTB #39 for a summary of the Wisconsin Tax Appeals Commission's decision.)

In order to answer the question raised, the following sub-issues must be addressed:

A. Did the adoption of the federal definition of income by the Wisconsin legislature in 1965 legislatively overrule *sub silentio* the Supreme Court's decision in *Department of Taxation v. Siegman*, 24 Wis. 2d 92 (1964), which held that the transfer of appreciated, jointly-held real property was not a taxable event in Wisconsin?

B. If so, does Wisconsin property and divorce law place this case under the rule of *United States v. Davis*, 370 U.S. 65 (1962), which held that the transfer of appreciated assets is a taxable event where the transferee spouse has no co-ownership interest in the assets during the marriage, or should this case fall outside of the *Davis* rule and the transfer of appreciated property be deemed to be a nontaxable division of property between co-owners?

In *Siegman*, the Supreme Court held that interspousal transfers of appreciated property made pursuant to a court-imposed divorce judgment were not subject to Wisconsin income tax, pursuant to the provisions of s. 71.03(1)(g), Wis. Stats. Section 71.03(1)(g) defined taxable income as: "All profits derived from the transaction of business or *from the sale or other disposition of real estate* or other capital assets. . ." (Emphasis added.) The Supreme Court determined that: "Because of the difficulty in assessing the economic benefit conferred upon the taxpayer in this context we conclude that the legislature did not intend the transfer of appreciated property, as an incident of a property settlement, to be a taxable event within the meaning of sec. 71.03(1)(g), Stats."

Krueger argued that *Siegman* is the controlling law to be applied in this case and that the Circuit Court erred in not applying it. The department argued that *Siegman* is not applicable because the state legislature, following the *Siegman* decision, amended chapter 71 and changed the definition of taxable income to be co-extensive with the federal definition of income. The Supreme Court found the department's argument to be compelling in this regard.

Chapter 163, Laws of 1965, federalized Wisconsin tax law and adopted many definitions from the Internal Revenue Code as Wisconsin law. Section 71.02(2)(e), Wis. Stats. 1979-80, states that "'Wisconsin adjusted gross income' means federal adjusted gross income, with the modifications prescribed in s. 71.05(1) and (4)." The Court found that in adopting a definition of state income to mean the same as federal income,

the legislature intended that the federal definition of income be applicable as it is interpreted and modified. In other words, what constitutes income for Wisconsin purposes changes as the federal standard evolves. In order to determine Krueger's tax liability in the instant case it is necessary to determine whether the transfer of appreciated property is a taxable event within the federal definition as it has evolved to date.

The department argued that this case is governed by the rule in *Davis*, and that therefore Krueger's transfers are taxable income within the definition of federal taxable income. In *Davis,* the Supreme Court held that there was a taxable event within the meanings of Sections 61 and 1001 of the Internal Revenue Code when a husband transfers property to his wife in exchange for the release of her marital property rights in her husband's separately-owned property where, under state law, such rights are not the equivalent of ownership.

Davis established a general rule that a transfer in satisfaction of a marital obligation is taxable, but a transfer in satisfaction of a property interest is not. If a transfer of appreciated property simply divides jointly-acquired or marital property, the transfer is not generally considered to result in income to the transferor because the transferee, as co-owner of the property, received no more than that which he or she already owned. The transfer merely changes the record title to correspond to the transferee's rights of ownership. In order to determine whether a divorce-forced transfer is in satisfaction of a marital obligation or a division of property between co-owners it is necessary to examine the marital property system of a given state.

Krueger contended, and the Supreme Court agreed, that the couple's property must be considered to be effectively co-owned, given the explicit legislative pronouncement of s. 767.255, Wis. Stats., which presumes that upon the dissolution of a marriage all property which is not traceable to a gift or inheritance is to be divided equally between the parties except where specific factors are present to militate against such a division. Thus, regardless of how the property which was acquired during the marriage may have been titled, each spouse in Wisconsin, since the statutory changes made effective in 1978, has presumptively an equal ownership interest in such property upon the dissolution of the marriage. In the instant case, the parties stipulated that the transfer made pursuant to the divorce agreement equally divided the Kruegers' real and personal property.

Thus, the transfer does not result in a capital gain to the husband. Accordingly, the decision of the Circuit Court must be reversed.

Jeanne F. Polan vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, May 8, 1985). The taxpayer contended that (a) the department improperly applied s. 71.337(1), Wis. Stats., because the imposition of a tax where the nonresident shareholder suffers a loss is inconsistent with the language and the records stating the legislative purpose of the statute; (b) s. 71.337(1), Wis. Stats., as applied, violates the United States Constitution; and (c) s. 71.11(21)(bm), Wis. Stats., bars any of the department's tax assessments against her.

Jeanne F. Polan is and was, at all relevant times, a resident of the State of Illinois. She was the sole shareholder of Burr Oaks Camp, Ltd. (the "Corporation"), until its dissolution on May 17, 1976. The corporation was incorporated in the State of Illinois and operated a camp (Burr Oaks Camp) in the State of Wisconsin.

In 1976, the Corporation executed a plan of complete liquidation, pursuant to Internal Revenue Code Section 337, under which it sold Burr Oaks Camp for $650,000. The Corporation's basis in the property and its expenses in the sale were $260,818.69 and $22,213.44, respectively. Therefore, the Corporation realized a net gain of $366,967.87 on the sale. The Corporation distributed all of its cash and other assets to Jeanne F. Polan, its sole shareholder, after it paid all of its non-Wisconsin tax liabilities.

The taxpayer had acquired her stock in the Corporation on September 30, 1973, and had a basis in that stock of $235,874. When the Corporation distributed its assets, she received $190,361.48. Under Internal Revenue Code Section 337, she realized a net capital loss in the amount of $45,512.52. The taxpayer claimed this loss on her 1976 federal income tax returns.

Under Internal Revenue Code Section 337, the Corporation recognized no gain or loss on the sale of its property because it distributed all of its assets to the shareholder within 12 months of the date that the shareholder adopted a plan of complete liquidation.

Under s. 71.337(1), Wis. Stats., the Corporation realized a taxable gain of $366,967.87 on the sale of its property, notwithstanding the fact that the Corporation distributed all of its assets to its sole shareholder within 12 months of the date that the shareholder adopted a plan of complete liquidation, because there were no Wisconsin resident shareholders of the Corporation.

On May 30, 1978, pursuant to s. 71.337(1), Wis. Stats., the department sent the Corporation a franchise tax assessment notice for the 1976 calendar year, in the amount of $20,578.30 ($18,011.64 tax and $2,566.66 interest). Additional income of $230,780.23 was assessed ($366,967.87 capital gains minus $133,187.64 in operating losses from the last five years of operations). The Corporation petitioned for redetermination of the assessment. The department denied the petition for redetermination. No appeal was made.

Jeanne F. Polan did not file Wisconsin income tax returns for the years 1976, 1977, 1978 or 1979. On April 27, 1981, the department assessed the Corporation's tax against her, pursuant to s. 71.11(21n), Wis. Stats. This assessment consisted of the $18,011.64 in tax plus $6,845.88 in interest.

The Commission concluded that the department properly applied the provisions of s. 71.337(1), Wis. Stats., and assessed the taxes due from Burr Oaks Camp, Ltd. against Jeanne F. Polan, per the clear and unambiguous language contained in s. 71.11(21n), Wis. Stats. The six-year statute of limitation contained in s. 71.11(21)(g), Wis. Stats., applies to the matter before the Commission, because Burr Oaks Camp, Ltd. reported no income for taxation to the State of Wisconsin on its 1976 fiscal year tax return while its properly assessable taxes were in fact $18,011.64. The provisions of s. 71.337(1), Wis. Stats., are presumed to be constitutional until they are de-

cared unconstitutional by a Court of competent jurisdiction. The Wisconsin Tax Appeals Commission is not vested with the authority to review the constitutionality of laws legally enacted by the legislature of the State of Wisconsin.

The taxpayer has appealed this decision to the Circuit Court.

Joseph F. Schissler Estate vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, May 31, 1985). The issue for the Commission to decide is whether the decedent's estate came into possession of a real estate interest in a Florida apartment complex not subject to Wisconsin taxation, or an income interest in the proceeds of the sale, subject to Wisconsin taxation as "income in respect of a decedent" under Section 691(a) of the Internal Revenue Code.

Prior to March 13, 1981 the decedent entered into an agreement to sell a 24-unit apartment building located in Florida. The closing was scheduled to be held at 12:30 p.m., Central Standard Time, in Florida. The decedent signed the Warranty Deed and other closing documents prior to March 12, 1981, postdating the documents for March 13, 1981, and sent them to Donna M. Waniewski, a Florida attorney representing the decedent at the closing. The transaction was closed on March 13, 1981 after 12:30 p.m., Central Standard Time. The decedent died at 11:08 a.m., Central Standard Time, in Milwaukee, Wisconsin.

The Commission held that the proceeds received on the sale of the decedent's interest in the Florida apartment complex constituted income in respect of a decedent within the meaning of Section 691(a) of the Internal Revenue Code and, thus, were includable in gross income for 1981.

The taxpayer has appealed this decision to the Circuit Court.

Richard P. Singer vs. Wisconsin Department of Revenue (Circuit Court of Waukesha County, June 12, 1985). The issue on appeal is whether the taxpayer is liable for an additional underpayment penalty because of his failure to make estimated payments in the first three quarters on the additional $750,000 received in December of 1981, even though the Wisconsin Tax Appeals Commission found that such income was not "reasonably expected" by the taxpayer until September of 1981. The Commission's decision answered this question in the affirmative.

