WISCONSIN TAX BULLETIN

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CORPORATIONS: FOURTH QUARTER ESTIMATES DUE EARLIER

A corporation must make installment payments of estimated tax if it can expect to have a tax liability for the year of over $500. Installment payments for 1986 taxable years are due on the fifteenth day of the third month, sixth month, ninth month and twelfth month of the taxable year (under prior law, the fourth quarter installment payment was not due until the fifteenth day of the first month after the close of the taxable year).

If a required installment is not paid by its due date, an addition to the tax may be assessed on the amount of the underpayment for the period of the underpayment. In determining the underpayment for 1986, the percentage of tax that is required to be prepaid is 90% of the net tax liability shown on the return.

Corporations should keep in mind the change in Wisconsin law (1983 Wisconsin Act 27) concerning exceptions 1 and 2 (s. 71.22(10)(a) and (b), Stats.) to avoid the addition to the tax. Beginning with 1984 taxable years, corporations with Wisconsin net income of $250,000 or more are no longer eligible for these exceptions. These exceptions continue to apply to corporations with less than $250,000 of net income.

Corporations' installment payments of estimated tax are reported on Form 4-ES, the Wisconsin Corporation Declaration Voucher. Corporations who received a preprinted Form 4-ES in the mail are urged to file on that form rather than on a facsimile, since the preprinted forms are color coded and are less costly and faster to process.

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NEW WISCONSIN TAX LAWS

The Wisconsin Legislature enacted several changes to the Wisconsin tax laws during March and April 1986. The following are brief descriptions of the major income, corporation franchise/income, sales/use, inheritance and excise tax provisions. The description for each item indicates the act number, the sections of the statutes affected and the effective date of the provision.

INCOME TAXES

1. Update Reference to Internal Revenue Code for Individuals, Trusts, Estates and Tax-Option Corporations (1985 Wisconsin Act 261, amend s. 71.02(2)(d)12, create s. 71.05(1)(km), and 1985 Wisconsin Act 153, create s. 71.02(3), effective for the 1986 taxable year and thereafter.)

For the 1986 taxable year and thereafter, individuals, trusts, estates and tax-option corporations will use the Internal Revenue Code in effect on December 31, 1985, with the following exceptions.

a. The depreciation deduction and gain or loss on the sale or other disposition of the following depreciable property placed in service by the taxpayer during the 1986 taxable year and thereafter must be computed under the Internal Revenue Code in effect on December 31, 1980:

(1) Residential real property.

(2) Property used in farming, as defined in Section 464(e)(1) of the Internal Revenue Code, if (a) the taxpayer's nonfarm Wisconsin adjusted gross income exceeds $55,000, or exceeds $27,500 for a married person filing separately, or (b) the gross farm profit exceeds $155,000, or exceeds $77,500 for a married person filing separately.

b. Taxable unemployment compensation benefits must be determined using the provisions of the Internal Revenue Code for the current year.

c. At the taxpayer's option, "internal revenue code" for the 1986 taxable year and thereafter includes any revisions to the federal Internal Revenue Code adopted after January 1, 1986 that relate to the taxation of income derived from any source as a direct consequence of participation in the milk production termination program created by Section 101 of Public Law 99-198.

d. Certain entertainment and travel expenses allowable under Section 162, 212 or 274 of the Internal Revenue Code may not be claimed for Wisconsin.

e. Certain farm losses allowable for federal tax purposes may not be deductible for Wisconsin tax purposes. (See Item 3.)

f. Railroad retirement benefits continue to be nontaxable for Wisconsin.

g. Sick pay benefits paid under the Railroad Unemployment Insurance Act continue to be nontaxable for Wisconsin.

h. The deduction from gross income allowed two-earner married couples does not apply for Wisconsin.

i. The charitable contributions deduction allowed to persons who do not claim itemized deductions does not apply for Wisconsin.

j. The disability income exclusion of up to $5,200 which was allowed to persons under age 65 who retired on disability and received disability income while permanently and totally disabled, as provided under Section 105(d) of the Internal Revenue Code immediately prior to its repeal in 1983 by Public Law 98-21, continues to apply for Wisconsin.

k. For tax-option corporations, the Internal Revenue Code applies only to the election and termination of Subchapter S status and not to the computation of net income, etc.

2. Define Basis of Assets Acquired Before Becoming a Wisconsin Resident (1985 Wisconsin Act 261, create s. 71.05(1)(m), (n) and (o), effective for the 1986 taxable year and thereafter as well as retroactively to the earliest taxable year in which additional assessments or refunds may be made on April 30, 1986.)

Except in the case of a principal residence, the Wisconsin basis of an asset owned by an individual, estate or trust and acquired before the individual became a resident of Wisconsin or before the estate or trust became subject to Wisconsin taxation is the federal adjusted basis.

Whenever an individual acquires a new residence, as defined in Section 1034(a) of the Internal Revenue Code, in Wisconsin, the adjusted basis of the new residence is not required to be reduced by the amount of deferred gain on the sale or exchange of an old residence located outside Wisconsin (as provided by Sections 1016(a)(7) and 1034(e) of the Internal Revenue Code) if

a. The sale or exchange of the old residence occurred in taxable year 1975 or thereafter and the individual was not a Wisconsin resident at the time of the sale or exchange, or

b. The sale or exchange of the old residence occurred before taxable year 1975.

Example: Taxpayer A, a Minnesota resident, sold his Minnesota residence for $75,000 on March 1, 1985. He realized a $30,000 gain on the sale. On September 1, 1985, Taxpayer A became a Wisconsin resident. Also on that date, he purchased a Wisconsin residence for $100,000. For federal tax purposes, the basis of his Wisconsin residence is $70,000 ($100,000 cost minus $30,000 deferred gain on the sale of the Minnesota residence). For Wisconsin tax purposes, the basis of his Wisconsin residence is $100,000.

Example: On January 1, 1986, Taxpayer B became a Wisconsin resident. She purchased a Wisconsin residence on January 31, 1986 for $200,000. On April 1, 1986, Taxpayer B sold her California residence #2 for $100,000. The federal adjusted basis of her California residence #2 was $60,000 ($75,000 cost minus $15,000 deferred gain on the sale of her prior California residence #1). Taxpayer B thus realized a $40,000 gain for federal tax purposes on the sale of California residence #2. The federal adjusted basis of her Wisconsin residence is $160,000 ($200,000 cost minus $40,000 deferred gain on the sale of California residence #2). For Wisconsin tax purposes, the basis of Taxpayer B's Wisconsin residence is $175,000 ($200,000 cost minus $25,000 deferred gain realized on the sale of her California residence while Taxpayer B was a Wisconsin resident). The Wisconsin basis is not reduced by the $15,000 deferred gain from the earlier sale of California residence #1 while Taxpayer B was a nonresident.

Example: Taxpayer C became a Wisconsin resident and purchased a Wisconsin residence for $50,000 on July 1, 1974. On September 1, 1974, Taxpayer C sold her Illinois residence for $45,000 and realized a $7,500 gain. For federal purposes, the basis of her Wisconsin residence is $42,500 ($50,000 cost minus $7,500 deferred gain on the sale of her Illinois residence). For Wisconsin tax purposes, the basis of her Wisconsin residence is $50,000.

Whenever a Wisconsin resident sells or exchanges a principal residence located outside Wisconsin and the nonrecognition of gain provision of Section 1034(a) of the Internal Revenue Code does not apply to the sale or exchange, the adjusted basis of the residence sold or exchanged is not required to be reduced for any nonrecognized gain on the sale or exchange of any old principal residence located outside Wisconsin if

a. The sale or exchange of the old residence occurred in taxable year 1975 or thereafter and the individual was not a Wisconsin resident at the time of the sale or exchange, or

b.The sale or exchange of the old residence occurred before taxable year 1975.

Example: Taxpayer D, who was 30 years old, became a Wisconsin resident on February 1, 1986. On May 1, 1986, Taxpayer D sold her Illinois residence for $80,000. The Illinois residence was her first residence and had a federal basis (cost) of $50,000. Taxpayer D did not purchase a replacement residence. Taxpayer D is subject to Wisconsin income tax on the $30,000 gain she realized on the sale.

Example: Taxpayer E, who was 50 years old, became a Wisconsin resident on June 1, 1985. On October 1, 1985, Taxpayer E sold his New York residence for $250,000. His New York residence had a federal basis of $85,000, which was computed as follows: $150,000 cost minus $65,000 deferred gain on the sale of a prior New York residence. For federal tax purposes, Taxpayer E realized a $165,000 gain on the sale. For Wisconsin purposes, the basis of the New York residence is its $150,000 cost; the Wisconsin basis is not reduced by the deferred gain on the sale of the first New York residence. Taxpayer E has a taxable gain of $100,000 for Wisconsin income tax purposes.

3. Provide Limit on Deduction for Certain Farm Losses Incurred by Married Persons Who File Separate Returns (1985 Wisconsin Act 261, amend s. 71.05(1)(a) 26, effective for the 1986 taxable year and thereafter.)

Beginning with the 1986 taxable year, combined net losses, exclusive of net gains, from businesses, rents, partnerships, S corporations, estates or trusts incurred in the operation of a farming business, as defined in Section 464(e)1 of the Internal Revenue Code, otherwise includable in calculating Wisconsin income, which can be used to offset nonfarm income are limited. The amounts applicable to married persons filing separate returns are 50% of the amounts applicable to other persons.

4. Amend Itemized Deductions Credit (1985 Wisconsin Act 153, amend s. 71.09(6r)(a), and 1985 Wisconsin Act 261, amend s. 71.09(6r)(a), effective for the 1986 taxable year and thereafter.)

a. For purposes of the itemized deductions credit, interest expense which is not subject to the $1,200 cap includes interest allowed as an itemized deduction under Section 163 of the Internal Revenue Code and paid to acquire agricultural property, other than a residence, if that property was personally operated or leased as farmland by the taxpayer during the period of ownership and is subsequently sold by the taxpayer on a land contract, to a buyer who agrees, in writing, to continue to personally operate the property as farmland over the term of the contract, for which interest income is reported by the taxpayer.

Agricultural property is defined in s. 93.50(1) and means real property that is used principally for farming, real property that is a farmer's principal residence and any land contiguous to the residence, personal property that is used as security to finance farming or personal property that is used for farming.

b. For married persons filing separate returns, the limit on interest which is allowed as an itemized deduction under Section 163 of the Internal Revenue Code, but which is subject to the cap, is $600 instead of $1,200.

5. Provide Limit on One-Time Property Tax and Rent Credit for Married Persons Filing Separate Returns (1985 Wisconsin Act 261, amend s. 71.54, effective for the 1986 taxable year.)

For the 1986 taxable year, a one-time credit equal to 7.9% of property taxes or rent constituting property taxes may be claimed. For married persons filing separate returns, the credit is allowed for up to $1,000 of property taxes and rent constituting property taxes, instead of $2,000 of property taxes and rent constituting property taxes.

6. Permit Married Persons to Compute Their Section 179 Deduction Based on the Amount Allowable on a Joint Federal Return (1985 Wisconsin Act 261, nonstatutory provision, effective for taxable years 1982 to 1985.)

For taxable years 1982 to 1985, married persons electing the expensing provisions of Section 179 of the Internal Revenue Code may compute the amount of deduction allowable on the same basis as married persons filing a joint federal return. The total amount of the deduction may be divided between spouses in any manner they choose.

CORPORATION FRANCHISE/INCOME TAXES

1. Impose Franchise Tax on Corporations That Cease Doing Business in Wisconsin (1985 Wisconsin Act 261, amend s. 71.01(2), effective for the 1986 taxable year and thereafter.)

This provision imposes a special franchise tax on corporations that cease doing business in Wisconsin. The tax is measured by the corporation's entire net income for the taxable year during which the corporation ceases doing business in Wisconsin.

Under prior law, a franchise tax was imposed on corporations for the privilege of doing business in Wisconsin during the year the tax return was due. The tax was measured by the corporation's entire net income for the previous taxable year. Thus, when a corporation ceased doing business in Wisconsin, its income for the year of cessation was not subject to franchise tax. Instead, an income tax was imposed on the net income from the final year of operation in Wisconsin.

2. Update Reference to Internal Revenue Code for Insurance Companies (1985 Wisconsin Act 261, amend s. 71.01(4)(g)9, create s. 71.01 (4)(g)10, effective for the 1986 taxable year and thereafter.)

For the 1986 taxable year and thereafter, insurance companies will compute their income under the Internal Revenue Code in effect on December 31, 1985, with certain exceptions.

a. The depreciation deduction and gain or loss on the sale or other disposition of the following depreciable property acquired in the 1986 taxable year or thereafter by a corporation must be computed under the Internal Revenue Code in effect on December 31, 1980:

(1) Residential real property.

(2) Property used in farming, as defined in Section 464(e)(1) of the Internal Revenue Code, if the taxpayer's Wisconsin gross farm receipts or sales exceed $155,000 for taxable year 1986.

b. The special rules for safe harbor leases provided by Section 168(f)(8) of the Internal Revenue Code may not be used for Wisconsin.

c. Depreciation on out-of-state property placed in service by the taxpayer on or after January 1, 1983 must be

computed under the Internal Revenue Code in effect on December 31, 1980.

d. Certain entertainment, gift and travel expenses allowable under Section 162, 212 or 274 of the Internal Revenue Code may not be claimed for Wisconsin.

3. Update Reference to Internal Revenue Code for Regulated Investment Companies and Real Estate Investment Trusts (1985 Wisconsin Act 261, amend s. 71.02(1)(c)10, create s. 71.02(1)(c)11, effective for the 1986 taxable year and thereafter.)

For the 1986 taxable year and thereafter, regulated investment companies and real estate investment trusts will compute their income under the Internal Revenue Code in effect on December 31, 1985, with certain exceptions.

a. The depreciation deduction and gain or loss on the sale or other disposition of the following depreciable property acquired in the 1986 taxable year or thereafter by a corporation must be computed under the Internal Revenue Code in effect on December 31, 1980:

(1) Residential real property.

(2) Property used in farming, as defined in Section 464(e)(1) of the Internal Revenue Code, if the taxpayer's Wisconsin gross farm receipts or sales exceed $155,000 for taxable year 1986.

b. The special rules for safe harbor leases provided by Section 168(f) (8) of the Internal Revenue Code may not be used for Wisconsin.

c. Depreciation on out-of-state property placed in service by the taxpayer on or after January 1, 1983 must be computed under the Internal Revenue Code in effect on December 31, 1980.