Section 71.21(1), Wis. Stats., requires a taxpayer to make quarterly declarations and payments of estimated tax whenever his tax for a taxable year "can reasonably be expected" to exceed withholding by $100 or more. The Commission found that the taxpayer reasonably expected to receive approximately $40,000 of income not subject to withholding in 1981. It also found that he had "no reasonable expectation" until "sometime in September" of 1981 of receiving the $750,000 which was received in December of 1981 as a result of a corporate redemption of his Clark Oil common stock. It is undisputed that the taxpayer failed to make the required estimated payments on the $10,000 received in each of the first three quarters of 1981. He did make an estimated payment of $80,000 for the fourth quarter, in January of 1982. The taxpayer concedes that he owes a penalty of $126.60 due to his failure to make the required payments for the first three quarters.

Section 71.21(11), Wis. Stats., provides a penalty determined at the rate of 12 percent per year "on the amount of the underpayment for the period of the underpayment". The manner in which this penalty is calculated is prescribed by s. 71.21(12) and (13), Wis. Stats.

The Circuit Court concluded that the decision of the Commission is based upon an erroneous interpretation of s. 71.21, Wis. Stats., and must be reversed. The matter is remanded to the Commission for determination of whether the taxpayer's expectation of receipt of the $750,000 took place before or after September 15, 1981. If before, the taxpayer was liable under s. 71.21(2)(b), Wis. Stats., to pay an estimated tax on this $750,000 for the third quarter and is subject to a penalty under s. 71.21(11), Wis. Stats., for failure to do so. If after, his liability on the $750,000 arose only with the fourth quarter and no penalty is due on the $750,000. In either event, the taxpayer is liable for the conceded penalty of $126.60 for failure to make the quarterly payments on the $30,000.

The department has not appealed this decision.

CORPORATION FRANCHISE/INCOME TAXES

Wisconsin Department of Revenue vs. Lake Wisconsin Country Club (Wisconsin Supreme Court, June 4, 1985). The department appealed the adverse decision of the Court of Appeals, District IV, which concluded that the Wisconsin Tax Appeals Commission's determination that assessments for Lake Wisconsin's capital improvement fund were nontaxable contributions to capital is reasonable. (See WTB #42 for a summary of the decision of the Court of Appeals.)

The Supreme Court denied the department's petition for review.

Wisconsin Railroad Services Corp. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, June 5, 1985). The issue in this case is whether or not the taxpayer correctly reported its income for franchise tax purposes under s. 71.11(8)(a), Wis. Stats., on the cash method of accounting.

The taxpayer is engaged in the business of repair, maintenance and construction of railroad beds, spurs and associated functions. It supplies labor, material and track in construction of railroad beds. The taxpayer maintains an inventory used in the construction business.

The cash method of accounting was regularly employed by taxpayer in keeping its books and records. The taxpayer used a carbonized check writing system to record expenses and a carbonized deposit system to record income. No general ledgers were kept. A monthly spread sheet was prepared to track expenses.

The taxpayer prepared and filed its Wisconsin income and franchise tax returns on the cash basis.

The Commission concluded that the taxpayer's method of reporting income for the Wisconsin franchise tax during the period under review was computed in accordance with the method of accounting which the taxpayer regularly employed in keeping its books. The taxpayer's use of the cash method of reporting income for the Wisconsin franchise tax during the period under review has not been proven by the greater weight of credible evidence to clearly reflect the taxpayer's income for purposes of s. 71.11(8)(a), Wis. Stats. The department's assessment which changed

the taxpayer's method of accounting from a cash method to an accrual method was correct.

The taxpayer has not appealed this decision.

SALES/USE TAXES

Wisconsin Department of Revenue vs. Artex Corporation (Circuit Court of Dane County, June 11, 1985). Artex Corporation participated between December 1, 1979 and November 30, 1981 in the construction of a grain bin for the Dane County Farmers Union Cooperative. The Wisconsin Department of Revenue assessed sales and use tax totalling $24,939.33 on November 3, 1982 against the taxpayer for the above period under ss. 77.51(4)(i), 77.52(1) and 77.53(1), Wis. Stats. The Wisconsin Tax Appeals Commission reversed the department's tax assessment, concluding that the taxpayer's grain-drying operation constituted "manufacturing" under s. 77.51(27), Wis. Stats., and the taxpayer was therefore exempt from taxation under s. 77.54(6)(a), Wis. Stats.

The department raised the following issues under s. 227.20(5) and (6), Wis. Stats.:

A. Was the Commission's conclusion of law that the taxpayer's activities associated with the grain bin constituted "manufacturing" under s. 77.54(6)(a), Wis. Stats., erroneous?

B. Was the Commission's conclusion that the grain processing facility constituted "manufacturing" unsupported by substantial evidence in the record?

C. Did the Commission fail to interpret a provision of the law as to whether the grain bin amounted to a real estate improvement and was therefore subject to sales tax?

The department argued that only *storage* of grain takes place in the bin itself and that the bin, like the silo in *Dept. of Revenue v. Smith Harvestore Products,* 72 Wis. 2d 60 (1976), is a taxable real estate improvement under s. 77.51(4)(i), Wis. Stats.

Several recent Wisconsin cases have considered the application of s. 77.54(6)(a), Wis. Stats., to various business enterprises. In *Wis. Dept. of Rev. v. Bailey-Bohrman Steel Corp.,* 93 Wis. 2d 602 (1980), the Court identified six statutory elements of manufacturing under s. 77.51(27), Wis. Stats.: (1) production by machinery; (2) of a new article; (3) with a different form; (4) with a different use; (5) with a different name; and (6) by a process popularly regarded as manufacturing.

In this case, the department argued there is no production by "machinery", since the grain structure serves as a storage facility only. The department argued that the heating and flaking processes occur before the grain enters the bin itself and that the bin is, therefore, not a "machine". The Circuit Court concluded that there is "production by machinery", given the presence of aerating fans, ducts and thermocouples in the bin. Although the grain bin has certain features in common with buildings, it "performs an independent, essential function in the manufacturing process". The utility of the grain bin is to preserve the feed by controlling air flow and temperature.

The second *Bailey-Bohrman* element of "a new article" is also met in this case. Raw grain, a highly perishable product, is transformed through the Coop's processing into a "new article" which can be held indefinitely for feed purposes.

The Circuit Court looked to the entire grain processing system with regard to this third element, a different form. The feed held for preservation in the grain bin is smaller and dryer (by 15% moisture) than the virgin grain. The corn kernels are shrunk in the drying process and become dry to the touch. The significant biological effect of this change in form is to slow down the activity of bacteria, molds and fungi, which cause grain to rot if it is not processed.

The feed which is held in the taxpayer's grain tank meets the fourth and fifth *Bailey-Bohrman* elements because it has both a different use and a different name. The "feed" can be used for animals for up to several years or ultimately processed into other food articles, such as cornflakes. In contrast, the virgin corn, being a "living organism", can only be used as a food product for a few days.

For the sixth element, the record demonstrates the taxpayer's process is "popularly regarded as manufacturing".

The department raised an additional ground on review, that the Tax Appeals Commission erroneously failed to resolve this question: Whether the grain bin constitutes a real estate improvement and is therefore taxable under ss. 77.51(4)(i), 77.52(1) and 77.53(1), Wis. Stats. The Circuit Court held that the evidence in the record does not establish that a sales tax assessment was levied under that provision by the department. The Circuit Court concluded that all six elements regarding use tax exemption under s. 77.51(27), Wis. Stats., are supported by substantial evidence in the record. The Commissioner's conclusions that the taxpayer's activities associated with the grain bin constitute manufacturing and are therefore exempt from use taxation under s. 77.54(6)(a), Wis. Stats., are not erroneous. The Commission did not err in failing to reach the department's claim that s. 77.51(4)(i) applies to the facts of record.

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

Wisconsin Department of Revenue vs. First National Leasing Corporation (Court of Appeals, District IV, July 16, 1985). The Wisconsin Department of Revenue appealed a Circuit Court judgment affirming an order by the Wisconsin Tax Appeals Commission. The department contended that the Commission lacked authority to grant relief from a stipulation made between the First National Leasing Corporation and the department. Because First National stipulated to the correctness of the assessment and did not timely appeal the stipulation, the Commission improperly granted relief.

On March 7, 1979, the department assessed delinquent taxes against First National after a field audit. First National petitioned the department for redetermination of the assessment on April 5, 1979. First National disputed liability for sales and use taxes assessed on equipment it leased to Sargento Cheese Company, Inc. First National and the department reached an agreement concerning the assessment on October 15, 1979. First National did not appeal the field audit assessment nor the stipulated settlement to the Commission.

On May 30, 1980, the department cancelled an assessment of sales and use taxes against Sargento on

the equipment leased from First National. The basis for the cancellation was that the lessee used the leased equipment in manufacturing. Equipment used in manufacturing is exempt from sales and use taxes. First National already had paid sales and use taxes on the same leased equipment, pursuant to its previous stipulation. First National then filed an amended sales and use tax return seeking a refund of the taxes paid on the leased manufacturing equipment. The department denied a refund for taxes paid before the stipulation.

First National appealed the department's denial of the petition for redetermination to the Commission on September 4, 1980. The department objected to the Commission's jurisdiction because First National did not timely appeal the field audit determination. The Commission ruled that it could grant relief from the stipulation because First National filed the petition for relief within one year of the stipulation. The Commission relied on s. 806.07(2), Wis. Stats., which provides that a Circuit Court may grant relief from a stipulation based on mistake if relief was sought within one year of the stipulation. The Commission applied this rule because Wis. Adm. Code section TA 1.39 (1983) provides that the practice and procedures before the Commission shall substantially follow the practice and procedures before Circuit Courts. Applying the s. 806.07 rule, the Commission ordered relief from the stipulation because First National and the department mistakenly believed that the leased equipment was subject to sales and use taxes. The department then sought judicial review of the Commission's decision. The Circuit Court affirmed the Commission's order.

The only issue is whether the Commission may order relief from the stipulated settlement of tax liability. The Court of Appeals noted that the Commission has no common law powers. It has only the powers that are either expressly conferred or necessarily implied from the four corners of the statutes under which it operates. Such statutes are strictly construed to preclude the exercise of powers not expressly granted.

Section 77.59(2), Wis. Stats., provides that the department's field audit determination becomes final at the expiration of the appeal periods in subsection (6), and the tax liability of the taxpayer may not be subsequently adjusted except in cases of fraud. Section 77.59(6), Wis. Stats., provides that the department's determination is final unless the taxpayer petitions the department for a redetermination within sixty days. Section 77.59(6)(a), Wis. Stats., provides that a redetermination becomes final after sixty days unless the taxpayer appeals to the Commission. Finally, s. 77.59(6)(c), Wis. Stats., provides that a taxpayer may pay any portion of a deficiency determination admitted to be correct, and the payment shall be considered an admission of the validity of that portion of the deficiency determination and may not be recovered in an appeal.

The Court of Appeals concluded that the Commission lacked authority to grant relief from the stipulation. First National timely petitioned the department for a redetermination of the field audit determination, thereby preventing it from becoming final. The subsequent stipulation, however, constituted an admission by First National of the validity of the taxes assessed and subsequently collected. As a result, First National is prevented by s. 77.59(6)(c) from recovering the taxes agreed to in the stipulation. Moreover, even if the Court considers the stipulation to be an appealable redetermination, First National did not appeal that decision within sixty days. The assessment therefore became final, and the Commission lacked authority to later order a refund.

The taxpayer has appealed this decision to the Supreme Court.

F.W. Boelter Co., Inc. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, May 31, 1985). This is a timely filed appeal to the Commission for review of the department's decision on the taxpayer's claim for refund of sales and use taxes for the period from January 1, 1978 through February 28, 1980.

On May 2, 1980, as a result of a field audit covering the period from March 1, 1975 through February 29, 1980, a sales and use tax determination was issued by the department, resulting in an assessment of $20,816.44 ($14,180.61 in sales and use taxes, plus $3,090.68 interest and $3,545.15 penalty).

On June 5, 1980, the taxpayer paid the assessment in full, instead of depositing it pursuant to s. 77.59(6)(c), Wis. Stats., pending ultimate determination of the taxpayer's liability.

On August 19, 1983, the taxpayer filed a claim for refund of these taxes (in the amount of $22,781.22) for the period from January 1, 1978 through December 31, 1982 "under the 'Rause' decision under which certain single service items were ruled to be tax exempt" (*Rause Enterprises, et al. v. Wisconsin Department of Revenue,* Docket No. S-8003, decided January 29, 1982, by the Wisconsin Tax Appeals Commission).

The department denied in part the taxpayer's claim for refund of the taxes paid for the period before March 1, 1980, but conceded $18,113.67 (plus accruing interest) in refunds for the period from March 1, 1980 through February 28, 1983.

The Commission held that it cannot consider the applicability of the *Rause* decision cited by the taxpayer since it had already paid the assessment in full, instead of depositing it pursuant to s. 77.59(6)(c), Wis. Stats. Since the department had field audited the taxpayer for the periods involved, but the taxpayer paid its assessment instead of depositing it in accordance with the statute, the Commission lacks the authority to order a refund of the sales and use taxes, interest and penalty for the periods before March 1, 1980.

The taxpayer has not appealed this decision.

Iverson, Rundell and Stewart, a partnership vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, May 13, 1985). During the period under review, July 1981 to May 1982, the taxpayers, Iverson, Rundell and Stewart, were doing business in Rewey, Wisconsin in a business known as Last Chance Saloon. The issues for this Commission to determine are whether the taxpayers have successor liability for unpaid sales tax under provisions of s. 77.52(18), Wis. Stats., and whether the department is estopped from assessing such tax.

On June 30, 1982, Robert F. Nyman and Betty Nyman, d/b/a Nyman & Nyman, sold the business located at 323 Main Street, Rewey, Wisconsin to Lisa R. Iverson, Linda L. Rundell and Deena C. Stewart. At the closing, the Nymans were represented by Attor-

ney Ronald Walker and Iverson, Rundell and Stewart were represented by the law offices of Morrow & Pope.

Prior to the closing, Attorney Ronald Walker, representing the Nymans, telephoned the Wisconsin Department of Revenue and requested the payoff for delinquent tax warrants issued against the partnership known as Nyman & Nyman. Attorney Ronald Walker testified that he received from the department (over the phone) the amount of $214.03 which would satisfy the delinquent tax warrants against the Nymans.

Attorney Ronald Walker, representing the Nymans, conveyed to Attorney J. Paul Morrow's office that the sum of $214.03 would satisfy the tax warrants. This sum was withheld at the closing and a check was sent in the amount of $214.03 to the department, which issued the satisfaction. The three warrants satisfied were for a September 1981 delinquency.

Robert and Betty Nyman, d/b/a Nyman & Nyman, had outstanding sales tax assessments against them for July, August, October and November 1981 and March, April and May 1982. Their attorney, Ronald Walker, testified that he had no knowledge of these outstanding assessments except as to the warrants for September 1981 which were paid and satisfied. No one requested a clearance certificate pursuant to s. 77.52(18), Wis. Stats.

The Commission held that the taxpayers were successors to the seller's business under s. 77.52(18), Wis. Stats., and section Tax 11.91(1)(a), Wis. Adm. Code. At the time of sale of the business to the taxpayers, the seller was liable for unpaid sales tax for the period under review. 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., the taxpayers' failure to withhold from the purchase price an amount sufficient to cover this liability renders them liable for that amount. The department is not estopped from assessing such tax.

The taxpayers have not appealed this decision.

Security Savings and Loan Association vs. Wisconsin Department of Revenue (Court of Appeals, District I, June 21, 1985). The Wisconsin Tax Appeals Commission issued a decision upholding two tax assessments against Security Savings and Loan Association (Security). (See WTB #32 for a summary of the Wisconsin Tax Appeals Commission's decision.) Security petitioned for judicial review of the decision pursuant to ch. 227, Wis. Stats. The Circuit Court held that the assessments were proper, but that the Wisconsin Department of Revenue was estopped from collecting the tax from Security. The department appealed from the Circuit Court's judgment, contending that the doctrine of equitable estoppel is not applicable in this case. Security cross-appealed, contending that it has no use tax liability for items it gave away as premiums.

Prior to 1972, Security began to give away various premiums to attract new depositors. Security bought the premiums from both in-state and out-of-state vendors. Security also purchased various nonpremium items, such as office supplies, from in-state and out-of-state vendors. In September of 1972, Security was audited by the Department of Revenue. Security received a copy of the auditor's report, which stated "[a] review of the taxpayer's operations indicated that there was no liability for sales or use tax, nor were any sales or use tax returns filed." Security did not file use and sales tax returns until 1976 when the department advised Security that it was incorrectly reporting its tax liability.

On December 17, 1976, Security was assessed additional taxes for the first three quarters of 1976. On May 26, 1977, the department issued another assessment for additional taxes for the period beginning January 1, 1971 and ending June 30, 1976. Security petitioned for redetermination of both the assessments.

At the hearing before the Commission, Security conceded liability for use tax for the nonpremium items purchased from out-of-state vendors. Security contested its tax liability for the premium items purchased in-state or out-of-state on the ground that the depositor, not Security, was the "user" of the premiums within the meaning of s. 77.53, Wis. Stats., the use tax statute.

Security also contested its tax liability for premium and nonpremium items purchased from in-state vendors. Security objected to the assessment on the ground that the burden of taxation for in-state sales is on the vendor. The department ordinarily taxes retail transactions by collecting from vendors. In instances where collection of sales tax from a vendor is impossible, the department collects use tax from the vendee instead. At the hearing, a representative of the Department of Revenue testified that the department was barred by the statute of limitations from collecting from Security's vendors and, therefore, assessed use tax against Security.

Although it noted in its opinion that there was a possibility that the assessment would result in a double tax for Security, the Commission nonetheless upheld the department's assessments. The Circuit Court also affirmed the assessments, but held that the department was estopped from collecting from Security.

Security contends that it was not the "user" of the premiums as that term is employed in ch. 77, Wis. Stats. and, therefore, has no use tax liability.

The person who acquires the property to give it away is a user or consumer rather than a reseller, and is liable for the use tax *(Department of Revenue v. Milwaukee Brewers Baseball Club,* 111 Wis. 2d 571, 576 (1983)). The acquisition of promotional items which are not for resale is a taxable event. Therefore, Security is subject to the use tax on the premiums that it purchased to give away to its customers.

The other issue presented by this appeal is whether the department is estopped from collecting the taxes in question as a result of the audit report transmitted to Security in 1972. Estoppel should be applied against the government with utmost caution and restraint *(Department of Revenue vs. Moebius Printing Co.,* 89 Wis. 2d 610, 638 (1979)). Nevertheless, a governmental agency may be estopped even when it acts in its governmental capacity. The defense of equitable estoppel consists of action or non-action by one against whom estoppel is asserted that induces reasonable reliance thereon by the other, either in action or non-action, to his detriment. The department contends that application of the doctrine is inappropriate because Security suffered no detriment, and its reliance on the 1972 audit was unreasonable.