4. Amend Definition of Internal Revenue Code (1985 Wisconsin Act 153, create s. 71.02(3), effective for the 1986 taxable year and thereafter.)

For corporations, at the taxpayer's option, "internal revenue code" for the 1986 taxable year and thereafter includes any revisions to the federal Internal Revenue Code adopted after January 1, 1986 that relate to the taxation of income derived from any source as a direct consequence of participation in the milk production termination program created by Section 101 of Public Law 99-198.

5. Clarify That Corporations Cannot Receive Both a Credit and a Deduction on Their Franchise or Income Tax Returns for Expenditures for Research or Research Facilities (1985 Wisconsin Act 261, repeal s. 71.04(2)(b)5, create s. 71.03(1)(j), effective for the 1986 taxable year and thereafter.)

To ensure that corporations cannot claim both a deduction and a tax credit for the same expenses, these provisions clarify that research expenses equal to the amount of any research credit or research facility credit computed under s. 71.09(12r) or (12rf) are not deductible.

Under prior law, s. 71.04(2)(b)5 required corporations claiming a tax credit for increasing research spending or investing in Wisconsin research facilities to adjust deductions by the amount of these credits.

6. Provide Consistent Tax Treatment of Incentive Stock Options (1985 Wisconsin Act 261, amend 1985 Wisconsin Act 29, Section 3203(46)(g)2 and Section 3204 (46)(c), create 1985 Wisconsin Act 29, Section 3203(46)(g)4, effective for the 1985 or 1986 taxable year and thereafter.)

Under provisions included in 1985 Wisconsin Act 29 the state adopted, effective with the 1986 taxable year, the federal income tax treatment of incentive stock options. As a result, individuals are not taxed on the difference between the option price and the market value of the stock when the option is exercised. Corporations are not permitted to deduct this amount as employe compensation [s. 71.04(1) and (2)(b)10].

This amendment makes technical changes to the initial applicability provisions in 1985 Wisconsin Act 29. It provides that the treatment of s. 71.04(1) and (2)(b)10 first applies to taxable year 1985 or 1986, as appropriate, to conform the treatment with that of the person exercising the option as required under s. 71.02(2)(d)11 or 12. Thus, if an employe is taxed at the time of exercise, the corporation is allowed a deduction. If the employe is not taxed, the corporation is not allowed a deduction.

7. Update Reference to Internal Revenue Code for Incentive Stock Option Provisions (1985 Wisconsin Act 261, amend s. 71.04(1) and (2)(b)10, effective for the 1986 taxable year and thereafter.)

Corporations may not deduct the value of incentive stock options as defined in Section 422A of the Internal Revenue Code as amended to December 31, 1985.

8. Provide That Drop Shipment Sales Are Attributable to Wisconsin (1985 Wisconsin Act 261, amend s. 71.07 (2)(c)2m, effective for the 1986 taxable year and thereafter.)

Under prior law, sales of tangible personal property were included in the sales factor of the corporate apportionment formula of a corporation doing business in Wisconsin if the sales were made by or through the corporation's Wisconsin sales office to a purchaser in another state which did not have jurisdiction to tax the seller, if the property was shipped by a third party to the purchaser, and if the state from which the property was shipped also did not have jurisdiction to tax the seller. These sales are often referred to as drop shipment sales.

This amendment provides that drop shipment sales are attributable to Wisconsin and thus includable in the apportionment formula no matter who ships or delivers the property, if the other conditions are met.

SALES/USE TAXES

1. Clarify Exemption for Mobile Home Rental (1985 Wisconsin Act 149, amend s. 77.52(2)(a)1, create s. 77.54(33), effective July 1, 1986.)

Prior law provided a sales tax exemption for certain mobile home rentals. This amendment clarifies that the rental of a mobile home which is used as a residence for a continuous period of one month or more is exempt from sales tax, regardless of whether the mobile home is classified as real or personal property.

2. Provide Exemption for Manufacturing Machinery Safety Attachments (1985 Wisconsin Act 149, amend s. 77.54(6)(a), effective June 1, 1986.)

Prior law provided a sales tax exemption for safety attachments sold as part of the original manufacturing machinery. This amendment extends the sales tax exemption to new safety attachments added to manufacturing machinery and equipment.

3. Clarify Exemption for Local Government Agencies (1985 Wisconsin Act 149, amend s. 77.54(9a)(e), effective June 1, 1986.)

Prior law provided a sales tax exemption for any unit of government or any agency of 2 or more units of government. This amendment provides an exemption for any agency of any unit of government, not just an agency of 2 or more units.

4. Clarify Exemption for Controlled Circulation Publications (1985 Wisconsin Act 149, amend s. 77.54(15), effective September 1, 1983.)

Prior law provided a sales tax exemption for periodicals sold to publishers for distribution without charge. This provision clarifies that the exemption applies only to sales by a printer of a controlled circulation publication to the commercial publisher of the publication. The amendment defines "controlled circulation publication" as a publication that has at least 24 pages, is issued at regular intervals not exceeding 3 months, that devotes not more than 75% of its pages to advertising and that is not conducted as an auxiliary to, and essentially for the advancement of, the main business or calling of the person that owns and controls it.

5. Provide Exemption for Peat and Fuel Cubes for Residential Use (1985 Wisconsin Act 149, amend s. 77.54 (30)(a)1 and (f), effective April 2, 1986.)

This amendment provides a sales tax exemption for fuel cubes produced from solid waste, such as paper and cardboard, and for peat sold to a residential user for fuel. Prior law provided a sales tax exemption for coal, fuel oil, propane, steam and wood used for residential fuel.

6. Clarify Exemption for Copying Public Records (1985 Wisconsin Act 149, amend s. 77.54(32), effective April 2, 1986.)

Prior law provided a sales tax exemption for copying public records. This provision clarifies that the sales tax exemption applies to charges incurred for copies of confidential records of an authority, such as a state agency.

A nonstatutory provision states that any person who on April 2, 1986 has a liability for sales taxes on charges for copying records under s. 19.35(1) is absolved of that liability. No refunds may be made of sales taxes paid before April 2, 1986 in respect to those charges.

7. Alert Taxpayers to Venue for Sales Tax Cases (1985 Wisconsin Act 149, amend s. 227.16(1)(a), effective April 2, 1986.)

This bill adds a cross reference to the statutes to alert taxpayers that the venue for review of sales tax decisions by the Tax Appeals Commission is in Dane County Circuit Court.

8. Provide Sales Tax Refunds for Defective Motor Vehicles Returned to the Manufacturer (1985 Wisconsin Act 205, amend s. 218.015(2)(b), create s. 218.015(2)(e), effective for motor vehicles for which the contract to purchase is entered into on or after April 22, 1986.)

If a motor vehicle, which is covered by a warranty, has a defect which after a reasonable attempt to repair is not repaired, the consumer may return the motor vehicle to the manufacturer, and the manufacturer shall refund the purchase price plus sales tax, less a reasonable allowance for use. The Department of Revenue will refund to the manufacturer any sales tax which the manufacturer refunded to the consumer. The manufacturer must provide to the Department a written request for a refund along with evidence that the sales tax was paid when the motor vehicle was purchased and that the manufacturer refunded the sales tax to the consumer.

INHERITANCE AND GIFT TAXES

1. Update Reference to Internal Revenue Code for Power of Appointment, Qualified Retirement Plans and Installment Payments (1985 Wisconsin Act 261, amend ss. 72.01 (17), 72.12(4)(c)1 and 72.22(4)(a), effective for transfers because of deaths on or after April 30, 1986.)

The references to the Internal Revenue Code relating to power of appointment (s. 72.01(17)), qualified retirement plans (s. 72.12(4) (c)1) and installment payments (s. 72.22(4)(a)) are updated to December 31, 1985.

2. Eliminate Requirement to File an Inheritance Tax Return if No Federal Estate Tax Return Is Required (1985 Wisconsin Act 278, renumber s. 72.30(1) to s. 72.30(1)(a) and amend s. 72.30(1) (a) as renumbered, amend ss. 72.30(1)(title), 72.30 (3)(e), 72.33(1), 867.01(3)(e) and 867.02(2)(e), create s. 72.30(1)(b) and (3)(bm), effective for transfers because of deaths on or after April 30, 1986.)

No inheritance tax return is required to be filed if no federal estate tax return is required to be filed in regard to the transfer of property and if the inheritance tax exemptions that may be properly claimed clearly exceed the heir's or beneficiary's share of the estate.

Courts and probate registrars are required to accept as presumptive proof the determination of the distributive share and the applicable exemptions submitted on an inheritance tax report by the personal representative, special administrator, trustee, distributee or other interested person. The Department of Revenue and other interested parties may attempt to rebut that presumption.

EXCISE TAXES

1. Exempt Regular Leaded Gasoline Sold for Nonhighway Use From the Motor Fuel Tax (1985 Wisconsin Act 153, repeal s. 78.73(5), amend s. 78.73(1) (intro.), (d) and (e), create ss. 78.01(2)(e), 78.12(3m) and 78.73 (1)(dm) and (f), effective July 1, 1986.)

Regular leaded gasoline sold for nonhighway use in mobile machinery

and equipment and delivered directly into the consumer's storage tank in an amount of not less than 200 gallons is exempt from motor fuel tax if the supplier obtains from the consumer an annual exemption certificate prescribed by the Department of Revenue.

Any person who purchases regular leaded gasoline tax-free must file an annual report not later than April 15 of the year following the reporting period. The Department of Revenue may not renew the exemption certificate of any person who fails to file the exemption report.

Under prior law, a consumer of motor fuel could file a claim for refund with the Department of Revenue for motor fuel tax paid on motor fuel for nonhighway use.

2. Authorize Suppliers of Special Fuel to Report and Pay Tax on Deliveries to Retailers (1985 Wisconsin Act 302, amend ss. 78.40(1), 78.44, 78.45, 78.47 and 78.49(3), effective May 7, 1986.)

Suppliers of special (diesel) fuel may report and pay the special fuel tax on deliveries to retailers. The suppliers will then bill the retailers for the tax. Under prior law, retailers were responsible for reporting and paying the special fuel tax on deliveries of fuel received from suppliers.

3. Provide Requirements for Timely Filing of Motor Fuel, Beverage, Cigarette and Tobacco Products Tax Returns and Other Documents (1985 Wisconsin Act 302, amend s. 78.67, create ss. 139.11(2m), 139.38(2m) and 139.835, effective for returns and other documents required to be filed on or after May 7, 1986.)

Motor fuel, beverage, cigarette and tobacco products tax returns are considered timely filed if mailed in a properly addressed envelope with the correct postage, postmarked on or before the due date and received by the Department of Revenue within 5 days of the due date.

4. Exclude Fermented Malt Beverages From the Definition of Intoxicating Liquor (1985 Wisconsin Act 302, amend s. 125.02(8), effective May 7, 1986.)

Fermented malt beverages are not included in the definition of intoxicating liquor. Thus, all fermented malt beverages, no matter what percentage weight of alcohol they contain, are subject to regulation as fermented malt beverages and not as intoxicating liquor. Under prior law, the definition of intoxicating liquor included fermented malt beverages containing 5% or more alcohol by weight.

5. Amend Description of Premises on Alcohol Beverage Applications (1985 Wisconsin Act 302, amend s. 125.04(3)(a)3, effective May 7, 1986.)

In describing the premises where alcohol beverages are sold or stored on Alcohol Beverage Applications, both the sales and storage areas must be described.

6. Create Exception to the Requirement to Mail Copy of Application for License to Sell Alcohol Beverages to the Department of Revenue (1985 Wisconsin Act 302, amend s. 125.04 (4)(a), effective May 7, 1986.)

Copies of applications for temporary picnic beer licenses need not be filed with the Department of Revenue.

7. Repeal Penalties for 2nd or Subsequent Offense for a Violation of Alcohol Beverage Laws (1985 Wisconsin Act 302, repeal s. 125.11 (1)(c), amend s. 125.11(1)(a)(title), effective May 7, 1986.)

The mandatory forfeiture provisions relating to the forfeiture of any alcohol beverage license and the forfeiture of the right to purchase alcohol beverage stamps because of a 2nd or subsequent offense for a violation for which a specific penalty is not provided are repealed.

8. Permit Representation by the Attorney General for Prosecution of Violations of Alcohol Beverage, Cigarette and Tobacco Products Laws (1985 Wisconsin Act 302, create ss. 125.145, 139.26, 139.45 and 139.86, effective May 7, 1986.)

The Secretary of Revenue may request the Attorney General to represent the state or assist a district attorney in prosecuting any case arising under the alcohol beverage, cigarette or tobacco products laws.

9. Permit the Issuance of "Class B" Liquor Licenses to Country Clubs (1985 Wisconsin Act 302, amend s. 125.51(5)(a)1, effective May 7, 1986.)

The state may issue "Class B" liquor licenses to country clubs notwithstanding the quotas of the local governing body.

10. Permit Gifts of Samples of Intoxicating Liquor to "Class A" and "Class B" Licensees (1985 Wisconsin Act 302, amend s. 125.65(1), create s. 125.69(2)(g), effective May 7, 1986.)

Authorized sales persons may give a sample of a brand of intoxicating liquor to a "Class A" licensee who has not previously purchased that brand from the permittee. Also, a manufacturer, rectifier or wholesaler may give a sample of a brand of intoxicating liquor to a campus or "Class B" licensee who has not previously purchased that brand from that manufacturer, rectifier or wholesaler.

11. Permit Sales by Manufacturers, Rectifiers or Wholesalers (1985 Wisconsin Act 302, create s. 125.69(2)(f) and (h), effective May 7, 1986.)

A manufacturer, rectifier or wholesaler may sell consumable merchandise intended for resale, including selling or loaning containers, to a campus or "Class B" licensee and permittee in the regular course of business.

12. Express Tax Rates in Terms of Metric Containers (1985 Wisconsin Act 302, repeal s. 193.03(2m)(a) (figure) and (b) (figure), (2t)(figure) and (2w), renumber s. 139.03(2m)(intro.) to s. 139.03(2m) and s. 139.03(2t) (intro.) to s. 139.03(2t) and amend s. 139.03(2m) and (2t) as renumbered, amend s. 139.03(2n) and (2x)(b), effective May 7, 1986.)