The facts in this case parallel those in *Moebius*. The Court of Appeals concluded that it was reasonable for Security to rely on the auditor's report which stated that Security had no liability for sales or use tax. Furthermore, Security's reliance was to its detriment. Because Security no longer had recourse to the seller due to the lapse in time between the transactions and the redetermined assessment, Security was forced to accept the department's determination that the seller did not remit the sales tax at the time of the purchases. The Commission itself conceded that the department's failure to collect the tax from the seller before the statute of limitations ran may have subjected Security to double taxation. The Circuit Court correctly decided that the department is estopped from collecting the additional tax assessments from Security.

The department has appealed this decision to the Supreme Court.

Wisconsin Telephone Company, et al. vs. Wisconsin Department of Revenue and Mark Musolf, as Secretary of the Wisconsin Department of Revenue (Court of Appeals, District IV, June 25, 1985). Wisconsin Telephone Company and others appeal from a summary judgment which held s. 77.52(2)(a)4, Wis. Stats., constitutional. The issue is whether the sales tax imposed by s. 77.52(2)(a)4 on interstate telephone calls originating in Wisconsin and billed to Wisconsin telephones impermissibly burdens interstate commerce in violation of the commerce clause, U.S. Const. art. I, sec. 8, cl. 3. (See WTB #37 for a summary of the Circuit Court's decision.)

The taxpayers argue that the tax violates the commerce clause because (a) the interstate telephone "activity" lacks a sufficient nexus with Wisconsin; (b) the tax is not apportioned to activity solely in Wisconsin and therefore creates the risk of multiple taxation of the interstate telephone activity outside Wisconsin; (c) the tax discriminates against interstate commerce; and (d) the tax is not fairly related to services provided by Wisconsin to the taxpayers.

Complete Auto Transit v. Brady, Inc., 430 U.S. 274, *reh. denied*, 430 U.S. 976 (1977), established the standard for determining the constitutionality of a state tax which affects interstate commerce. To withstand a challenge under the commerce clause a tax must (a) apply to an activity having a substantial nexus with the taxing state; (b) be fairly apportioned; (c) not discriminate against interstate commerce; and (d) be fairly related to the services provided by the state.

A. Substantial Nexus

The taxpayers contend that an interstate phone call originating from and billed to a telephone in Wisconsin does not have a sufficient nexus with Wisconsin to justify the tax. They rely on *Midwestern Gas Transmission Co. v. Revenue Dept.*, 84 Wis. 2d 261, 271 (1978), which struck down a use tax on gas consumed by two compressor stations because the consumption was an integral part of interstate commerce that did not have a substantial nexus with the state. The taxpayers argued that *Midwestern Gas* is on point because the interstate telephone call passing through Wisconsin, like the gas transmission, is taxed midstream in the process of interstate commerce before it has terminated, and without realistic separation from the process.

The Court rejected this argument. The s. 77.52(2)(a)4, Wis. Stats., tax is not imposed on interstate activity midstream, but on the sale at the call's origin, an activity which occurs in Wisconsin. The sellers and buyers of the telephone services are located in Wisconsin. The placing of the telephone call and subsequent billing occur in Wisconsin. These factors sufficiently establish Wisconsin's nexus with these telephone service sales. The same factors establish that the sale of service is a local incident that is separate from the interstate process.

B. Fair Apportionment and Risk of Multiple Taxation

The taxpayers contend that the tax is not fairly apportioned and that it poses the risk of multiple taxation. Fair apportionment requires the avoidance of any unfair burden on interstate commerce resulting from more than one jurisdiction imposing the same tax on the same activity.

While s. 77.52(2)(a)4, Wis. Stats., is an unapportioned tax, no risk of multiple taxation has been shown. An unapportioned tax, while suspect, is not per se unconstitutional *(General Motors Corp. v. Washington*, 377 U.S. 436, 448 (1964)).

The taxpayers argue that the existence of a gross receipts tax, which is found in eight other states and the District of Columbia, presents a risk of multiple taxation. They contend that revenues transferred from their telephone companies to telephone companies in those jurisdictions, pursuant to the pooling and division of revenues from interstate calls, will be subject to a gross receipts tax in those jurisdictions in addition to the Wisconsin sales tax.

Wisconsin also imposes a gross receipts tax on telephone companies (s. 76.38(5), Wis. Stats.). The tax is based on gross revenues derived from toll services which are attributable to Wisconsin. The gross receipts tax and sales tax, however, are imposed on different transactions and property. The sales tax is imposed on the privilege of making retail sales of service to Wisconsin consumers. The gross receipts tax is a surrogate property tax, which taxes equipment and property as valued by revenue.

The taxpayers have not shown how another jurisdiction might tax the sale of telephone services so as to establish a significant risk of multiple taxation. Practicalities appear to preclude the possibility. The seller is located in Wisconsin; the call originates from and is billed in Wisconsin. No similar sales tax can be practically imposed on the receiving or nonbilled telephone equipment because no sale is made there. The Supreme Court of Alaska reached a similar conclusion in *Douglas v. Glacier State Tel. Co.*, 615 P. 2d 580, 588 (Alaska 1980).

In addition, no other state would appear to have a legal right equal to Wisconsin's to impose a tax on the sale of telephone service originating and billed in Wisconsin because of the lack of a comparable nexus. The taxpayers have not shown a significant risk of multiple taxation.

C. Discrimination Against Interstate Commerce

A tax does not discriminate against interstate commerce if it places interstate and intrastate activities on an equal footing *(McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 48-49 (1940)). Section 77.52(2)(a)4, Wis. Stats., taxes equally each telephone call originating in Wisconsin and billed to a Wisconsin phone, whether the call is interstate or intrastate. The tax,

therefore, does not discriminate against interstate commerce.

The taxpayers contend the tax discriminates against interstate commerce because it creates multiple burdens to which local commerce is not exposed. The Court rejected the multiple burden argument when discussing apportionment.

D. Fair Relationship to Services Provided by the State

The test of the tax's fair relationship to the benefits enjoyed is whether the state has given anything for which it can ask for something in return *(Wisconsin v. J.C. Penney Co.,* 311 U.S. 435, 444 (1940)). This test is closely related to whether the interstate activity has a substantial nexus with the state *(Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 625-26 (1981)). The measure of the tax must be reasonably related to the extent of the contact with the state because the activity and its participants may properly be made to bear a just portion of the tax burden.

The measure of the tax — the percentage of Wisconsin sales — need not be in precise proportion to the services provided in Wisconsin. A reasonable relation is required, and that standard is met here. The tax is imposed on calls originating from and billed in Wisconsin. The taxpayers are all incorporated, organized, or doing a substantial share of their business in Wisconsin. They enjoy police and fire protection and other benefits of doing business within the state. Deference is accorded the legislature's determination of the appropriate level of taxation. The tax is assessed in proportion to the companies' sales in Wisconsin. The Court concluded the sales tax is reasonably related to the services provided by Wisconsin.

Use Tax

Lastly, the taxpayers argue that "the use tax, which would be imposed in the absence of a sales tax, is invalid for the same reasons that the sales tax is invalid." Section 77.52(3), Wis. Stats., provides that "[t]he taxes imposed by this section may be collected from the consumer or user." The Court has concluded that their attack on s. 77.52(2)(a)4 is without merit and therefore rejects their challenge to s. 77.52(3).

The taxpayers have not met their burden of proving s. 77.52(2)(a)4, Wis. Stats., unconstitutional beyond a reasonable doubt. The Court of Appeals therefore affirmed the decision of the Circuit Court.

The taxpayers have appealed this decision to the Supreme Court.

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.)

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INDIVIDUAL INCOME TAXES

1. Allocation of Death Benefit Exclusion Between Capital Gain and Ordinary Income Parts of a Lump-Sum Distribution

Statutes: section 71.05(1)(a)8, 1983 Wis. Stats.

Note: See the Tax Release titled "Treatment for Capital Gain Portion of a Lump-Sum Distribution From a Retirement Plan or Profit Sharing Plan" in *Wisconsin Tax Bulletin* #34.

Facts and Question: During 1984, Taxpayer A received a lump-sum distribution from her deceased spouse's qualified retirement plan. The 1984 Form 1099-R issued to Taxpayer A reported $16,000 of the distribution as taxable income: $12,000 allocated to ordinary income and $4,000 allocated to capital gain income. Taxpayer A elected to figure her federal tax on the distribution using the 10-year Averaging Method (Internal Revenue Code (IRC) Section 402(e)(4)(L)). On federal Form 4972, "Special 10-year Averaging Method", she elected to report the entire $16,000 as ordinary income and deducted the $5,000 death benefit exclusion against the $16,000.

Section 71.05(1)(a)8, 1983 Wis. Stats., provides that any portion of a lump-sum distribution which is excluded from federal adjusted gross income under IRC Section 402(e) must be added back for purposes of determining a taxpayer's Wisconsin taxable income. A taxpayer who elects federally to treat the entire distribution as ordinary income may report the capital gain portion as capital gain income for Wisconsin.

If Taxpayer A elects to treat the $4,000 as capital gain income for Wisconsin, how should she allocate the $5,000 death benefit exclusion (IRC Section 101(b)) between the capital gain and ordinary income portions of the distribution?

Answer: The death benefit exclusion must be allocated between the ordinary income and capital gain portions of a lump-sum distribution in the following manner:

A. Add the capital gain and ordinary income portions of the distribution to get the total taxable distribution.

B. Divide the capital gain by the total taxable distribution computed in (A) to get a percentage.

C. Subtract the death benefit exclusion from the total taxable distribution computed in (A) to get the net taxable distribution.

D. Multiply the percentage computed in (B) by the net taxable distribution computed in (C). This is the taxable capital gain less the death benefit exclusion.

E. Subtract the taxable capital gain computed in (D) from the net taxable distribution computed in (C). This is the taxable ordinary income less the death benefit exclusion.

Taxpayer A must allocate the $5,000 exclusion as follows:

A.	$ 4,000	Capital Gain Income
	+ 12,000	Ordinary Income
	$ 16,000	Total Taxable Distribution
B.	$ 4,000	Capital Gain
	÷ 16,000	Total Taxable Distribution
	25%	Capital Gain Percentage
C.	$ 16,000	Total Taxable Distribution
	− 5,000	Death Benefit Exclusion
	$ 11,000	Net Taxable Distribution
D.	$ 11,000	Net Taxable Distribution
	× 25%	Capital Gain Percentage
	$ 2,750	Taxable Capital Gain Less Exclusion
E.	$ 11,000	Net Taxable Distribution
	− 2,750	Taxable Capital Gain Less Exclusion
	$ 8,250	Taxable Ordinary Income Less Exclusion

2. Credit for Taxes Paid to Other States - New York Minimum Income Tax

Statutes: section 71.09(8)(c), 1983 Wis. Stats.

Facts and Questions: The taxpayer pays a minimum income tax of $3,000 to New York based on the 60% capital gain deduction (i.e., that portion of the capital gains which are not subject to the New York income tax). May this New York minimum income tax payment based on this 60% capital gain deduction be claimed as a credit against Wisconsin income tax pursuant to s. 71.09(8)(c), 1983 Wis. Stats.?

Answer: Section 71.09(8)(c), 1983 Wis. Stats., requires that certain conditions be met before a credit may be claimed for taxes paid to another state. One of these conditions is that a net income tax must be paid to another state upon income taxable by such state. Also, the credit is not allowable unless the income taxed by the other state is also considered income for Wisconsin tax purposes.

The New York minimum income tax meets the above two conditions for years prior to 1984. However, since Wisconsin taxed only 80% of capital gains in 1982 and 60% in 1983, a taxpayer does not get full credit for the New York minimum income tax for either of those years. Rather, credit is allowed for 2/3 of the New York minimum income tax for 1982 since 2/3 of the 60% capital gain deduction subject to the New York minimum income tax is considered income for Wisconsin. Credit under s. 71.09(8)(c), 1983 Wis. Stats., is allowed for 1/3 of the New York minimum income tax for 1983. (Note: If New York had a minimum tax rather than a minimum income tax, none of the payment to New York would be allowed as a credit under s. 71.09(8)(c) since the payment would not be an income tax paid to New York but rather a minimum tax.)

For 1984 and thereafter, no credit would be allowed for the New York minimum income tax since no part of the 60% capital gain deduction subject to the New York minimum income tax is considered income for Wisconsin.

3. Section 179 Deduction Available for Married Persons

Statutes: sections 71.01(1), 71.02(2)(b) and (e), 1983 Wis. Stats. section 71.02(2)(d)11, 1985 Wis. Stats.

Facts and Question: Under Section 179 of the Internal Revenue Code, all taxpayers, except trusts, estates and certain noncorporate lessors, may elect to expense certain depreciable business assets purchased and placed in service in taxable years beginning after 1981. For the taxable years 1982 through 1985, single persons and married persons filing joint federal returns may elect to expense up to $5,000 of Section 179 property. (Note: Prior to its amendment in 1984 by Public Law 98-369, the Section 179 deduction was scheduled to increase to $7,500 for taxable years 1984 and 1985.) Married persons filing separate federal returns may each claim up to one-half of the amount available to married persons filing joint federal returns ($2,500 for each of the years 1982, 1983, 1984 and 1985).

Section 71.02(2)(e), 1983 Wis. Stats., provides that Wisconsin adjusted gross income means federal adjusted gross income with certain prescribed modifications. For the 1982 taxable year, federal adjusted gross income is determined under the Internal Revenue Code in effect on December 31, 1981 (s. 71.02(2)(b)8, 1983 Wis. Stats.). For the 1983 taxable year, federal adjusted gross income is determined under the Internal Revenue Code in effect on December 31, 1982 (s. 71.02(2)(b)9, 1983 Wis. Stats.). For the 1984 taxable year, federal adjusted gross income is determined under the Internal Revenue Code in effect on December 31, 1983 (s. 71.02(2)(b)10, 1983 Wis. Stats.). For the 1985 taxable year, federal adjusted gross income is determined

under the Internal Revenue Code in effect on December 31, 1984 (s. 71.02(2)(d)11, 1985 Wis. Stats.).

What are the maximum Section 179 deductions available to married persons filing Wisconsin income tax returns for the years 1982, 1983, 1984 and 1985?

Answer: Since a husband and wife are considered separate taxpayers under s. 71.01(1), 1983 Wis. Stats., married persons filing Wisconsin income tax returns for the years 1982, 1983, 1984 and 1985 are limited to the Section 179 deductions available to married persons filing separate federal returns. The amount of deduction available each year is determined under the Internal Revenue Code in effect for that taxable year. Thus, the maximum Section 179 deduction available to each spouse is $2,500 in 1982 and 1983, $3,750 in 1984 and $2,500 in 1985.

Example 1: A husband and wife file a 1985 Wisconsin income tax return. On their 1985 federal return, the husband claims a $5,000 Section 179 deduction for machinery used in his business. For Wisconsin, the maximum Section 179 deduction that the husband may claim is $2,500, the amount available to married persons filing separate federal returns. The wife may not claim any part of her husband's Section 179 deduction.

Example 2: A husband and wife file a 1984 Wisconsin income tax return. On their 1984 federal return, the wife claimed a $5,000 Section 179 deduction. For Wisconsin, the maximum Section 179 deduction that the wife may claim is $3,750, the amount available to married persons filing separate federal returns under the December 31, 1983 Internal Revenue Code. The husband may not claim any part of his wife's Section 179 deduction.

Example 3: A husband and wife file a 1984 Wisconsin income tax return. On their 1984 federal return, the husband claimed a $5,000 Section 179 deduction for farm equipment. For Wisconsin, the maximum Section 179 deduction that the husband may claim is $3,750, the amount available to married persons filing separate federal returns under the December 31, 1983 Internal Revenue Code. Since the wife also purchased business assets during 1984 which would qualify for the Section 179 deduction, she may also claim a maximum Section 179 deduction of $3,750 on her 1984 Wisconsin return.

4. Using the Section 179 Deduction to Create the Same Depreciable Basis for Wisconsin and Federal Purposes for Individuals

Statutes: section 71.02(2)(b)10, 1983 Wis. Stats.

Note: See the Tax Release titled "Wisconsin Basis of Investment Tax Credit Property" in *Wisconsin Tax Bulletin* #35 and "Section 179 Deduction Available for Married Persons" in this Bulletin.

Background:

A. Basis of Investment Tax Credit Property

For federal purposes, individuals who elect the full 10% investment tax credit on property placed in service after December 31, 1982 must reduce the depreciable basis of the property by one-half of such credit. For Wisconsin income tax purposes, the basis of such property does not have to be reduced when the 10% federal investment tax credit is claimed.

B. Section 179 Expense Deduction

For federal purposes, individuals may elect to treat part of the cost of qualifying property as an expense rather than as a capital expenditure (Internal Revenue Code Section 179). The maximum Section 179 expense deduction allowed federally for 1984 is $5,000 for single persons and married persons filing jointly and $2,500 each for married persons filing separately.

For 1984, Wisconsin follows the Internal Revenue Code in effect as of December 31, 1983. Therefore, the maximum Section 179 expense deduction allowed on 1984 Wisconsin income tax returns is $7,500 for single persons and $3,750 for each spouse for married persons.

Example: During 1984 a single person purchased and placed in service equipment which cost $20,000. The equipment is in the 5-year ACRS recovery class. The taxpayer claimed the 10% federal investment tax credit of $2,000 on this equipment. This individual's federal depreciable basis for 1984 is $19,000 ($20,000 minus one-half of the $2,000 investment tax credit). Since the individual used the full cost of the property to compute the investment tax credit, no Section 179 expense deduction is available for federal purposes.

If a Section 179 expense deduction is not claimed or allowed for Wisconsin purposes, the individual's depreciable basis for 1984 is $20,000, the cost of the equipment. The individual in this instance would be required to maintain separate depreciation records for Wisconsin and federal income tax purposes.

Question 1: May this individual elect to claim a $1,000 Section 179 expense deduction on this property on his or her Wisconsin income tax return, thereby creating the same depreciable basis of $19,000 ($20,000 - $1,000) for 1984 for Wisconsin and federal purposes?

Answer 1: Yes. Since the Section 179 expense deduction is an *election* available under the Internal Revenue Code, an individual may elect to use this expense deduction on qualifying property on the individual's Wisconsin return even though the same election is not claimed on the federal return. In the above example, the individual could claim a $1,000 Section 179 expense on his or her Wisconsin return for 1984, provided the maximum Section 179 expense deduction was not claimed on other business assets purchased and placed in service in 1984. This individual will then have a $19,000 depreciable basis for Wisconsin and federal purposes for 1984, and the same depreciation deductions may be claimed on the individual's federal and Wisconsin returns for 1984 and thereafter. The individual will not have to maintain separate depreciation records for Wisconsin.