The tax rates on wine and distilled spirits are expressed in terms of metric containers rather than gallons. The rate of tax is 6.605 cents per liter on wine containing 14% or less of alcohol by volume and 11.89 cents per liter on wine containing more than 14% of alcohol by volume but not in excess of 21% of alcohol by volume.

The rate of tax on distilled spirits is 85.86 cents per liter. The rate of tax on distilled spirits manufactured or distilled in Wisconsin from whey which is produced in Wisconsin is 43.59 cents per liter.

13. Permit Persons Changing Their Domicile to Wisconsin to Bring Liquor and Wine Into Wisconsin as Household Goods (1985 Wisconsin Act 302, amend s. 139.03(5)(a), effective May 7, 1986.)

Persons who change their domicile from another state or a foreign country to Wisconsin may bring into Wisconsin distilled spirits and wine which constitute household goods. Prior law prohibited persons entering Wisconsin from having distilled spirits or wine in their possession.

14. Permit Persons Who Arrive in Wisconsin After Spending 48 Hours in a Foreign Country to Bring 4 Liters of Liquor and Wine Into Wisconsin Tax-Free (1985 Wisconsin Act 302, amend s. 139.03(5)(b), effective May 7, 1986.)

Any person, except an underage person, who arrives in Wisconsin after spending at least 48 hours in a foreign country may possess and bring into Wisconsin a total of 4 liters of distilled spirits and wine without paying the state tax. Prior law provided that persons could bring one gallon of liquor and wine into Wisconsin tax-free.

15. Provide Confidentiality Rule for Fermented Malt Beverage and Intoxicating Liquor Tax Returns, Reports, Schedules, Exhibits or Other Documents (1985 Wisconsin Act 302, create s. 139.11(4), effective May 7, 1986.)

The confidentiality provisions of s. 71.11(44)(a) and (c) to (h) as they relate to income and gift tax returns apply to fermented malt beverage and intoxicating liquor tax returns. However, the Department of Revenue shall publish brewery production and sales statistics and shall publish or permit the publication of statistics on the total number of gallons of the types and brands of intoxicating liquor sold in Wisconsin. Under prior law, beer, liquor and wine tax returns were open to public inspection.

16. Provide Limited Manufacturer's Permits Expire on August 1 (1985 Wisconsin Act 302, amend s. 125.52 (4), effective May 7, 1986.)

Limited manufacturer's permits expire on August 1 of each year rather than July 1.

17. Allow Transfers of Permits to Another Premise (1985 Wisconsin Act 302, amend s. 125.04(12)(a), effective May 7, 1986.)

An alcohol beverage warehouse permit, a winery permit or an intoxicating liquor wholesaler's permit may be transferred to another premise within the state.

18. Correct Erroneous Term by Replacing "Licenses" With "Licensees" (1985 Wisconsin Act 135, amend s. 125.33(2)(L), effective March 20, 1986.)

Section 125.33(2)(L), which was created as s. 125.33(1)(c)11 by 1983 Wisconsin Act 182 and renumbered by 1983 Wisconsin Act 538, is amended by replacing "licenses" with "licensees" to conform with the intent of the bill.

19. Define Sale of Cigarette and Tobacco Products (1985 Wisconsin Act 302, amend ss. 139.30(12) and 139.75(9), effective May 7, 1986.)

The definition of "sale" is expanded to include soliciting orders and sales for future deliveries.

20. Provide Additional Condition Regarding Refund of Cigarette Tax to Indian Tribes (1985 Wisconsin Act 302, create s. 139.323(5), effective May 7, 1986.)

An additional condition that must be met by Indian Tribes requesting refunds of cigarette tax is that the retailer has not sold the cigarettes to another retailer or to a jobber.

21. Extend Penalty for False Cigarette Reports to All Persons (1985 Wisconsin Act 302, amend s. 139.44 (2), effective May 7, 1986.)

The penalty for filing a false cigarette report now applies to all persons and is not limited to permittees.

22. Permit Department to Waive Tobacco Products Tax Penalty for Unintentional Miscalculation (1985 Wisconsin Act 302, amend s. 139.77 (6), effective May 7, 1986.)

If additional tobacco products tax is assessed, the Department of Revenue may waive the 10% penalty if the additional tax due is a result of an unintentional miscalculation on the report.

23. Provide for Administration and Enforcement of Tobacco Products Law (1985 Wisconsin Act 302, amend s. 139.83, effective May 7, 1986.)

The provisions of the cigarette tax law as they relate to seizure and confiscation also relate to the administration and enforcement of the tobacco products law.

24. Permit Department to Require Surety Bond for Tobacco Products (1985 Wisconsin Act 302, create s. 139.84, effective May 7, 1986.)

Persons liable for the tobacco products tax may be required to post a surety bond.

25. Change Criteria for a Cigarette Retailer to Also Be a Cigarette Distributor or Jobber (1985 Wisconsin Act 313, amend s. 139.34(5), effective May 7, 1986.)

A person who owns and operates a cigarette retail outlet may receive a cigarette distributor or jobber permit if more than 50% of the person's sales of cigarettes are at wholesale to retailers, vending machine operators or multiple retailers neither owned, controlled nor operated by that person. Under prior law, a cigarette retailer was not precluded from receiving a permit as a cigarette distributor or jobber if a substantial part of the person's sales of cigarettes were at wholesale.

OTHER

1. Permit Claims for Income or Franchise Tax Refunds After Field Audit (1985 Wisconsin Act 261, amend s. 71.10(10)(d) and (e), effective for field audit assessments issued on or after April 30, 1986.)

A claim for refund may be made within 2 years after the tax was

assessed by field audit, if the assessment was paid and not protested by the filing of a petition for redetermination.

If a claim is filed under this provision, the Department of Revenue may make an additional assessment in respect to any item of income or deduction that was a subject of the prior assessment.

This provision does not extend the time period during which the Department of Revenue may assess, or the taxpayer may claim a refund, in respect to any item of income or deduction that was not a subject of the prior assessment.

Under prior law, claims for refund could not be made after a field audit assessment became final.

2. Permit Claims for Sales Tax Refunds After Field Audit (1985 Wisconsin Act 261, amend s. 77.59 (4)(a), create s. 77.59(8m), effective dates are indicated below.)

a. Effective for field audit assessments issued on or after April 30, 1986, a claim for refund may be made within 2 years after the tax was assessed by field audit, if the tax was paid by the retailer and not protested by the filing of a petition for redetermination.

If a claim for refund is filed, the Department of Revenue may make an additional assessment in respect to any item that was a subject of the prior assessment.

b. Beginning April 30, 1986, sales tax refunds may be made to retailers within the regular 4-year refund period in s. 77.59(4)(intro.), even if the retailer was field audited, if the retailer's customers have filed valid claims for refunds with the retailer and if the refund is passed on to those customers.

Under prior law, claims for sales tax refunds could not be made after a field audit assessment became final.

3. Permit Department to Petition for a Court Order Requiring a Person to File a Tax Return (1985 Wisconsin Act 261, amend s. 71.11(30), effective April 30, 1986.)

If a taxpayer who is required to file an income or franchise tax return fails to do so, the Department of Revenue may petition the Circuit Court to issue a court order requiring that person to file a return. Under prior law, the Department of Revenue could petition the court for a writ of mandamus requiring that person to file a return.

4. Permit Deposit of Additional Assessment During Appeal (1985 Wisconsin Act 261, amend s. 71.12(1)(b) and (2), effective April 30, 1986.)

A taxpayer can deposit the amount of an additional assessment of a tax at any time during an appeal for redetermination by the Department of Revenue, or at any time while the petition is pending before the Tax Appeals Commission or an appeal of that petition is before a court.

Prior law provided that a taxpayer could deposit an additional assessment only when a petition for redetermination was filed with the Department of Revenue or when an application for a hearing was filed before the Tax Appeals Commission.

5. Permit Withholding from Sick Pay Payments (1985 Wisconsin Act 261, amend s. 71.20(11m), effective April 30, 1986.)

Individual taxpayers may require payers of sick pay to withhold amounts for Wisconsin income taxes from sick pay payments.

6. Require Reporting of Rent, Interest, Dividends or Royalties of $600 or More (1985 Wisconsin Act 261, amend s. 71.10(15), effective for the 1986 taxable year and thereafter.)

Persons deducting rent, interest, dividends or royalties on their income tax returns must notify the Department of Revenue of the name and address of Wisconsin residents to whom payments of $600 or more were made during the taxable year. Prior law required the payer to notify the Department of Revenue of payments of $100 or more.

6 MONTH EXTENSION OF TIME TO FILE AVAILABLE TO CORPORATIONS

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

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

ATTORNEY CONVICTED OF FAILING TO FILE WISCONSIN INCOME TAX RETURN

A Madison attorney has been ordered to serve probation and pay $615 in fines and costs for a criminal violation of the Wisconsin state income tax law.

Roger G. Schnitzler was placed on 2 years probation in Dane County Circuit Court, Branch 5, by Circuit Judge Robert R. Pekowsky on March 10, 1986. Under the conditions of probation, Schnitzler must pay a $500 fine plus court costs and file state income tax returns on time during the probationary period. Schnitzler was charged with failing to file a timely state income tax return on gross income of more than $54,000 for 1980. He was found guilty on January 16, 1986.

Failure to file a Wisconsin state income tax return is a crime punishable by a fine of not more than $500 or imprisonment not to exceed 6 months or both for income tax returns due prior to July 20, 1985. Beginning July 20, 1985, the criminal penalty is a $10,000 fine or imprisonment not to exceed 9 months or both. In addition to the criminal penalties, Wisconsin law provides for substantial civil penalties on the civil tax liability.

WOMAN CHARGED WITH HOMESTEAD FRAUD

A woman suspected of filing 126 fraudulent homestead tax credit claims with the state during a four-year period was charged April 14, 1986 with three criminal counts.

Mary Thomas, 48, of 1129 North 13th Street, Milwaukee, was charged with three counts of homestead credit claim fraud, a felony.

"We have information supporting about 126 claims signed and/or prepared by her," Assistant District Attorney Matthew V. Richmond said during Thomas' initial court appearance. Richmond said the claims listed 74 different addresses and 54 different people, many of whom were fictitious. The fraudulent claims sought payments totaling $87,759 for the tax years 1981 through 1984, Richmond said. However, $23,180 actually was paid out. Thomas entered a not-guilty plea.

The criminal complaint cited three fraudulent claims:

- A 1983 claim for herself in which Thomas illegally received $676 by falsifying her income and rent and forging the names of a landlord and tax preparer.

- A 1982 claim from which Thomas illegally received $796 by falsifying income and rent and forging a landlord's signature.

- A 1984 claim fraudulently filed by Thomas for a man in exchange for $150. Richmond said he decided not to issue additional charges against Thomas because the three counts carried significant penalties totaling 15 years in prison and $30,000 in fines upon conviction.

ALLEGED SCHEME BRINGS CHARGES

Three charges of failing to file state income tax returns were issued April 14, 1986 against a 47-year-old Eau Claire man, who investigators say used a fund-transfer scheme involving a religious organization to escape taxes.

Leonard S. Svee, president of Mid-State Tubeforming in Eau Claire, was scheduled to make an initial appearance in Eau Claire County Circuit Court April 29.

A complaint issued by the district attorney's office alleges that between 1982 and 1984, Svee wrote 71 checks worth $42,150 on his business account to Life Science Church of Truth.

During the same period, Svee wrote $42,084 in checks on the church's account. Those checks were cashed by Svee's wife, Arlene, a few days later, according to the complaint.

JAIL TERM FOR OPERATING AS A SELLER WITHOUT A SELLER'S PERMIT

A Mosinee man has been ordered to serve 90 days in jail and 2 years probation for criminal violations of state tax laws.

Stanley Bartus was sentenced on April 2, 1986 in Marathon County Circuit Court by Circuit Judge Ronald D. Keberle on 12 counts of operating as a seller of tangible personal property without a seller's permit. He was convicted February 18 after a jury trial.

Judge Keberle ordered Bartus to serve 30 days in the Marathon County Jail on each of the first 3 counts to run consecutively for a total of 90 days and ordered probation for 2 years on each of the next 9 counts to run concurrently. Under the conditions of probation, Bartus must file all missing tax returns and make restitution of state sales taxes. Bartus must begin serving the sentence immediately unless he files an appeal and posts a $5,000 bond.

Operating as a seller after a state seller's permit has been revoked or failing to file Wisconsin state sales tax returns is a crime punishable by a maximum fine of $500 or 30 days in jail or both.

DO YOU HAVE SUGGESTIONS FOR ARTICLES?

The Wisconsin Tax Bulletin is designed to provide current and accurate information on topics of general interest to taxpayers and tax practitioners. Articles pertain primarily to income, franchise, sales and use, inheritance, gift, motor fuel, cigarette, and beer and liquor taxes.

To make this bulletin more useful to its readers, the department is seeking suggestions for topics and areas of reader interest for articles in future issues. Send your suggestions to: Wisconsin Tax Bulletin, Technical Services Staff, Post Office Box 8933, Madison, WI 53708.

NEW ISI&E DIVISION RULES AND RULE AMENDMENTS IN PROCESS

Listed below, under Parts A and B, are proposed new administrative rules and amendments to existing rules that are currently in the rule adoption process. The rules are shown at their stage in the process as of July 1, 1986. Part C lists new rules and amendments which were adopted in 1986. Part D lists emergency rules now in effect. ("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 Governmentalunits-A
11.65 Admissions-A

B. Rules at Legislative Standing Committees

11.001 Definitions and use of terms-A
11.32 "Gross receipts" and "sales price"-A
11.68 Construction contractors-A
11.83 Motor vehicles-A
11.92 Records and record keeping-A
11.95 Retailer's discount-A
11.97 "Engaged in business" in Wisconsin-A
17.01 Administrative provisions-NR*
17.02 Eligibility-NR*

17.03 Application and review-NR*
17.04 Repayment of loan-NR*

*These rules will be part of a new chapter, Chapter 17, which will contain rules relating to the Wisconsin Property Tax Deferral Loan Program.