Question 2: If the individual in the above example elects to claim the $1,000 Section 179 expense deduction for Wisconsin, how should the individual report this difference on the Wisconsin return?

Answer 2:

A. If the Section 179 expense deduction affects other amounts on the federal return.

Since the Section 179 expense deduction claimed for Wisconsin will affect the computation of federal adjusted gross income, it may also affect other items of income or deduction which are based on federal adjusted gross income (such as taxable unemployment compensation, itemized deduction for medical expenses). If the Section 179 deduction claimed for Wisconsin does affect other income or deductions, the individual must submit with the Wisconsin Form 1 a revised federal Form 1040 and accompanying schedules which reflect the $1,000 Section 179 expense deduction claimed only for Wisconsin income tax purposes. In this situation, the federal return filed with Wisconsin will *not* be identical to the federal return filed with the Internal Revenue Service.

The amounts on lines 5 through 25 and 37 of the 1984 Wisconsin Form 1 will be taken from the revised federal return which reflects the Section 179 expense deduction being claimed for Wisconsin.

B. If the Section 179 expense deduction does not affect other amounts on the federal return.

The individual should report on lines 5 through 25 and 37 of the 1984 Wisconsin Form 1 the amounts as they appear on the federal return filed with the Internal Revenue Service. On line 34 of the 1984 Wisconsin Form 1, the individual should write "Section 179 expense claimed for Wisconsin only" and claim a subtraction modification for $1,000. A schedule must be attached to the Wisconsin return identifying the specific items to which the Section 179 election applies and the part of the cost of each item the individual elects to deduct as an expense.

Note: Although the taxpayer in this example elected only $1,000 of Section 179 expense on the Wisconsin income tax return, $7,500 Section 179 expense could have been deducted on the 1984 Wisconsin income tax return. The Wisconsin depreciable basis would then be $12,500 ($20,000 - $7,500) and the taxpayer would be required to maintain separate depreciation records for Wisconsin income tax purposes.

If the taxpayer in this example had been an estate or a trust, the Section 179 expense would not be allowed. For federal and Wisconsin tax purposes, estates, trusts, and certain noncorporate lessors do not qualify for the Section 179 expense deduction.

CORPORATION FRANCHISE/INCOME TAXES

1. Accounting for Accrued Expenses of a Corporation

Statutes: sections 71.04(7) and (12), 71.041 and 71.11(8), 1983 Wis. Stats.

Facts and Question: The Federal Tax Reform Act of 1984 made several changes to the timing of an accrued expense for federal income tax purposes. Since Wisconsin corporate franchise/income tax law is not generally federalized, these changes do not apply to Wisconsin and may create differences between federal and Wisconsin treatment of accrued expenses. Contributions to pension plans are an exception, as described below.

What is the federal and Wisconsin treatment of accrued expenses?

Answer: Following is a summary of federal and Wisconsin treatment of accrued expenses.

A. General Rules

(1) Federal Law - Section 461(h), Internal Revenue Code, effective for amounts deductible after July 18, 1984.

Under the accrual method of accounting, an expense was deductible in the taxable year in which all events occurred which determined, with reasonable accuracy, both the fact and amount of the liability. This "all events test" has been modified to provide that all of the events that establish liability for an item during a taxable year may not occur earlier than the time of "economic performance" Generally, economic performance occurs when the activities that must be performed to satisfy a liability are, in fact, performed. For example:

(a) In the case of a taxpayer's liability that requires a payment for property or services, economic performance occurs as the property or services are provided to the taxpayer.

(b) If the taxpayer's liability requires the taxpayer to provide services or property, economic performance occurs as the taxpayer provides the services or property.

(c) In the case of a taxpayer's liability to another person arising under worker's compensation laws or out of any tort, economic performance occurs as payments to that person are made.

There are several exceptions to the economic performance test. The requirement does not apply to the liability of a taxpayer providing benefits to employes under qualified pension and profit sharing plans. The requirement is also inapplicable to contributions to a funded welfare benefits plan as well as to items that are covered by other Internal Revenue Code sections such as deductions for additions to bad debt reserves.

Also, certain items are treated as incurred in a taxable year if (a) the all events test is met, (b) economic performance occurs within a reasonable period (but limited to 8 1/2 months after the end of the taxable year), (c) the item is recurring and the tax treatment is consistent, and (d) the item is not material and accrual during the year results in better matching against income. In determining whether an item is recurring and consistently treated, items incurred in starting up a business and items not occurring each and every year may be considered.

Finally, special elections permit deductions in advance of economic performance. Where a taxpayer elects to adopt a uniform method of deducting qualified reclamation and closing costs associated with certain mining and solid waste disposal properties, or to deduct contributions to a qualified nuclear decommissioning reserve fund, the economic performance rule does not apply.

(2) Wisconsin Law - Sections 71.04(7) and 71.11(8), 1983 Wisconsin Statutes.

Taxable income must be computed using a method of accounting which clearly reflects income. A method of accounting will not be regarded as clearly reflecting income unless all items of gross income and deduction are treated

with reasonable consistency. Reserves for contingent losses or liabilities are not deductible.

The accrual method of accounting attributes items of income to the year in which earned. Items of deduction are attributed to the year in which all events necessary to establish liability for their payment have occurred. An accrual basis taxpayer may deduct the amount of an accrued expense when the liability becomes fixed and determinable.

B. Related Party Transactions

(1) Federal Law - Section 267, Internal Revenue Code, effective for taxable years beginning after December 31, 1983.

An accrual basis taxpayer may deduct expenses and interest owed to a related cash basis person when payment is made and the amount is includable in the gross income of the recipient. A related taxpayer includes (a) members of a family, (b) an individual and a corporation more than 50% in value of the outstanding stock of which is owned, directly or indirectly, by or for such individual, (c) two corporations that are members of the same controlled group, (d) a fiduciary of a trust and a corporation more than 50% in value of the outstanding stock of which is owned, directly or indirectly, by or for the trust or by or for a person who is a grantor of the trust, (e) a person and an organization to which Section 501 applies and which is controlled directly or indirectly by such person, (f) a corporation and a partnership if the same persons own more than 50% in value of the outstanding stock of the corporation and more than 50% of the interest in the partnership, (g) an S corporation and another S corporation if the same persons own more than 50% in value of the outstanding stock of each corporation, or (h) an S corporation and a C corporation if the same persons own more than 50% in value of the outstanding stock of each corporation.

(2) Wisconsin Law - Section 71.04(12), 1983 Wisconsin Statutes.

Whenever the recipient is a cash basis taxpayer, generally no deduction is allowed for accrued wages, salaries, bonuses, interest or other expenses if not paid within 2 1/2 months after the close of taxable year to an officer of a corporation or to a shareholder of a corporation who owns more than 20% of the outstanding voting stock. Any amount disallowed under this section is deductible when ultimately paid.

C. Accrued Vacation Pay

(1) Federal law - Section 463, Internal Revenue Code, effective for taxable years beginning after March 31, 1984.

A taxpayer may elect to deduct a reasonable addition to a reserve for vacation pay, representing the taxpayer's liability for contingent or vested vacation pay, earned by employes before the close of the current year and expected to be paid during the taxable year or within 12 months following the close of the taxable year.

(2) Wisconsin Law - Section 71.04(7), 1983 Wisconsin Statutes.

Accrued vacation pay may be deducted only if the employe's right to the vacation vests in him or her as it is earned, so that the employe may never lose it. If the employe could lose the vacation pay, it is a contingent liability and, therefore, not deductible.

D. Pension Plan Contributions

(1) Federal Law - Sections 401 and 404, Internal Revenue Code, existing law unchanged by the Federal Tax Reform Act of 1984.

Contributions to qualified pension plans are deemed to have been made on the last day of the preceding taxable year if the payment is on account of such taxable year and is made not later than the time prescribed by law for filing the return for such taxable year, including extensions.

(2) Wisconsin Law - Section 71.041, Wisconsin Statutes.

Wisconsin follows the federal treatment for deducting qualified pension plan contributions. (Section 71.041 was enacted by 1983 Wisconsin Act 405 and applies to plan years beginning after September 2, 1974 that are open to adjustment on or after the effective date of the Act, May 10, 1984.)

2. Expenses Related to Wholly Exempt Income

Statutes: section 71.04(2)(b)9, (4)(b) and (7m), 1983 Wis. Stats.

Note: This Tax Release applies only with respect to taxable years 1983 and thereafter.

Facts: Section 71.04(2)(b)9 and (7m), 1983 Wis. Stats., effective for the taxable year 1983 and thereafter, does not allow deductions related to "wholly exempt income". Wholly exempt income for corporations subject to Wisconsin franchise or income tax includes amounts received from affiliated or subsidiary corporations for interest, dividends or capital gains that, because of the degree of common ownership, control or management between the payor and payee, are not subject to taxation under Chapter 71. Interest on obligations of the United States is included in "wholly exempt income" for a corporation subject to the income tax.

In 1983, Corporation X received $1,000 in dividends from Corporation Y, a non-unitary subsidiary, and $5,000 in dividends from Corporation Z, a unitary subsidiary. Both Corporation Y and Corporation Z are wholly owned subsidiaries of Corporation X. Because Corporation Y is a non-unitary subsidiary of Corporation X, the $1,000 in dividends Corporation X received from Corporation Y is exempt from taxation under Chapter 71. The $5,000 in dividends Corporation X received from Corporation Z is not exempt under Chapter 7l but would be deductible to the extent of $2,500 under s. 71.04(4)(b), 1983 Wis. Stats.