C. Rules Adopted in 1986 (in parentheses is the date the rule became effective)

2.045 Information returns: form 9c for employers of nonresident entertainers, entertainment corporations or athletes-R (1/1/86)
3.22 Real estate and personal property taxes of corporations-R (1/1/86)
3.30 Depreciation and amortization, leasehold improvements: corporations-R (1/1/86)
3.31 Depreciation of personal property of corporations-R (1/1/86)
3.61 Mobile home monthly parking permit fees-R (1/1/86)
11.71 Computer industry-NR (3/1/86)
11.83 Motor vehicles-A (3/1/86)

D. Emergency Rules

Chapter 17, relating to the property tax deferral loan program (effective 2/18/86).

The following sales tax rules to incorporate county sales/use tax provisions were published and became effective on March 24, 1986:

11.001 Definitions and use of terms-A
11.32 "Gross receipts" and "sales price"-A
11.68 Construction contractors-A
11.83 Motor vehicles-A
11.92 Records and record keeping-A
11.95 Retailer's discount-A
11.97 "Engaged in business" in Wisconsin-A

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

Carl F. Isonhart
Statute of limitations

Arthur F. Jackson
Constitutionality of taxes

Arthur F. Jackson
Negligence penalty
Capital losses
Not-for-profit activity

Diane C. (Mentch) Nelson
Gain or loss—property transferred pursuant to divorce

Klaus Wacker
Foreign income taxes paid

Corporation Franchise/Income Taxes

Avon Products, Inc.
Nexus

Brown Deer Medical Building, Ltd.
Appeals—deposit of contested taxes

H.K. Ferguson Company
Allocation of income—separate accounting

McHenry Sand & Gravel Co., Inc.
Net business loss carryforward

Milwaukee Seasoning Laboratories, Inc.
Nexus
Allocation of income—apportionment

Pabst Brewing Company
Apportionment, sales factor—dock sales

Schumacher, Nelson, Grambo & Associates, Inc.
Deductions—client lists

Suburban Beverages, Inc.
Interest expense—purchase of own stock

Sales/Use Taxes

Anderson Laboratories, Inc.
Manufacturing exemption
Negligence penalty

Johnson and Johnson, a partnership, d/b/a Asphalt Products Co., and Asphalt Products Co., Inc.
Construction contractors

Thiry Daems Cheese Factory, Inc.
Manufacturing exemption

Vita Plus Corporation
Manufacturing exemption

INDIVIDUAL INCOME TAXES

Carl F. Isonhart vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, November 20, 1985). The issue before the Commission was whether the Wisconsin Department of Revenue can assess the 1978 reported changes after the four-year statute of s. 71.11(21) (bm), Wis. Stats.

The 1978 tax year of the taxpayer was closed to audit on April 15, 1983, pursuant to s. 71.11(21) (bm), Wis. Stats. On July 11, 1983, the IRS furnished a report adjusting the taxpayer's 1978 and 1979 tax years. An amended return for 1979 was filed with the Wisconsin Department of Revenue during September 1983 within 90 days of the IRS notice. The changes for 1978 were furnished to the Department of Revenue, but no tax was paid.

Section 71.11(21)(g)2, Wis. Stats., authorizes the Wisconsin Department of Revenue to assess a tax within 90 days after the required notice under s. 71.11 (21m) is received. The Department of Revenue issued an assessment for the 1978 tax year within 90 days.

The Commission held that the Wisconsin Department of Revenue can assess beyond the four-year statute limitation if the notice of assessment is given to the taxpayer within 90 days of the date on which the department receives a report from the taxpayer of an adjustment to IRS returns.

The taxpayer has not appealed this decision.

Arthur F. Jackson vs. Wisconsin Department of Revenue (Court of Appeals, District IV, October 24, 1985). Arthur Jackson appealed a judgment which affirmed a decision of the Wisconsin Tax Appeals Commission. The Commission had affirmed an assessment of income taxes and the imposition of a penalty by the Wisconsin Department of Revenue. On appeal, Jackson raised several objections to the concept of income taxation, to the process of assessment, and to the power of a government to subject its citizens to a levy of taxes. He argued that the income tax statutes are vague, that the Wisconsin definition of income must follow the federal definition, that wages and salaries are not income, that an assignment of income exempts him from taxation, that the administrative procedure denies him his right to a jury trial, and that the imposition of a penalty denies him the right to petition the government for redress of grievances.

The Court of Appeals concluded that the appeal presents frivolous arguments and warrants the imposition of costs and attorney fees under Rule 809.25(3). The arguments have no basis in law or equity, and no reasonable person would present them. The payment of legitimate taxes is an obligation of citizenship. Through its elected officials, the State of Wisconsin may levy taxes on its citizens, provide administrative procedures for review of tax obligations, and enforce its laws against individuals who avoid taxation through no legal basis. Jackson challenges this authority with arguments which reasonable persons would not assert. The trial court is directed to assess frivolous appeal costs and attorney fees against Jackson.

The taxpayer has appealed this decision to the Supreme Court.

Arthur F. Jackson vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, November 1, 1985). The issues for the Commission to determine are whether:

A. The department correctly assessed a 25% negligence penalty for improper filing of 1980 and 1981 Wisconsin individual income tax returns.

B. The department's adjustment of the taxpayer's 1980-1982 Wisconsin tax returns was correct based on a disallowance of $1,500 capital loss carryover from 1979 which was available to the taxpayer during that year, but was not used.

C. The department correctly disallowed claimed business losses for 1981 and 1982 resulting from the taxpayer's start-up costs of a horse training business.

The department imposed the 25% negligence penalty provided in s. 71.11(47), Wis. Stats., for the years 1980 and 1981 because the original tax returns were incorrectly filed.

In 1980, the taxpayer filed a Wisconsin tax return placing an asterisk on line 6 in place of wages or salaries. The asterisk was explained in an attached letter written by the taxpayer to the Internal Revenue Service. The taxpayer stated that wages and salaries were received as equal compensation for labor, resulting in no gain or profit, therefore no income was received.

The taxpayer's 1981 Wisconsin tax return again contained an asterisk in place of wages and salaries with an attached letter and affidavit by the taxpayer, declaring that he was not liable for any indirect tax and had fulfilled his obligation for all direct taxes owed.

W-2 forms attached to the taxpayer's tax returns indicate that he received $39,374.94 as wages from the Sherex Chemical Company in 1980 and $47,262.46 as wages from the same company in 1981. The taxpayer noted on his W-2 forms for both years that the wages were contract income from nominee trustee.

The taxpayer's 1980, 1981 and 1982 capital gains and losses were adjusted by the department based on a disallowance of a carryover loss from 1979 which was never taken in that year. The taxpayer applied a $1,500 capital loss carryover available in 1979, which he failed to claim as a deduction in that year, to his subsequent original and amended tax returns for 1980, 1981 and 1982 for determination of capital gains and losses.

The department disallowed the taxpayer's 1981 and 1982 business losses reported on a horse training business which the department claimed is not an activity entered into for profit.

The record included unsupported testimony that the horse training business was entered into for profit. No records or proof that the activity was conducted in a businesslike manner was presented at the hearing. The financial records of the activity consist of the general checkbook for the family trust. The taxpayer admitted no previous experience in horse training and very little personal involvement in the activity since he works full time as a plant manager. His daughter, who was twelve years old when the business was begun, and a trainer from a local stable were the people responsible for training the one horse which is the sole asset of the business.

The Commission held as follows:

A. The 25% negligence penalty provided in s. 71.11(47), Wis. Stats., is proper when a taxpayer incorrectly files a tax return without proving good cause or lack of neglect.

B. A capital loss carryover available in a particular year is lost if not taken during that year.

C. The department properly denied the business losses where the horse training business was found to be a not-for-profit activity.

The taxpayer has not appealed this decision.

Wisconsin Department of Revenue vs. Diane C. (Mentch) Nelson (Circuit Court of Racine County, February 20, 1986). This was a petition of the Wisconsin Department of Revenue for review of the decision and order of August 6, 1985 by the Wisconsin Tax Appeals Commission which reversed the Wisconsin Department of Revenue's action on Diane C. (Mentch) Nelson's petition for redetermination.

The Wisconsin Tax Appeals Commission determined that the department's assessment of gain on real estate was erroneous because the gain was a division by co-owners of jointly held property and therefore not a taxable gain.

The department contended that the decision and order of the Commission should be set aside and reversed be-

cause it rests on a misrepresentation and misapplication of *Krueger v. Wisconsin Department of Revenue*, 124 Wis. 2d 453 in which the Wisconsin Supreme Court held that an equal division of property between husband and wife pursuant to a divorce settlement is not taxable. The department contended that the division between Diane C. (Mentch) Nelson and Aaron Mentch was not an equal division; therefore, the Commission's decision is wrong as a matter of law.

The Commission did not make a finding of fact on the issue of whether the marital property was equally divided although paragraph 3 of the findings of fact recognizes that the actual value of the property is unequal.

The *Krueger* case holds that the explicit legislative announcement of s. 767.255, Wis. Stats., presumes that upon 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. 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.

The divorce judgment incorporated the division of the property as made in the stipulation.The Court did not alter the distribution nor did it consider any of the 12 factors of s. 767.255, Wis. Stats.

The Court by approving the stipulation accepted the presumption that the property was divided equally. There is nothing in the record to indicate that in granting the divorce judgment, the Court indicated that it was altering the equal distribution. To say that the Court in accepting the stipulation was altering the distribution and considering the statutory factors and considered the tax consequences, would be an injustice. The Court in granting the judgment of divorce and approving the stipulation believed that it was dividing the property in conformity with s. 767.255, Wis. Stats.

Under these circumstances, the Circuit Court believed that the transfer of the taxpayer's undivided interest as a joint tenant in the two appreciated parcels of real estate under a stipulated divorce division settlement is a nontaxable division of property and within the *Krueger* decision. The petition of the department was denied.

The department has not appealed this decision.

Klaus Wacker vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, February 27, 1986). The sole issue for determination by the Commission was whether the department properly disallowed the taxpayer's subtract modification of $328,670 for German trade tax claimed by the taxpayer on line 37 of his 1981 Wisconsin income tax return.

During 1981, the taxpayer was a partner in two partnerships in the Federal Republic of Germany (West Germany), which were involved in the business of manufacturing construction machinery.

During 1981, the partnerships paid West German trade taxes on the income of the partnerships. During 1981, Klaus Wacker paid income tax to the Federal Republic of Germany on his distributive share of the income earned by these partnerships, which distributive share was net of the trade taxes.

For Wisconsin income tax purposes, the taxpayer did not claim a subtract modification for the German income tax which he paid on his distributive share of the income from the German partnerships. On line 37 of his 1981 Wisconsin income tax return, the taxpayer claimed a subtract modification of $328,670 for his share of the trade tax on business profits which was levied against the partnerships and paid by the partnerships.

Although trade taxes are liabilities of the partnership and not liabilities of the partners, under Internal Revenue Code Sections 702(a)(6) and 901(b)(5), an individual filing a U.S. individual income tax return is entitled to a foreign tax credit for the amount of the trade taxes.

The Commission concluded that in determining his 1981 income tax under the Internal Revenue Code for Wisconsin tax purposes as a partner, the taxpayer was required to take into account separately his distributive share (1) of the partnerships' foreign income (trade) taxes and (2) of the partnership taxable income exclusive of the deduction for such foreign income taxes.

Under the Internal Revenue Code, the taxable income of a partnership is computed in the same manner as in the case of an individual except that foreign income taxes paid or accrued and taxable income exclusive of the deduction for foreign income taxes must be separately stated and the deduction for foreign income taxes is not allowed to the partnership.

The taxpayer's distributive share of the partnerships' taxable income reported for federal purposes properly included (without deduction) the partnerships' foreign income taxes, and he is not entitled for Wisconsin tax purposes to any subtract modification to his distributive share of partnership taxable income under s. 71.05, Wis. Stats.

Under Wisconsin income tax law, there is no provision for a credit for foreign taxes paid and such taxes cannot be deducted as itemized deductions. Foreign income taxes are not deductible by the taxpayer as trade or business expenses or as a Wisconsin subtract modification.

The taxpayer has appealed this decision to the Circuit Court.

CORPORATION FRANCHISE/ INCOME TAXES

Avon Products, Inc. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, March 14, 1986). The issue in this matter was whether the business activities of Avon Products, Inc. within the State of Wisconsin during the period 1973 through 1978 constituted doing business in Wisconsin within the intent and meaning of s. 71.01(2), Wis. Stats., in excess of the solicitation of orders within the intent and meaning of 15 U.S.C. Section 381(a)(1) and (2).

Avon Products, Inc. (Avon) is a New York corporation with its corporate headquarters located in New York, New

York. During the years at issue, Avon manufactured cosmetics, toiletries and related items of tangible personal property and sold them throughout the United States, including the State of Wisconsin, through a method of distribution referred to as door-to-door or direct sales.

The dollar volume of the taxpayer's sales in Wisconsin during the years 1974 through 1978 was as follows:

1974	$21,600,019
1975	20,833,282
1976	24,316,586
1977	29,318,201
1978	36,012,674

In the assessment under review, the department apportioned the following income to Wisconsin for Wisconsin franchise/income tax purposes:

1973	$ 950,000
1974	1,080,000
1975	1,041,000
1976	1,210,000
1977	1,466,000
1978	1,800,000

In 1973 and thereafter, Avon maintained contracts with approximately 4,800 Avon sales representatives who sold Avon products door-to-door in Wisconsin. The number of Avon sales representatives increased to the point where, in 1978, approximately 8,200 representatives were selling Avon products in Wisconsin.

The contract between Avon and each Avon representative, which was called a "sales dealer's contract," provided that Avon agreed (1) to sell products to the representative, (2) to pay transportation charges on the merchandise it sold and (3) not to place a service charge on orders over $100. A fourth provision, which Avon agreed to, was that it reserved the right to change the three preceding provisions "at any time upon ten (10) days prior written notice." The contract provided that the sales representative agreed (1) to pay $15 for the order taking privilege, (2) to sell, purchase and deliver Avon products in the assigned territory, (3) to pay for the purchase by the due date of the next Campaign Purchase Order, (4) that the contract and all purchase orders were subject to Avon's acceptance, and (5) to furnish references subject to approval by Avon. The sixth and last provision that the sales representative agreed to provided as follows:

> The Sales Dealer is an independent contractor and has no power or authority to incur any debt, obligation or liability or to make any promise or contract on behalf of Avon. This is the sole and only Agreement between the parties and does not constitute the Sales Dealer an employee of Avon.