Question 1: Does "wholly exempt income" for Corporation X include the $2,500 in deductible dividends under s. 71.04(4)(b), 1983 Wis. Stats., received from Corporation Z in addition to the $1,000 in dividends received from the non-unitary subsidiary Corporation Y?

Answer 1: Section 71.04(2)(b)9, 1983 Wis. Stats., does not apply to the $2,500 dividends deductible under s. 71.04(4)(b) because of the definition of "wholly exempt income." Section 71.04(2)(b)9, 1983 Wis. Stats., states that wholly exempt income does not include income excludable, exempt or deductible under specific provisions of Chapter 71. In this case, only the $1,000 would be considered "wholly exempt income".

Question 2: What types of expenses would be included as nondeductible under s. 71.04(2)(b)9, 1983 Wis. Stats.?

Answer 2: Section 71.04(2)(b)9, 1983 Wis. Stats., specifies any amount directly or indirectly related to producing wholly exempt income is not deductible. Examples of such expenses would be taxes, interest, and administrative fees related to the production of this wholly exempt income.

3. Certificate of Authority and Nexus

Statutes: section 71.07(1m) and (2), 1983 Wis. Stats.

Wis. Adm. Code: section Tax 2.82, September 1983 Register

Facts and Question: Corporation A is a New York based multistate corporation with manufacturing operations in several states. On May 1, 1984 Corporation A sold its Wisconsin plant and ceased all of its Wisconsin operations. Corporation A continued, however, to make sales into Wisconsin and maintained its certificate of authority to operate in Wisconsin through December 31, 1984.

Does Corporation A, a calendar year taxpayer, have nexus in Wisconsin in 1984 for four months (up to the sale of its plant on May 1, 1984) or for the entire 1984 taxable year?

Answer: Corporation A is considered to have nexus in Wisconsin for all of 1984, even though it had no activity in Wisconsin, except for destination sales during the last eight months of 1984. Nexus, once established, is for the entire taxable year.

As such, Corporation A is required to file a 1984 Wisconsin corporation franchise/income tax return for the entire year, reporting its total Wisconsin income in accordance with s. 71.07(1m) and (2), 1983 Wis. Stats.

In arriving at its 1984 apportionment percentage, Corporation A would include its total property, payroll and sales for all of 1984 in the denominator of its property, payroll and sales factors. The property and payroll factor numerators would include all Wisconsin property and payroll in Wisconsin up to the time of the sale of its Wisconsin plant on May 1. The sales factor numerator would include all applicable Wisconsin sales as defined in s. 71.07(2)(c), 1983 Wis. Stats., up to the time of the sale of the plant, plus all sales shipped into Wisconsin during the remainder of 1984.

4. Throwback Sales - Shipments by Third Parties

Statutes: section 71.07(2)(c)1 and 2m, 1983 Wis. Stats.

Wis. Adm. Code: section Tax 2.39 (5)(c)7, September 1983 Register

Note: This Tax Release applies only with respect to taxable years 1983 and thereafter.

Facts and Questions: Section 71.07(2)(c)2m was created by 1983 Wisconsin Act 27 to provide that in computing the sales factor of the apportionment formula, Wisconsin sales will include sales of tangible personal property made by an office in Wisconsin to a purchaser in another state if the property is shipped directly by a third party to the purchaser and neither the purchaser's state nor the state from which the property is shipped have jurisdiction for franchise/income tax purposes to tax the taxpayer. Section 71.07(2)(c)2m is effective for the 1983 taxable year and thereafter.

In 1984, Corporation X negotiates a sale of tangible personal property of $1,000 from its Wisconsin office to Corporation Z located in Texas. The property is manufactured by Corporation Y in Ohio and shipped from Ohio to Texas. Corporation X does not have any property, payroll or other activities in either the state of shipment (Ohio) or the destination state (Texas).

Question 1: If Corporation X arranges to have the tangible personal property shipped from the loading dock of Corporation Y by hiring a common or contract carrier to transport the property to Corporation Z, is the sale of $1,000 treated as a Wisconsin sale for purposes of computing the sales factor of the apportionment formula?

Answer 1: No. Section 71.07(2)(c)2m, 1983 Wis. Stats., does not apply since the property is not shipped directly by a third party to the purchaser, Corporation Z.

Question 2: If Corporation Y arranges to have the property shipped to Corporation Z, either by common, contract or private carrier, is this sale treated as a Wisconsin sale for purposes of computing the sales factor of the apportionment formula?

Answer 2: Yes. Since Corporation Y ships the property, or arranges for the shipping, the property is shipped directly by a third party and s. 71.07(2)(c)2m would apply.

Question 2a: If this sale of $1,000 is treated as a Wisconsin sale in Question 2 above, is it included in the numerator of Corporation X's sales factor at 50% ($500) or 100% ($1,000)?

Answer 2a: Pursuant to s. 71.07(2)(c)1, this sale would be included in the numerator of Corporation X's sales factor at 50% ($500) because Corporation X would not be within the jurisdiction of the destination state (Texas) for income tax purposes.

Question 3: How does the creation of s. 71.07(2)(c)2m by 1983 Wisconsin Act 27 affect the decision in *Business and Institutional Furniture, Inc. vs. Wisconsin Department of Revenue* (Circuit Court of Milwaukee County, May 29, 1981)?

Answer 3: In its decision the Circuit Court held that sales directed by Business and Institutional Furniture, Inc.'s Wisconsin office which were shipped from third parties located outside Wisconsin to purchasers located outside Wisconsin, where neither the purchaser's state nor the state from which the property was shipped had jurisdiction to tax Business and Institutional Furniture, Inc. for income tax purposes, were not Wisconsin sales under Wis. Adm. Code section Tax 2.39 (5)(c)7 because there was no statutory authority to include such sales in the numerator of the sales factor. Section 71.07(2)(c)2m, 1983 Wis. Stats., gives Wisconsin such statutory authority and overrides this decision for taxable years 1983 and thereafter.

5. Wisconsin Destination Sales

Statutes: section 71.07(2)(c)1, 1983 Wis. Stats.

Wis. Adm. Code: section Tax 2.39 (5)(c), September 1983 Register

Question: If a manufacturer transfers merchandise to a public warehouse in Wisconsin for delivery outside Wisconsin at a later date and title passes to the customer at the time of transfer to storage, is this a Wisconsin sale for purposes of s. 71.07(2)(c)1, 1983 Wis. Stats.?

Answer: Pursuant to s. 71.07(2)(c)1, 1983 Wis. Stats., and Wis. Adm. Code section Tax 2.39(5)(c), this is a Wisconsin sale since the shipment terminates in Wisconsin, even though the property is subsequently transferred by the purchaser to another state, unless the activity in Wisconsin is exempted by s. 71.01(2m)(b), 1983 Wis. Stats. If the customer takes title to the merchandise and temporarily stores the merchandise on rented space in Wisconsin, this is deemed to be a delivery into Wisconsin. Such sales therefore are includable in the numerator of the sales factor at 100%.

6. Wisconsin Treatment of Government Sales for Sales Factor Purposes

Statutes: section 71.07(2)(c)l and 2, 1983 Wis. Stats.

Wis. Adm. Code: section Tax 2.39(5)(d), September 1983 Register

Facts and Questions: Section 71.07(2)(c)2, 1983 Wis. Stats., provides in part that sales are in Wisconsin if the property is shipped from an office, store, warehouse, factory or other place of storage in Wisconsin and the purchaser is the United States government or the taxpayer is not within the jurisdiction, for income tax purposes, of the destination state.

Are sales to the United States Government included in the numerator of the sales factor at 100% or 50% of such sales?

Answer: Sales to the U.S. Government are included in the sales factor at 100%. Section 71.07(2)(c)1, 1983 Wis. Stats., provides in part that the numerator of the sales factor includes the following:

A. 100% of the property delivered or shipped to a purchaser, other than the U.S. Government, within Wisconsin regardless of the f.o.b. point or other conditions of sale.

B. 100% of the property shipped from an office, store, warehouse, factory or other place of storage in Wisconsin and the purchaser is the U.S. Government.

C. 50% of the property shipped from an office, store, warehouse, factory or other place of storage in Wisconsin and the corporation is not within the jursidiction for income tax purposes of the destination state.

Section 71.07(2)(c)1, 1983 Wis. Stats., clearly sets forth that sales includable in the numerator of the sales factor at 50% are those deemed to be in Wisconsin because the corporation is not within the jursidiction of the destination state for income tax purposes.

Example: Corporation W, a multistate corporation, ships property from its Wisconsin factory to customers in numerous states, including Illinois and Missouri. Among its customers in these two states is the U.S. Government. During 1984 Corporation W's shipments from Wisconsin into Illinois totalled $4,000,000 which included $500,000 to the U.S. Government, while its shipments into Missouri amounted to $2,000,000, including $600,000 to the U.S. Government. Assuming Corporation W has nexus in Illinois but not in Missouri during 1984, its 1984 sales factor numerator would include the following Illinois and Missouri sales:

Wisconsin shipments to U.S. Government in Illinois	$ 500,000
Wisconsin shipments to all other Illinois customers	-0-
Wisconsin shipments to U.S. Government in Missouri	600,000
Wisconsin shipments to all other Missouri customers ($1,400,000 x 50%)	700,000
Total Wisconsin shipments includable in sales factor numerator to Illinois and Missouri	$1,800,000

7. Wisconsin Treatment of Government-Owned and Company-Operated Plants for Property Factor Purposes

Statutes: section 71.07(2)(a), 1983 Wis. Stats.