The contract also named the territory to which the representative was assigned.

Avon's sales representatives sold Avon products under a distribution system structured and furnished with sales aids by Avon. Avon gave new representatives an "appointment kit" or "sale kit" which is a 14-inch by 10-inch by 5-inch vinyl, open-topped bag, in which the representative carried all of the samples, brochures and related materials she needed to sell door-to-door. Every two-week period constituted a sales "campaign."

One week the representative would sell and order from Avon's branch warehouse in Morton Grove, Illinois. The next week the goods would arrive and while delivering them to her customers, the representative could take orders for the next campaign. In addition, Avon supplied the order forms on which the representative wrote up a customer's order, the order form on which the representative ordered products, the instructions for the order form, and the brochures which pictured the products.

Avon exercised control over the sales representatives in terms of assistance, training and supervision. Under an agreement with the department, Avon collected from its representatives Wisconsin sales tax as due, computed on the price the representative charged the customer. Avon then filed a single sales and use tax return with the Wisconsin Department of Revenue reporting all the sales of its representatives and paying the taxes due. Avon also conducted district sales meetings where representatives received information concerning new products, suggestions on how to sell the products, information about earnings incentive programs and recognition for sales performance.

A sales representative could end her relationship with Avon at any time by choosing not to order products. Avon could end the association in the event of inactivity, nonpayment or fraud on the part of the sales representative.

All of the material the sales representative used in her selling activities was furnished by Avon. In addition, the sales program, consisting of two-week campaigns, service fees for small orders, the sales specials, sales incentives for representatives, and sales meetings, was designed by Avon and monitored by Avon's district managers. The heavy dependence of the sales representatives on Avon for supplies and assistance and the threat of termination, all effectively caused the sales representatives to sell Avon's products exclusively in the manner desired by Avon.

In 1973, Avon employed approximately 35 district managers who lived in Wisconsin and who were assigned to districts located in Wisconsin. The number of district managers and the number of districts increased in the ensuing years to a point where in 1978 approximately 60 district managers were employed in 60 districts. Each district had on the average 137 sales representatives assigned to territories within the district. The turnover among sales representatives was more than 120% per year. District managers spent a substantial portion of their working time recruiting sales representatives. Recruiting involved district managers soliciting existing representatives and others for the names of prospects, screening the prospects and interviewing them. If a prospect agreed to become a sales representative, the district manager assigned her a territory and explained the sales dealer's contract and the other materials in the appointment kit necessary to start selling door-to-door. The rest of the district managers' time was spent attempting to motivate sales representatives to sell more by providing information about products, selling techniques and incentive programs at district sales meetings and by personal contact with the representatives. The district managers' activities, which all took place in

Wisconsin, were of a managerial and supervisory nature.

When vacancies in district managers' positions occurred, Avon advertised for persons who were leaders and motivators with a range of business and interpersonal skills who might qualify "for a challenging sales management position."

In its 1974 Annual Report, Avon stated:

> Women hold key Avon management positions. Our Company has one of the best records in business for women executives. They represent 65% of our total U.S. management staff, including about 2,300 who hold the key position of District Manager.

Similar statements were made in the 1975 Annual Report.

Avon's district managers were not engaged in soliciting orders for the sale of cosmetics and toiletries, but rather engaged in supervisory and managerial activities for Avon during the period at issue.

During the period 1973 through 1978, Avon employed three division managers who performed a portion of their duties while physically present in Wisconsin. All of the division managers performed approximately 50% of their work in their offices in Morton Grove, Illinois and the remaining 50% within their assigned divisions. The North Star division was located wholly within Wisconsin. The Premier division was located both in Wisconsin and Illinois; 6 of the 18 districts were located in Wisconsin; and one-third of the time the division manager was in her division, she was physically in Wisconsin. The Crown division consisted of 56 counties located north of the Wisconsin River and Columbia, Dodge, Washington and Ozaukee counties and, in addition, the Upper Peninsula of Michigan. In 1978, 29 districts were located within the Wisconsin portion of the Crown division. During the period 1973 through 1978, the division managers of the Crown division spent in the very least two-thirds of the working time, spent physically within the division, within the geographic boundaries of the State of Wisconsin.

The division managers had authority to effectively recommend the hiring and firing of district managers employed by Avon within their respective districts. The division managers' duties involved interviewing for vacant positions of district managers and stand-in district managers, participating in their training, assisting them and motivating them in their work through frequent staff meetings and individual visits to their districts and reporting to regional sales managers superior to themselves regarding the effectiveness of sales programs and incentives.

All of the division managers' activities, whether performed in the office in Illinois or in the field in Wisconsin, involved supervising district managers and implementing Avon's policies and procedures and were supervisory and managerial in nature.

Avon district managers held monthly staff meetings for the approximately 137 sales representatives assigned to territories within their district. Meeting rooms were rented in Wisconsin for some of the quarterly and more frequent divisional staff meetings.

Commencing in 1974 and continuing through at least 1978, Avon made available to each of its approximately 39 to 60 district managers in Wisconsin the use of an automobile for the performance of their duties.

Avon shipped to its district managers in Wisconsin "the product of the month" to give to sales representatives who attended the monthly district sales meeting to encourage attendance. The quantity shipped depended on how many sales representatives the district manager anticipated would come to the meeting. Avon provided district managers with projectors to show slide strips at sales meetings.

Avon's district managers maintained offices in their home for the purpose of discharging their duties to Avon and in furtherance of the business activities of Avon in Wisconsin.

Avon purchased telephone answering services in Madison and Milwaukee, Wisconsin to facilitate telephone contact between sales representatives and the district manager for their district and also to receive telephone calls from persons seeking to purchase Avon products or making inquiries regarding becoming a sales representative. The May 1972 through 1978 Milwaukee Telephone Directory yellow pages in their annual editions contained a listing for Avon as did the white pages for November 1973 through November 1978. Similarly, the Madison Telephone Directory white pages contained a listing for Avon in its January 1973 through January 1978 annual editions.

Avon purchased from newspapers located in Wisconsin space for advertisements designed to recruit Avon sales representatives. The district managers placed the advertisements in the newspaper, which consisted of copy prepared by Avon. Avon paid for the advertisements which listed a telephone number where a prospect could call, which in Madison and Milwaukee was the telephone number of a telephone answering service.

In 1973 through 1978, Avon operated its corporate offices and a research laboratory in New York; manufacturing laboratories in New York, Illinois, Ohio and California; and distribution branches in New York, Massachusetts, Delaware, Ohio, Georgia, Illinois, Missouri and California. It had offices in all of these states also. It did not have offices, laboratories, distribution branches or warehouses in any of the other 42 states.

During the years 1973 through 1978, Avon carried on its selling activities throughout the entire United States. District managers and division managers employed by Avon all over the United States performed the same duties.

Avon has filed income or franchise tax returns in the following 18 states for the indicated years where it neither owns nor leases real estate and where it carried on its business activities in the same manner it did in Wisconsin in 1973 through 1978:

1967 and subsequent years	New Jersey
1971 and subsequent years	Colorado
1973 and subsequent years	Arkansas
1974 and subsequent years	Iowa, Kentucky, Rhode Island

1975 and subsequent years	North Dakota
1977 and subsequent years	Minnesota
1978 and subsequent years	Alaska, Idaho, Kansas, Montana, Nebraska, New Mexico, Oregon, Utah, West Virginia
1980 and subsequent years	Hawaii

Avon has not filed a Wisconsin franchise tax return for 1973 or any subsequent year.

The Commission concluded that the taxpayer's business activities in Wisconsin, during the period under review, exceeded the mere solicitation of orders standard prescribed and defined in Public Law 86-272 (15 U.S.C. 381) and constituted doing business in Wisconsin within the intent and meaning of s. 71.01(2), Wis. Stats.

The taxpayer has appealed this decision to the Circuit Court.

Brown Deer Medical Building, Ltd. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, January 10, 1986). This matter came for hearing of the department's motion to dismiss by the Commission on stipulated facts.

Under date of May 21, 1984, the department issued a Notice of Amount Due to Brown Deer Medical Building, Ltd. Under date of July 2, 1984, the taxpayer filed a petition for redetermination with the department. Under date of April 29, 1985, the department denied the taxpayer's petition for redetermination and issued a Notice of Amount Due.

On May 21, 1985, Mr. Miller, the accountant for Brown Deer Medical Building, Ltd., was directed by the officers of Brown Deer Medical Building, Ltd. to appeal the notice of action to the Wisconsin Tax Appeals Commission and to pay the tax and interest in the Notice of Amount Due to stop interest from accruing while the appeal was pending. Mr. Miller caused a check to be drawn payable to the Wisconsin Department of Revenue in the amount of $5,386.49. The check and a copy of the Notice of Amount Due were mailed to the department on May 21, 1985. No communication other than the Notice of Amount Due and check was included in the envelope mailed May 21, 1985. The taxpayer's check was processed on May 29, 1985 by the Central Audit Bureau of the Wisconsin Department of Revenue as payment in full of the assessment at issue.

On June 28, 1985 the taxpayer filed a timely appeal with the Wisconsin Tax Appeals Commission.

The payment of May 21, 1985 was not a deposit of contested taxes made pursuant to s. 71.12(2), Wis. Stats. The provisions of s. 71.12 (2), Wis. Stats., contain the exclusive procedure for the deposit of taxes in contested franchise tax assessments. The taxpayer's payment of the additional assessment of franchise taxes to the Wisconsin Department of Revenue did not constitute compliance in any manner with provisions of s. 71.12(2), Wis. Stats.

The department has shown good and sufficient grounds for the granting of its motion. Therefore, the Commission granted the department's motion to dismiss the taxpayer's petition for review.

The taxpayer has not appealed this decision.

H.K. Ferguson Company vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, January 21, 1986). The question for the Commission to answer was first whether the department acted properly in changing the taxpayer's method of reporting its income to Wisconsin from separate accounting to apportionment, and second, if the answer is yes whether the department abused its authority by double-weighting the sales factor in the three-factor statutory apportionment formula used.

The H.K. Ferguson Company was organized under the laws of the State of Ohio in 1937 and is a wholly-owned subsidiary of Morrison-Knudson Co., Inc. The H.K. Ferguson Company is a contractor specializing in engineering, designing, construction, management and direction of equipment installation at processing plants, chemical plants, paper mills and other facilities.

During the taxable years 1977, 1978, 1979 and 1980, the H.K. Ferguson Company was engaged by the Manitowoc Co., Inc. of Manitowoc, Wisconsin for the engineering and construction management of Manitowoc's South Works Facility.

During the years 1977, 1978, 1979 and 1980, the taxpayer reported its income to the State of Wisconsin on the basis of separate accounting. Upon subsequent audit by the Wisconsin Department of Revenue, the department determined that the taxpayer's operations in Wisconsin during the period under review were a dependent part of a multistate unitary business operation and that the taxpayer should file its tax returns on the apportionment method of accounting for the subject years.

In changing the taxpayer from the separate accounting to the apportionment method, the department computed the three factors—property, payroll and sales—for both Wisconsin and other states based on information submitted by the taxpayer. The department in its apportionment computation double-weighted the sales factor.

The Commission concluded that the taxpayer's business operations within the State of Wisconsin during the period involved, were dependent upon and contributory to the taxpayer's multistate unitary business. The department acted properly in changing the taxpayer's method of reporting its income from separate accounting to apportionment to more accurately reflect that portion of its income attributable to and taxable by the State of Wisconsin. The department did not abuse its discretion in double-weighting the sales factor of the statutory three-factor apportionment formulas contained in s. 71.07(2), Wis. Stats.

The taxpayer has not appealed this decision.

McHenry Sand & Gravel Co., Inc. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, January 21, 1986). The single issue before the Commission was whether McHenry Sand & Gravel Co., Inc., a Delaware corporation, is allowed to carry forward the net business loss of McHenry Sand & Gravel Co., Inc., an Illinois corporation.

At a shareholders meeting of McHenry Sand & Gravel, an Illinois corporation, of March 1, 1976, the stockholders voted to form a subsidiary corporation for purposes of forming a Delaware corporation. A Certificate of Incorporation for Charles S & G Merging Corporation was issued by the State of Delaware on March 18, 1976. On March 19, 1976, at a first meeting of the directors of Charles S & G Merging Corporation, it was voted to merge the Illinois corporation, McHenry Sand & Gravel, into the Charles S & G Merging Corporation of Delaware.

The State of Illinois issued Articles of Merger to McHenry Sand & Gravel Co., Inc., an Illinois corporation, recognizing the merger with Charles S & G Merging Corporation and renaming Charles S & G Merging Corporation to McHenry Sand & Gravel, a Delaware corporation, on March 29, 1976. McHenry Sand & Gravel, an Illinois corporation, ceased to do business as of that date.

On May 1, 1976, all stockholders of McHenry Sand & Gravel, an Illinois corporation, exchanged all stock held in McHenry Sand & Gravel for stock in McHenry Sand & Gravel, a Delaware corporation. All stockholders in McHenry Sand & Gravel, an Illinois corporation, continued to be the stockholders of McHenry Sand & Gravel Co., Inc., a Delaware corporation. The board of directors and officers of the Illinois corporation immediately prior to merger were the same as those of the Delaware corporation immediately following the merger. The McHenry Sand & Gravel Co., Inc., an Illinois corporation, held the same assets and liabilities as the Delaware corporation.

The merging of the Illinois corporation with the Delaware corporation was the legally necessary process by which McHenry Sand & Gravel was allowed to move the entity to a more favorable tax climate than existed in Illinois.

The Commission held that for purposes of business loss carryforward under s. 71.06, Wis. Stats., the taxpayer, a Delaware corporation, was the same "corporation" as its Illinois predecessor which sustained the net business loss in 1974. Thus, it was entitled to offset such loss carryforward against its net business income in fiscal 1978 and 1979. The taxpayer's legal machinations in reorganizing as a Delaware corporation merely effected a change in domicile which does not defeat the carryforward.

The department has appealed this decision to the Circuit Court.

Milwaukee Seasoning Laboratories, Inc. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, January 10, 1986). The taxpayer is a Wisconsin corporation engaged in the custom blending of seasoning compounds and the sale of compounds and spices to the food processing industry. The taxpayer's sole plant and headquarters were throughout the period in question located in Germantown, Wisconsin.

The single issue raised by the taxpayer was whether its income for purposes of Wisconsin franchise taxation was subject to apportionment during the fiscal years 1977 through 1979 because of the taxpayer's business activities in the states of Michigan and Minnesota. The taxpayer first apportioned its income between the states of Wisconsin and Michigan on its return for the 1977 fiscal year, and Minnesota was added to its apportionment beginning with the 1978 fiscal year.

During the 1977 through 1979 fiscal periods, the sales activities of the taxpayer in Michigan were conducted directly through its Wisconsin headquarters by mail or telephone contacts with Michigan customers, or through one employe-sales representative who resided in Michigan and was employed by the taxpayer. For the 1978 and 1979 fiscal periods, its activities in Minnesota were likewise conducted directly from headquarters or through an employe-sales representative who resided in Minnesota. Each of these sales representatives was paid on a salaried basis. Their solicitation in such states was frequent.

By the department's audit dated May 19, 1980, the taxpayer's Michigan sales, which it had reported as apportionable for 1977 through 1979, were "thrown back" to Wisconsin under Wis. Adm. Code section Tax 2.39(5)(c)6 and employe compensation and car lease expenses in conjunction with the Michigan salesman's activities reported by the taxpayer as attributable to Michigan were assigned by the department to Wisconsin under Wis. Adm. Code section 2.39(3). Similar adjustments were made concerning Minnesota sales, property and payroll for 1978 and 1979. Property was reported as apportionable only in fiscal 1978.

The taxpayer's sales representative for Michigan, David Mott, was assigned territory including Michigan, northern Indiana and Phoenix, Arizona pursuing sales leads and servicing existing accounts. He resided in Michigan where he maintained a small office which he had rented prior to his employment by the taxpayer and which he continued to rent without reimbursement from the taxpayer during the period in question. He used that office as his base of operations and paid Michigan tax upon the furnishings. Other than Mott's business card placed on the door for convenience of the postman, there was no logo or other indicia identifying the taxpayer. The office was used solely for the taxpayer's business.

The taxpayer's sales representative for Minnesota, Urban Gaida, resided in Minnesota. His assigned territory included Minnesota, and various points in Washington, Oregon, California, Arizona, Utah, South Dakota, Nebraska, Arkansas and North Dakota. He operated from an office in his home used solely for the taxpayer's business and the expenses for which were borne by him without reimbursement from the taxpayer. He stored large bags of sausage compound or bags or barrels of phosphate for the poultry industry in his garage, but was unsure as to the amount kept during the period in question.

The taxpayer leased cars for the use of these sales representatives which were used in Michigan and Minnesota. The locale in which the car leases were executed was not established.

The two sales representatives had limited authority to deviate from listed prices, primarily in the case of custom blends or to meet a competitor's price or the customer's cost parameters. Orders solicited by the sales representa-

tives were not required to be approved by the home office but were honored as placed. They verified and picked up damaged products from customers on occasion. They also from time to time collected customer payments where collection problems occurred. Some technical assistance concerning product use or development of blends was given by them at the customer's place of business. They provided such credit information as was derived by the taxpayer which lacked any apparent credit policy or investigative procedures.

The taxpayer shipped all ordered products from Wisconsin to the customers with the possible exception of some of Mr. Gaida's product and occasionally delivered the products in these states by its own truck, but common carrier was the usual method.

The taxpayer's two sales representatives in question did not perform services in this state.

The taxpayer filed income, franchise or similar business tax returns with Michigan and Minnesota and based upon the taxpayer's statements rather than their own audits and investigations, each state issued determinations that the taxpayer had "nexus" therein during the periods in question.

The Commission held that the sales activities of the taxpayer in the states of Michigan and Minnesota during the period in question exceeded "solicitation" and created "nexus" in such states as those terms are used in Wis. Adm. Code section Tax 2.39(5)(c)6 and 15 U.S.C. Section 381. (See also Wis. Adm. Code section Tax 2.82(1)(b), (3)(b) and (4)(a).) Those states had "jurisdiction to impose an income tax or a franchise tax measured by net income" and the taxpayer was "subject to taxation by this state and at least one other state" within the meaning of Wis. Adm. Code section Tax 2.39(2) and was "engaged in business within and without the state" within the meaning of s. 71.07(2), Wis. Stats., and was therefore entitled to apportion its income.

The taxpayer's sales shipped from Wisconsin destined for Michigan and Minnesota were within the income tax jurisdiction of such states and were not Wisconsin sales for purposes of computing the sales factor under s. 71.07(2)(c)1 and 2, Wis. Stats., and Wis. Adm. Code section Tax 2.39(5)(c)1 and 6.

The compensation of the taxpayer's sales representatives during the period in question was not "paid in this state" so as to be includable as Wisconsin payroll in the numerator of the payroll factor under s. 71.07(2)(b)1 and 4, Wis. Stats.

The taxpayer's rental of automobiles assigned to its traveling employes was therefore not "included in the numerator of the property factor" because the compensation was not "assigned to this state under the payroll factor" within the meaning of Wis. Adm. Code section Tax 2.39(3)(a).

The department has not appealed this decision.

Pabst Brewing Company vs. Wisconsin Department of Revenue (Court of Appeals, District IV, March 25, 1986). The Wisconsin Department of Revenue appealed from a judgment reversing the Tax Appeals Commission's decision upholding the department's assessment of additional franchise tax against Pabst Brewing Company. The issue was whether Pabst's sales of beer to out-of-state wholesalers who pick up the beer at its Milwaukee plant for out-of-state distribution are sales "in this state" under s. 71.07(2)(c)2, Wis. Stats.

Pabst operates a brewery in Milwaukee. Because it sells beer to in-state and out-of-state wholesalers, Pabst apportions its net income for Wisconsin tax purposes on the basis of property, payroll and sales factors established in s. 71.07(2), Wis. Stats. The sales factor is a fraction. The numerator is the taxpayer's total sales in Wisconsin, and the denominator is its total sales everywhere. Sales of tangible personal property are "in this state" and included in the numerator if "the property is delivered or shipped to a purchaser, other than the United States government, within this state regardless of the f.o.b. point or other conditions of the sale . . ." When computing its sales factor between 1973 and 1977, Pabst excluded from the numerator all beer sold to out-of-state wholesalers. The department subsequently assessed Pabst an additional $707,729.71 in taxes for these years. The assessment resulted from the department's treating beer pickups in Wisconsin by out-of-state wholesalers as Wisconsin sales and adding those sales to the numerator. Pabst challenged the resulting assessment before the Tax Appeals Commission and Circuit Court. The Commission upheld the department's determination and the Circuit Court reversed. (See WTB #35 and #37 for summaries of the prior decisions.)

The Court of Appeals concluded s. 71.07(2)(c)2, Wis. Stats., ambiguously treats out-of-state purchasers. Two reasonable readings are possible. The phrase "within this state" may be read to modify "delivered or shipped." That reading makes the purchaser's physical possession of the product in Wisconsin the condition for a Wisconsin sale. The department and Commission read the statute that way to conclude that Pabst's sales to out-of-state wholesalers who pick up the product in Milwaukee are sales "in this state." Alternatively, the phrase "within this state" may be read to modify "purchaser" rather than "delivered or shipped." If that is the reading, the purchaser's business location controls. Pabst argued and the Circuit Court accepted this position.

The Court of Appeals concluded that the Legislature intends "within this state" to modify "purchaser." Section 71.07(2)(c)2, Wis. Stats., provides that whether a sale occurs in this state is unaffected by "f.o.b. point or other conditions of the sale." The Legislature's intent regarding the effect of those two factors is beyond dispute. Yet the department's approach makes a condition of the sale, the method of delivery, the central factor when determining Wisconsin sales, notwithstanding the contrary legislative intent expressed in s. 71.07(2 (c)2. The Court therefore concluded that the location of the purchaser controls. That out-of-state wholesalers pick up Pabst's beer in Wisconsin rather than having it delivered is therefore immaterial. The department incorrectly relied on this distinction to impose additional franchise tax on Pabst.

The Court of Appeals concluded that because the location of the purchasing wholesaler rather than the pickup controls whether the sales are in this state,

the beer pickups are not sales "in this state." The Court therefore affirmed the judgment of the Circuit Court.

The department appealed this decision to the Supreme Court, which denied its petition for review. Therefore, the decision of the Court of Appeals is binding on the department.

Schumacher, Nelson, Grambo & Associates, Inc. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, November 1, 1985). The issue for the Commission to determine is whether the taxpayer may take a deduction for loss of clients previously purchased in the acquisition of an accounting practice under Section 165(a), Internal Revenue Code or whether the files are depreciable under Section 167, Internal Revenue Code.

Schumacher, Nelson, Grambo & Associates, Inc. is an accounting firm in the Eau Claire/Altoona area actively engaged in business. In 1976 the taxpayer entered into an agreement to purchase the accounting practice of Jerald Nelson. The purchase consisted of goodwill $9,000, specified client list $8,765, and office equipment.

On January 1, 1981, the taxpayer purchased the accounting practice of Daniel T. Mayer in Medford, Wisconsin. The purchase agreement between the taxpayer and Mayer was $5,000 for physical assets, $34,282 for client list and $6,668 for goodwill.

On July 21, 1981, the taxpayer purchased the accounting practice of Karl F. Miller of Medford, Wisconsin. The purchase agreement between the taxpayer and Miller was client list $9,067.50, goodwill $432.50 and equipment $500.

Each client list purchased in the transactions was a list of "regular" clients. The list did not include annual tax clients which did not need monthly or continuous contact with the firm. The values assigned client lists, goodwill and equipment were determined in each purchase by independent negotiations and were arrived at in a reasonable manner. Each client within each list was assigned a specific value based on a determinable figure from past billing revenue.

In the Nelson and Miller purchases, the taxpayer already had an active practice in the cities in which the purchases took place. The taxpayer's interest in those purchases was the acquisition of accounts or client files for the purpose of increased revenue. In the Mayer purchase, the taxpayer wanted to expand the geographical base of service and purchase revenue producing accounts.

As purchased, these client files do have an ascertainable cost basis separate and distinct from goodwill. These specific files are a wasting asset and have a limited useful life of 5 1/2 years measurable by the testimony of the taxpayer that the client list turns over in 5 1/2 years.

The Commission concluded that the taxpayer did purchase client files which were capital expenditures under Section 263, Internal Revenue Code, and those assets may be depreciated under Section 167(a).

The department has not appealed this decision.

Suburban Beverages, Inc. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, January 21, 1986). The issue for resolution was whether the $88,761.66 of interest paid on a promissory note to Pabst Brewing Company is "interest paid on money borrowed or interest on notes or securities issued by a corporation to purchase its own capital stock" and thus nondeductible under s. 71.04(2), Wis. Stats.

On June 4, 1979, Pabst Brewing Company (Pabst) purchased from Michael J. Moriarty all of the issued and outstanding capital stock of Suburban Beverages, Inc. (Suburban), a Wisconsin corporation, which was at that time wholly owned by Michael J. Moriarty. In payment for the 720 shares of common stock of Suburban, Pabst paid to Moriarty the sum of $1,119,378.61.

Suburban was at the time of the purchase a wholesale distributor of Pabst products. Pabst and Suburban were engaged in a dispute over Pabst's attempts to terminate Suburban as its distributor. To end that dispute, Pabst entered the agreement to purchase all of the stock of Suburban.

On the same date, June 4, 1979, Pabst sold to S-B of Milwaukee, Inc. (S-B), a Wisconsin corporation wholly owned by David A. and Sunny C. Schultz, the common stock of Suburban which Pabst had on that date purchased from Moriarty. S-B paid $1,119,378.61 for such stock (the exact purchase price which Pabst had paid to Moriarty) with a promissory note payable in certain installments designated therein. The principal balance outstanding bore interest at the rate of 9% per annum payable quarterly on September 1, December 1, March 1 and June 1 of each year commencing September 1, 1979.

Effective August 31, 1979, S-B, the parent of Suburban and the holder of all of its issued and outstanding capital stock, was merged with and into Suburban. The stock of Suburban held by S-B was cancelled and one share of Suburban common stock was issued to David A. and Sunny C. Schultz for each of the 1,000 shares of S-B held by them.

The merger of S-B and Suburban was undertaken to eliminate the additional burden and expense of maintaining an extra layer of corporate administration. Suburban, rather than S-B, was continued in existence as the surviving corporation in order to avoid upsetting Suburban's licensing and the contractual and the other business relationships it had as a wholesale distributor of Pabst's products (including its wholesaler's license, its distributor's agreement, and its relationships with its customers).

As a result of the merger, the taxpayer, as the surviving corporation, succeeded to all of the assets and assumed all of the liabilities of S-B, its former parent.

The taxpayer deducted the interest paid on the promissory note to Pabst on its Wisconsin corporation franchise tax return for the year ending June 30, 1980, in the amount of $88,761.66.

On September 8, 1981, the department sent a Notice of Amount Due to the

taxpayer, denying the deduction of interest paid to Pabst on the note issued by S-B for the purchase by S-B of Suburban, which purchase occurred before the two corporations merged.

The Commission concluded that interest paid by the taxpayer during the taxable year ending June 30, 1980 on a note issued by S-B of Milwaukee, Inc. to purchase the stock of the taxpayer was not "interest paid on money borrowed or interest on notes or securities issued by a corporation to purchase its own capital stock" under s. 71.04(2)(a)3, Wis. Stats.

The department has not appealed this decision.

SALES/USE TAXES

Anderson Laboratories, Inc. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, December 2, 1985). The issues being raised by the taxpayer were as follows:

A. Whether the taxpayer has incurred a liability for payment of use tax by reason of purchases from out-of-state vendors of machinery and equipment, chemicals and testing supplies, and office supplies used in the performance of metallurgical testing and analysis.

B. If it is determined that a use tax liability exists, then whether imposition of penalties, in addition to interest, is justified.

The taxpayer was a metallurgical testing laboratory which performed testing services for its customers which were foundries, fabricators and forging houses. The taxpayer's customers provided it with metal samples for testing. The purpose of the tests was a quality control check for the taxpayer's customers in order to assure that their products met specifications.

The taxpayer performed chemical analysis (either analyzing metal samples for components using either acid and chemicals or spectrographic instruments) or physical analysis (utilizing tensile testing equipment and Charpy impact machines to test hardness of the samples). After completion of the analysis, the taxpayer prepared standard reports on each test according to specifications, such as those of the Society of Automotive Engineers or American Standards for Testing Materials.