Wis. Adm. Code: section Tax 2.39(3)(a) and (c), September 1983 Register

Question: Section 71.07(2)(a), 1983 Wis. Stats., provides in part that property owned or rented and used in the production of apportionable income is to be included in the computation of the property factor. Does s. 71.07(2)(a), 1983 Wis. Stats., require the inclusion in the property factor of amounts attributable to United States or state government real or personal property which is used or leased by a corporation in the operation of a government-owned and company-operated plant?

Answer: If the government-owned property is leased by a corporation, the rental payments times eight would be included in the property factor under s. 71.07(2)(a)3, 1983 Wis. Stats. If the property is used by a corporation without payment of any kind to the government, no value is attributed to such use for inclusion in the property factor since the corporation neither owns or rents the property.

Example: The U.S. Government owns an ammunition plant in Wisconsin. Corporation A is furnished free use of this plant to produce ammunition for the U.S. Government. However, it must pay $100,000 per year to the U.S. Government for use of the machinery and equipment in this plant.

The machinery and equipment will be included in both the numerator and denominator of the property factor pursuant to s. 71.07(2)(a)3, 1983 Wis. Stats., at $800,000 (rent paid of $100,000 x 8). Since Corporation A paid no rent to the U.S. Government for use of the plant it will have a value of -0- for the property factor.

8. Taxability of ACT (Advance Corporation Tax) Refunds

Statutes: section 71.03(1)(k), 1983 Wis. Stats.

Facts and Question: The United Kingdom levies on companies the Advance Corporation Tax (ACT). ACT is an advance payment of the corporation's general corporate tax. Pursuant to federal Rev. Proc. 80-18, the Internal Revenue Service treats ACT refunds as a dividend. These are actually refunds of taxes from the United Kingdom. How are these refunds to be reported for Wisconsin franchise/income tax purposes?

Answer: The Wisconsin Statutes do not include a provision to treat these refunds as dividends. To the extent that a corporation received a tax benefit from the deduction of these taxes, the refund must be included in its net income (s. 71.03(1)(k), 1983 Wis. Stats.).

9. Wisconsin Tax Treatment of Stock Purchases Treated as Asset Purchases Under Sections 334 and 338 of the Internal Revenue Code

Statutes: section 71.334(2)(b), 1983 Wis. Stats.

Note: This tax release is effective with respect to all transactions occurring after August 31, 1982.

Facts and Question: The Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) made extensive changes to the 300 Sections of the Internal Revenue Code (IRC). One change made by TEFRA was to repeal Section 334(b)(2) of the IRC and replace it with Section 338.

Under the provisions of Section 334(b)(2) of the IRC (commonly referred to as the Kimbell-Diamond doctrine) an acquiring corporation could receive stepped up basis in the assets of the acquired corporation (target corporation) equal to its adjusted basis of the stock in the target corporation. To qualify for the stepped up basis, the acquiring corporation must have purchased within a twelve month period at least 80% of the total stock of the target corporation and within a two year period after that purchase adopt a plan of liquidation for the target corporation. The acquiring corporation can receive the same treatment for Wisconsin tax purposes pursuant to s. 71.334(2)(b), 1983 Wis. Stats.

Under the provisions of Section 338 of the IRC, the acquiring corporation, within 75 days after making a "qualified stock purchase" with respect to the acquired corporation (target corporation), may make an irrevocable election to treat the target corporation as if the target corporation had sold and repurchased its assets in a complete liquidation on the stock acquisition date for an amount generally equal to the acquiring corporation's basis in the target's stock. This gives the acquiring corporation a basis in the target's assets generally equal to its basis in the target's stock without the necessity of liquidating the target corporation. For purposes of Section 338 of the IRC a "qualified stock purchase" is the same as set forth under Section 334(b)(2) of the IRC (80% of the total stock within a twelve month period).

Wisconsin has not enacted legislation similar to Section 338 of the IRC. However, the provisions of Section 334 of the IRC prior to TEFRA are contained in s. 71.334(2)(b), 1983 Wis. Stats.

What differences between Wisconsin and federal treatment exist due to the fact that Wisconsin has not adopted the provisions of Section 338 of the IRC?

Answer: Some of the major differences between the treatment received under s. 71.334(2)(b), 1983 Wis. Stats., and Section 338 of the IRC are as follows:

A. The period of time in which to make a decision on stepped up basis is reduced from two years from the acquisition date to 75 days from the acquisition date under Section 338 of the IRC.

B. Under Section 338 of the IRC, the target corporation is deemed to have sold its assets for an amount equal to the purchasing corporation's "grossed up basis" in the target's stock on the acquisition date.

C. The target corporation will not be forced to liquidate under Section 338 of the IRC to receive a stepped up basis. Since Wisconsin has not adopted Section 338 of the IRC, a corporation must be liquidated to get a stepped up basis under s. 71.334(2)(b), 1983 Wis. Stats. The following example illustrates this difference:

ABC Corporation wants to acquire the operating assets in XYZ Corporation. To accomplish this the ABC Corporation buys 100% of the outstanding stock in XYZ Corporation for $505,500. Within 75 days after buying the stock of XYZ Corporation, the ABC Corporation makes an election under Section 338 of the IRC to treat this purchase of stock as if it had purchased the assets of XYZ Corporation and immediately resold them back to ABC Corporation's new subsidiary. XYZ Corporation is not liquidated.

XYZ Corporation's Balance Sheet

	(Col. A) Tax Basis	(Col. B) Fair Market Value	(Col. C) Basis Using S. 338
Cash	$ 16,000	$ 16,000	$ 16,000
Accounts Receivable	23,000	19,000	19,000
Land	6,000	10,000	10,000
Machinery & Equipment (Net)	122,000	588,000	588,000
Total	$167,000	$633,000	$633,000
Accounts Payable	$110,500	($110,500)	$110,500
Accrued Expenses	17,000	(17,000)	17,000
Capital Stock	15,000		15,000
Earned Surplus	24,500		490,500
Total	$167,000	$505,500	$633,000

Unless XYZ Corporation is liquidated into ABC Corporation pursuant to a plan of liquidation adopted within two years from the date of the stock purchase, the basis of the assets for Wisconsin tax purposes will be the original tax basis (Column A). To get the stepped up basis in assets, XYZ Corporation must be liquidated under the provisions of s. 71.334(2)(b), 1983 Wis. Stats.

HOMESTEAD CREDIT

1. Alien Student's Qualification for Homestead Credit

Statutes: section 71.09(7)(a)5, 1983 Wis. Stats.

Facts and Question: For homestead credit purposes, a claimant must be domiciled in Wisconsin during the entire calendar year for which the claim is filed (s. 71.09(7)(a)5, 1983 Wis. Stats.). A foreign student in this country with an "F" visa under Section 101(a)(15)(F) of the Immigration and Nationality Act may be classified for federal tax purposes as a nonresident alien or as a resident alien depending on his or her intended length of stay in the country. However, regardless of the student's alien status, the student maintains his or her domicile in his or her homeland.

May a foreign student in Wisconsin under an "F" visa, with resident alien status for federal tax purposes, claim homestead credit?

Answer: No, since a student in Wisconsin under an "F" visa is not domiciled in Wisconsin but rather is domiciled in his or her homeland, he or she is not eligible for homestead credit.

FARMLAND PRESERVATION CREDIT

1. "Property Taxes Accrued" for the Year Farmland Is Inherited

Statutes: section 71.09(11)(a)(7), 1983 Wis. Stats.

Facts and Question: Under s. 71.09(11)(a)1, 1983 Wis. Stats., a farmland preservation credit claimant is an owner of farmland who has been a resident of Wisconsin for the entire taxable year for which the credit is being claimed. A claimant bases his or her farmland credit on household income and "property taxes accrued" on qualified farmland.

Under s. 71.09(11)(a)7, 1983 Wis. Stats., "property taxes accrued" means the real property taxes (less the state credit) levied on the farmland and improvements owned by the claimant or any member of the claimant's household. Property taxes are "levied" when the tax roll is delivered to the local treasurer with a warrant for collection. Therefore, in order for property taxes to be eligible for the farmland preservation credit, a claimant or any member of the claimant's household must be the owner of the farmland at the date of the property tax levy (an exception applies to buyers and sellers of farmland).

The Wisconsin Statutes provide that "property taxes accrued" must be prorated in the case of joint ownership of farmland, and by persons who buy or sell farmland during the year. However, the Statutes do not require the taxes to be prorated in other circumstances.

In determining the farmland preservation credit must the "property taxes accrued" be prorated for a taxable year when during the year the farmland was owned by an estate, the estate closed prior to the tax levy and the farmland was distributed to a beneficiary?

For example, Mrs. Farmer owned farmland which is subject to a certified zoning ordinance. She died on March 20, 1983. Her estate was settled and closed on May 31, 1984. All assets, including the farmland, were distributed to her son, John, who was the sole beneficiary of the estate. The distribution was made on May 31, 1984. The property taxes were levied on November 15, 1984. John meets all the qualifications needed to claim the farmland preservation credit for 1984. In computing his 1984 farmland credit, must John prorate the property taxes to include only those taxes for 7/12 (June through December) of the year?

Answer: No proration of the "property taxes accrued" is required because of inheriting farmland during the taxable year. In the example above, the beneficiary, John Farmer, was the owner of the farmland at the time the real property taxes were levied and is eligible to claim the farmland preservation credit for the 1984 taxable year. In determining the amount of his 1984 credit, John Farmer may use the entire amount of the 1984 property taxes levied on the farmland and improvements.