At least two foundries, Grede Foundry and Wisconsin Centrifugal, have similar in-house laboratories which are considered as part of the manufacturing process for sales and use tax purposes.

During the years at issue, the taxpayer purchased machinery and equipment and supplies utilized in its operations ex-tax. The department assessed use tax on these purchases after determining that the taxpayer was not entitled to the manufacturer's exemption under s. 77.54(6)(a), Wis. Stats. The taxpayer did not file any sales and use tax returns for the period January 1, 1970 through December 31, 1979. The taxpayer employed a certified public accounting firm to prepare its tax returns and this accounting firm did not recommend the filing of sales and use tax returns during the period at issue. No evidence was presented to show the reason for the failure of the accounting firm to recommend filing of sales and use tax returns.

The Commission held that during the period at issue, the taxpayer's operations did not come within the definition of "manufacturing" as provided in s. 77.51(27), Wis. Stats., but rather the taxpayer was engaged in providing a service to manufacturers. The taxpayer was subject to use tax on the purchase of machinery and equipment and supplies used in its operations. The taxpayer has not shown that its failure to file sales and use tax returns for the period at issue was due to good cause and not neglect, and therefore, the department's imposition of the negligence penalty under s. 77.60(4), Wis. Stats., was proper.

The taxpayer has not appealed this decision.

Wisconsin Department of Revenue vs. Johnson and Johnson, a partnership, d/b/a Asphalt Products Co., and Asphalt Products Co., Inc. (Court of Appeals, District IV, March 6, 1986). The Department of Revenue appealed from an order affirming a decision of the Tax Appeals Commission. The Commission concluded that purchases of raw materials by Asphalt Products Company (APC) were exempt from the sales tax under ss. 77.52(13) and (14) and 77.51 (18), Wis. Stats. The sole issue was whether APC is a real property construction contractor within the meaning of s. 77.51(18).

APC purchases raw materials from suppliers for use in the manufacture of emulsified asphalt products. The end product is sold to local units of government for road repair and construction. Generally, under s. 77.52(13) and (14), Wis. Stats., APC's purchases would be exempt from the sales tax if the materials were simply resold to the ultimate consumers. If, however, APC is a "contractor" as that term is defined in s. 77.51(18), Wis. Stats.—if it is a "consumer" of the purchased materials in that its resale to the ultimate customer involves the "performance of real property construction activities" by APC—the exemption is unavailable. The Commission and the Circuit Court concluded that APC's activities did not fit the statutory definition and that APC was entitled to the benefits of the "resale exemption." (See WTB# 41 for a summary of the Circuit Court's decision.)

APC manufactures emulsified asphalt products from materials purchased from suppliers. It then sells these products to tax-exempt entities, primarily towns, municipalities and counties, for use in road construction and repair. APC's sales involve more than simple delivery; it surfaces the road with the product as part of a "seal coating" process—one of several steps in highway construction or repair. The purchaser prepares the road for APC's spraying operations and reroutes traffic during the application period. When APC's operations are completed, the purchaser completes the overall project with its own personnel.The purchaser controls the method, time and date of delivery and specifies the amount of asphalt to be applied. It designates the thickness, width and number of applications. The overall project is under the supervision of a state inspector or county foreman.

APC uses its own distribution equipment, expertise and personnel to apply the asphalt. It insures that the asphalt

meets specific tolerances for purity, temperature and composition in conformance with the purchaser's requirements. When spraying the asphalt, APC uses its own transport truck which is fitted with attached spray bars and nozzles. To insure uniformity of application, APC calibrates pressure gauges, meters and controls so that the angle of the spray nozzle and the height of the spray bar are properly adjusted. APC also maintains appropriate temperatures for various types and grades of asphalt and, in general, monitors and controls the spraying so as to meet the purchaser's specifications.

APC argued that the word "contractor," as it appears in s. 77.51(18), Wis. Stats., is ambiguous and that the Court of Appeals should define it, as the Circuit Court did, as requiring "control [over] the details of the work." The Court's definition is inapposite. It is taken from *Bond v. Harrel*, 13 Wis. 2d 369, 374 (1961), where the Court was defining the term for only a very limited purpose: to distinguish between an independent contractor and an agent in the context of vicarious tort liability. Section 77.51(18) specifically defines the term for purposes of the sales tax exemption; and when the Legislature has undertaken to define a term for a specific application, the Court will not add to or expand that definition.

Applying emulsified asphalt is one of six major steps in highway surface treatment. APC is responsible for accomplishing its particular task according to established specifications. It performs a distinct part of the on-site road construction and repair work for the projects in which it participates. In this light, APC becomes the ultimate consumer of the purchased materials in the statutory sense: it "consume[s] and use[s] the[m] . . . in creating a new and different product"—the finished roadway.

The Court of Appeals held that APC is a consumer of tangible personal property used by it in real property construction activities within the meaning of s. 77.51 (18), Wis. Stats. As a result, it may not avail itself of the "resale exemption" provided by s. 77.52(13) and (14) with respect to its purchases of raw materials.

The taxpayer appealed this decision to the Supreme Court, which denied its petition for review.

Wisconsin Department of Revenue vs. Thiry Daems Cheese Factory, Inc. (Circuit Court of Dane County, January 20, 1986). This matter was before the Circuit Court for judicial review under ch. 227, Wis. Stats., of an oral decision and order of the Wisconsin Tax Appeals Commission. On July 13, 1978, Thiry Daems purchased a 20-gauge, 20,000 gallon silo-type storage tank from Hercules Incorporated, a Minnesota corporation, for $24,400. No sales or use tax was paid in connection with this purchase. The tank was purchased for use in Thiry Daems' cheese processing business.

The cheese factory dispatches various trucks, throughout the day, which collect milk from farms. The trucks dump the collected milk in one of the two tanks Thiry Daems owns (one of those tanks being the subject of the tax disputed here), and go back out for successive loads. Having two such tanks allows Thiry Daems to clean the alternate tank not in use. The tanks are made of stainless steel, and the new tank is insulated in order to keep the milk cool. If Thiry Daems owned no such tanks, each truck would only be able to make one collection trip each day since on return to the cheese factory, there would be no place to dump the milk.

There is an agitator attached to the tank which stirs the milk to counter separation of the milk and cream. No additions or adulterations are made of the milk while it is in the storage tank. From the storage tank, the milk is pumped through the pasteurizer, into the cheese-making vat. Only as much milk as will be used the next day, starting at 3:00 a.m. when the day's cheese processing begins, is put in a tank; that is, the tank is completely emptied each day. If the cheese processing were begun with less than a full day's supply of milk, and milk were added to the vat throughout the day—e.g., if the storage tank was not used—the resulting cheese product would be off-grade cheese, ineligible for the state brand, and therefore non-competitive on the cheese market.

The Commission found Thiry Daems' tank purchase to be exempt from taxation because, in the Commission's view, the tank is the beginning of the process of manufacturing and is exclusively and directly used in the manufacturing of the cheese production within the intent and meaning of s. 77.54(6)(a), Wis. Stats.

This case involved two issues:

A. What is the appropriate scope of review?

B. Whether the tank purchased by Thiry Daems qualifies for tax exemption, as "machines and specific processing equipment . . . exclusively and directly used" in the manufacturing of cheese. Or, if instead, the tank is strictly a means of storage and therefore subject to taxation pursuant to section Tax 11.39(2)(b), Wis. Adm. Code, which states that "manufacturing does not include storage."

The Commission's interpretation of s. 77.54(6)(a), Wis. Stats., and ruling that the tank in question is exempt from taxation, can stand without upsetting the purpose of the Legislature, as evidenced by the review and formal promulgation of section Tax 11.39(2)(b), Wis. Adm. Code.

The Legislature plainly intended to tax the means of transportation and storage of the cheese and its ingredients, before and after its manufacture, while exempting from taxation the components of the actual manufacturing process of the cheese. While the tank in this case has the external appearance of storage, the Commission has found, and the Circuit Court agreed, that the tank functions directly and exclusively in the manufacture of cheese. The milk tank is used exclusively and directly in collecting enough milk, and maintaining its condition, to produce grade cheese on a daily production schedule. The milk tank is not only essential to the operation of the plant, but also an actual part of the operation of the plant. The tank is a piece of equipment used to make grade cheese.

The determination that the tank is part of the cheese manufacturing process and exempt from taxation under s. 77.54(6)(a), Wis. Stats., is not incon-

sistent with section Tax 11.39(2) (b) and 11.40(2)(c) and (3)(d), Wis. Adm. Code, since both the Commission and the Circuit Court have concluded that Thiry Daems' milk tank is *not* used as a means of storage as contemplated by the Legislature. Therefore, the decision and order of the Wisconsin Tax Appeals Commission were affirmed.

The department has not appealed this decision.

Wisconsin Department of Revenue vs. Vita Plus Corporation (Circuit Court of Dane County, March 13, 1986). This was an action to review a decision of the Wisconsin Tax Appeals Commission which reversed the department's action disallowing a tax exemption under s. 77.54(6)(a), Wis. Stats., claimed by Vita Plus Corporation (Vita Plus) and reversed the department's action denying a reduction to Vita Plus' franchise tax under s. 71.043(2), Wis. Stats., on property used in connection with the blending and secondary cleaning operations which are performed in the production of Vita Plus' finished product.

It was the department's position that the blending and secondary cleaning operations do not constitute "manufacturing" within the intent and meaning of s. 77.51 (27), Wis. Stats. The department contended that the manufacturing process terminates at the time the grain is placed into the conditioning bins, and therefore the property at issue does not qualify for the sales and use tax or franchise tax exemptions. Specifically, the department argued that because the Commission failed to make a legal distinction between "storage" and "manufacturing": (1) the Commission's conclusions of law are based on an erroneous view of the law and (2) Findings of Fact Nos. 14-28 are not supported by the record.

The basic issue for the Circuit Court to resolve is whether the blending and secondary cleaning operations constitute "manufacturing" under s. 77.51 (27), Wis. Stats.

First, the Court found that the Commission's conclusions of law were not based upon an erroneous view of the law. The Court found that the Commission did not fail to make a legal distinction between "storage" and "manufacturing." Accordingly, the Commission's Findings of Fact Nos. 14-28 are supported by substantial evidence in the record. For these reasons, it was the view of the Circuit Court that the Commission's decision and order dated August 16, 1985 be affirmed in all respects.

The department has not appealed this decision.

TAX RELEASES

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

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INDIVIDUAL INCOME TAXES

1. Taxability of Railroad Unemployment Insurance Benefits

Statutes: section 71.05(1)(b)4, 1983 Wis. Stats.

Facts and Question: For federal income tax purposes, Section 85 of the Internal Revenue Code provides that all or a portion of unemployment benefits which are received from the U.S. Railroad Retirement Board - Bureau of Unemployment and Sickness Insurance are subject to federal income tax. Can Wisconsin impose an income tax on amounts of railroad unemployment insurance benefits which are taxable for federal income tax purposes?

Answer: No, railroad unemployment insurance and sickness benefits are exempt from Wisconsin income tax. Section 352(e) of the United States Code bars state and local taxation of railroad unemployment insurance benefits. On a 1985 Form 1, railroad unemployment insurance and sickness benefits included in federal adjusted gross income are subtracted from federal income on line 34.

2. Taxing Supplemental Unemployment Benefits to Nonresidents

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

Facts and Question: Section 71.07(1), 1983 Wis. Stats., provides that "Income from personal services of nonresident individuals, including income from professions, shall follow the situs of the services. All other income or loss of nonresident individuals and nonresident estates and trusts, including income or loss derived from land contracts, mortgages, stocks, bonds and securities or from the sale of similar tangible personal property, shall follow the residence of such persons . . ."

A taxpayer who is a Wisconsin resident and works in Wisconsin becomes unemployed and then changes his or her residence to another state. Under a company plan, the taxpayer will receive supplemental unemployment benefits. Are any of the supplemental unemployment benefits which are received during the period of nonresidency taxable to Wisconsin?

Answer: No. Supplemental unemployment benefits paid by a Wisconsin employer under a company plan to a nonresident are "other income" under s. 71.07(1), 1983 Wis. Stats., not subject to the Wisconsin individual income tax.

3. Wisconsin Tax Treatment of Distributions Received Upon the Termination of a Disqualified Employe Savings Trust

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

Facts and Question: ABC Corporation established an employe savings plan, which it believed qualified as a tax-exempt trust. If an employe chose to participate in the savings plan, ABC Corporation contributed a portion of the employe's wages to the trust. On his or her individual income tax return, each participating employe was required to report as income (a) ABC Corporation's contribution to the trust on the employe's behalf, and (b) the employe's share of earnings from the trust for the taxable year.

During 1985, the Internal Revenue Service determined that the employe savings plan did not qualify as a tax-exempt trust. The employes were given two options: (a) to withdraw all of their funds, or (b) to roll over these funds into a new savings plan which qualifies as a tax-exempt trust. Regardless of which option they chose, the employes must treat the distribution as an accumulation distribution from a trust for federal tax purposes. Section 667 of the Internal Revenue Code provides for a tax on an accumulation distribution made by a trust. The employes compute the tax on federal Form 4970—Tax on Accumulation Distribution of Trusts—and add this tax to the federal income tax computed on federal taxable income shown on their federal Form 1040.

Are the employes subject to an additional Wisconsin income tax on the trust distribution?

Answer: No. Wisconsin law does not provide for an additional tax on accumulation distributions similar to the tax provided for in Section 667 of the Internal Revenue Code. Such distributions are not part of federal taxable income and thus are not included in Wisconsin taxable income.

4. Exception to the Penalty for Underpayment of Estimated Tax Based on a Return for the Preceding Taxable Year

Statutes: section 71.21(1), (4), (11), (14) and (16), 1983 Wis. Stats.

Facts and Question: Section 71.21(1), 1983 Wis. Stats., provides that every individual deriving income subject to taxation shall make a declaration of estimated income tax if the total tax on income of the year can reasonably be expected to exceed withholding on wages paid in the year by $100 or more. The amount of the estimated income tax shall be the total estimated tax, including surtaxes, if any, reduced by the amount the individual determines will be withheld from wages (s. 71.21(4), 1983 Wis. Stats.).

Section 71.21(11), 1983 Wis. Stats., provides for an addition to the tax in the case of any underpayment of estimated tax. However, s. 71.21(14) and (16), 1983 Wis. Stats., provide four exceptions to this underpayment penalty.

For purposes of the first exception, the underpayment penalty will not be imposed if the total amount of all payments of estimated tax made on or before the last day prescribed for such payments (April 15, June 15, etc.) equals or exceeds the amount which would have been required to be paid on or before such date if the total estimated tax were an amount equal to the tax shown on the return of the preceding taxable year (s. 71.21(14)(a), 1983 Wis. Stats.).

On April 15, 1985, a single taxpayer files a 1984 Wisconsin income tax return which indicates a net tax of $2,000. On September 15, 1985, the taxpayer amends the tax return which results in a reduction of the net tax to $1,600 for 1984. For tax year 1985, the taxpayer makes estimated tax payments of $400 on April 15, $400 on June 15, $400 on September 15 and $400 on January 15, 1986. The payments equal the tax shown on the preceding year's amended return. Does the taxpayer meet the requirements of the first exception for purposes of avoiding the penalty for underpayment of estimated tax?

Answer: Yes, the taxpayer does meet the requirements of the first exception and no penalty will be imposed for any underpayment of estimated tax. The amended return qualifies as the return "for the preceding taxable year." As long as the estimated tax payments are timely made, no penalty will be imposed if the payments equal or exceed the net tax shown on the amended return. To claim this exception, the taxpayer should complete Schedule U and attach it to his/her Wisconsin income tax return.

5. Interest Allowable in Computing the Wisconsin Itemized Deduction Credit

Statutes: section 71.09(6r), 1985 Wis. Stats.

Note: This Tax Release applies only with respect to taxable years 1986 and thereafter. Any reference to federal Schedule A and/or itemized deductions allowable for federal income tax purposes is based on federal law and forms as they existed on December 31, 1985.

If there are any changes to federal Schedule A and/or laws pertaining to itemized deductions allowable subsequent to December 31, 1985, references to federal Schedule A and itemized deductions allowable will still be as of December 31, 1985 in computing the Wisconsin itemized deduction credit unless s. 71.09(6r), 1985 Wis. Stats., is also changed.

Background: Persons filing a 1986 Wisconsin income tax return may claim a 5% credit against, but not to exceed the amount of, net income taxes due. The credit is based on certain expenses that were formerly deductible as itemized deductions and adoption expenses. If the total of these items exceeds the amount of Wisconsin standard deduction allowable to an individual, 5% of such excess is allowed as a credit. One of the items used in calculating the Wisconsin itemized deduction credit is interest expense per Internal Revenue Code (IRC) Section 163. The following types of interest may be used:

(a) Interest which would be deductible on federal Schedule A (itemized deductions) *and* is paid on a loan to purchase or refinance a residence in Wisconsin or paid on a land contract in respect to a residence in Wisconsin.

(b) Interest which would be deductible on federal Schedule A *and* is paid to purchase or refinance a residence in or near Washington, D.C. or paid on a land contract in respect to such a residence by members of the United States Congress.

(c) For the tax years 1986 to 1988 only, interest which would be deductible on federal Schedule A *and* is paid by an employe on a loan to purchase stock in an employe-owned business where the employe receives at least 50% of that employe's wage and salary income.

(d) Interest which would be deductible on federal Schedule A *and* is paid on agricultural real property, not including residences, that has been sold on a land contract from which interest income is reported. For the balance of this Tax Release, this interest will be identified as "agricultural property interest."

(e) Interest, up to $1,200 for single persons and married persons filing jointly and up to $600 for each married person if filing separately, which would be deductible on federal Schedule A and not mentioned above in "a" through "d." For the balance of this Tax Release, this type of interest will be identified as "other interest."

Question 1a-1i: Based on each of the facts below, does the interest paid qualify as interest paid to purchase or refinance a residence? (Assume all properties are located in Wisconsin.)

Fact 1a: A taxpayer borrows $5,000 from her parents to make a downpayment on her home. She makes annual interest payments on a personal note.

Answer 1a: Yes, the source of the loan is irrelevant. The statute requires only that funds be used for the purchase of a residence.

Fact 1b: A single taxpayer, who is building his own home, pays interest to the various suppliers of building materials.

Answer 1b: No, while the ultimate use of the goods may be to build a residence, the loans obtained are not being used to purchase or refinance a residence. However, the interest paid to retailers is includable in the $1,200 of "other interest" allowed to the taxpayer.

Fact 1c: A taxpayer takes out a second mortgage on her home to add a family room.

Answer 1c: Yes, a second mortgage is a means of refinancing a residence.

Fact 1d: A single taxpayer takes out a personal loan from a credit union to make home improvements.

Answer 1d: No, the loan obtained is neither for a purchase of a residence nor a refinance of a residence. However, the interest paid to the credit union is includable in the $1,200 of "other interest" allowed to the taxpayer.

Fact 1e: A taxpayer acquires and resides in a new residence but has not been able to sell his former residence. He pays mortgage interest on the current residence and former residence.

Answer 1e: Yes, the taxpayer may include the amounts of interest paid on both mortgages because both mortgages are to purchase a residence.

Fact 1f: A taxpayer sold her former home on a land contract; she continues to pay interest on the mortgage held by her bank.

Answer 1f: Yes, the mortgage was obtained to purchase the home. Even though she has now transferred equitable ownership in the residence to the land contract vendee, she remains obligated to pay principal and interest on the mortgage.

Fact 1g: A taxpayer co-signed a mortgage so his son could purchase a home. The taxpayer, not the son, makes the mortgage payment.

Answer 1g: Yes, the taxpayer is paying mortgage interest to purchase a residence. The taxpayer must be joint and severally liable for the mortgage note. If he were merely secondarily liable or a guarantor on the note, he would not be considered to be paying interest to purchase or refinance a residence.

Fact 1h: A taxpayer takes a first mortgage on her home to consolidate the existing mortgage, a car loan, and personal loans at a lower interest rate.

Answer 1h: Yes, the mortgage was used to refinance the taxpayer's residence.

Fact 1i: A taxpayer takes out a home improvement loan secured by a second mortgage on her home, but uses the funds to buy a new car.

Answer 1i: Yes, the taxpayer has refinanced her residence for making a noninvestment purchase.

Question 2: Do points, paid by a taxpayer when obtaining a mortgage, qualify as interest paid to purchase or refinance a residence?

Answer 2: Yes, if the points paid are deductible as compensation for the use of the money. However, if the points must be allocated over the life of the loan for federal income tax purposes, they must also be allocated over the life of the loan for purposes of calculating the Wisconsin itemized deduction credit. If the points are not allowable as an itemized deduction for federal purposes, they may not be used in calculating the Wisconsin itemized deduction credit.

Question 3: Does the term "residence" include such property as a lake cottage or hunting shack?

Answer 3: Yes, a taxpayer may include interest, in the calculation of the Wisconsin itemized deduction credit, to purchase or refinance more than one residence. However, the second residence must be for personal use. If the property is used for more than personal use (e.g., the property is rented for a portion of the year), only the portion attributable to personal use may be used for the credit.

Question 4: What is the proper treatment of interest paid in connection with a seller-financed sale of investment property which consists of retail space and residential apartments. During the period the property was owned by the seller, it was treated as rental property. After the sale, is a portion of the interest which is paid by the seller considered to be interest paid on a "residence" and the remaining portion considered "other interest" subject to the $1,200 ceiling?

Answer 4: No, investment property is not considered a residence for purposes of Section 71.09(6r), 1985 Wis. Stats., even though all or a portion of the investment property may be devoted to residential use. The entire amount of interest paid in connection with a seller-financed sale of investment property is "other interest," subject to the $1,200 limitation. [Exception: If the taxpayer occupied a portion of the investment property as his/her residence, interest attributable to the taxpayer's residence is fully includable in calculation of the credit under s. 71.09(6r), Stats.]

Question 5: A taxpayer refinances his home by taking out a new mortgage loan. The entire loan proceeds are used to purchase stock. For federal tax purposes this interest is considered "investment interest" and is only allowable as an itemized deduction up to the investment interest limits imposed by the IRC.

(a) Does this interest qualify as interest paid to refinance a residence, and does the "investment interest" limitation of section 163 of the IRC also apply for purposes of calculating the Wisconsin itemized deduction credit?

(b) If any amount of "investment interest" is not allowable as an itemized deduction for federal purposes in the year paid but is allowable as a carryover to a subsequent tax year, will that amount also be available for purposes of calculating the Wisconsin itemized deduction credit in the carryover year?

Answer 5a: Yes, the taxpayer has refinanced his residence. The amount of interest which qualifies for the Wisconsin itemized deduction credit will be limited to the amount which is deductible as investment interest under Section 163(d) of the Internal Revenue Code.

Answer 5b: Yes, interest carried over as excess investment interest is interest allowed as an itemized deduction. It is recognized for calculating the Wisconsin itemized deduction credit in the same year that it may be deducted for federal purposes.

Question 6: Does a mobile home qualify as a "residence" for purposes of the Wisconsin itemized deduction credit if it is used as a principal or recreational residence either permanently on the taxpayer's land or on land that is rented?

Answer 6: Yes, a mobile home does qualify as a residence for purposes of the Wisconsin itemized deduction credit, whether used as a principal residence or for recreational purposes and whether located on the owner's land or someone else's. The mobile home need not be attached to a foundation.

Question 7: Does a travel trailer designed to be pulled behind a vehicle when traveling or a similar recreational vehicle that is not pulled behind a vehicle but rather is one unit with its own driving compartment qualify as a residence for purposes of the Wisconsin itemized deduction credit?

Answer 7: No, a travel trailer or similar recreational vehicle is personal property and, thus, does not meet the requirement of being a residence.

Question 8: A taxpayer sells his farm, including the residence he and his family have resided in, on a land contract. The taxpayer has a balance remaining on the loan he obtained when he originally purchased the farm. He includes interest from the land contract in his Wisconsin taxable income. Can the interest which the taxpayer pays on the loan be used in computing the Wisconsin itemized deduction credit?

Answer 8: Yes. The portion of the interest payments relating to the residence may be used for the Wisconsin itemized deduction credit as interest paid to purchase or refinance a residence. The portion of the interest payments on the land and farm buildings qualifies as "agricultural property interest."

Question 9: Assume the same facts as in question 8 except that the taxpayer and his family never resided in the home on the farm but rented it out. Does the interest paid on the residence portion qualify as "agricultural property interest" for purposes of computing the Wisconsin itemized deduction credit?

Answer 9: No. The residence would have had to be lived in by the taxpayer. However, the interest paid on the residence portion is "other interest" and may be used, subject to the

$1,200 limitation, in computing the Wisconsin itemized deduction credit.

Question 10: Assume the same facts as question 8. In addition assume that when the taxpayer purchased the farm, a portion of the loan proceeds was used to purchase farm machinery (e.g., tractors, milking equipment). Does the portion of interest paid for farm machinery qualify as "agricultural property interest" for purposes of computing the Wisconsin itemized deduction credit?

Answer 10: No. Only interest paid on a loan to purchase agricultural real property is treated as "agricultural property interest." However, the interest allocable to the farm machinery is "other interest" and may be used, subject to the $1,200 limitation, in computing the Wisconsin itemized deduction credit.

INCOME, FRANCHISE OR SALES/USE TAXES

1. Application of $20 Late Filing Fee

Statutes: section 71.11(40), 1985 Wis. Stats.

Facts and Question: Section 71.11(40), as amended by 1985 Wisconsin Act 29, provides for a $20 late filing fee if an income or franchise tax return is filed 60 or more days late.

The initial applicability language for this amendment reads as follows in 1985 Wisconsin Act 29: "Late returns. The treatment of section 71.11 (40) of the statutes by this act first applies to returns required to be filed on the effective date of this paragraph." (Note: 1985 Wisconsin Act 29 was published on July 19, 1985; therefore the "effective date of this paragraph" is July 20, 1985, the day after publication.)

To what returns does this $20 late filing fee apply?

Answer: It applies only to income or franchise tax returns which have an original or extended due date on or after July 20, 1985 and which are filed 60 or more days late.

Example: A 1984 calendar year income tax return filed on October 15, 1985, would not be subject to the $20 late filing fee because the original due date of April 15, 1985, was before July 20, 1985 (assuming no extension of time was granted). However, if the taxpayer received an extension until August 15, 1985, the $20 late filing fee would apply to the 1984 return if it was filed 60 or more days after August 15, 1985.

2. Imposition of Penalties

Statutes: sections 71.11(6)(b), 71.11(46) and (47), 77.60(3), (4) and (5), 1985 Wis. Stats.

Note: The provisions of this Tax Release regarding the 100% penalty under s. 71.11(6)(b), 1985 Wis. Stats., apply to 1985 tax years and thereafter. For the 1969 through 1984 tax years the penalty was 50%. Prior law, applicable to 1968 tax years and prior, is found at s. 71.11(6)(a), 1985 Wis. Stats., and provides for assessments at twice the normal income or franchise tax rate.

Background:

25% Penalty - Sections 71.11(47) and 77.60(3), 1985 Wis. Stats., provide for a penalty of 25% of the additional tax finally determined if an incomplete or inaccurate income, franchise, sales or use tax return is filed.

5-25% Penalty - Sections 71.11(46) and 77.60(4), 1985 Wis. Stats., provide that if an income, franchise, sales or use tax return is not filed by its due date, a graduated penalty of 5% to 25% may be imposed. The penalty is 5% of the amount of tax due and unpaid if the failure to file is one month or less, with an additional 5% for each additional month or part of a month during which the failure to file continues, not to exceed 25%.

The 25% and 5-25% penalties described above are commonly referred to as negligence penalties. The penalties apply unless it is shown that the failure to file or the incomplete or inaccurate filing is due to reasonable cause and not due to neglect. Neglect may be defined as failure to exhibit the ordinary business care and prudence that should be used. It is characterized chiefly by inadvertence, thoughtlessness, inattention, etc. It includes, but is not required to be, intentional conduct. The 5-25% income tax graduated penalty under s. 71.11(46), 1985 Wis. Stats., specifies willful neglect. Willful neglect requires intent, but in the absence of reasonable cause for the negligent conduct intent need not be shown for the penalty to apply.

100% and 50% Penalties - Sections 71.11(6)(b) and 77.60(5), 1985 Wis. Stats., provide for penalties of 100% for income and franchise tax returns, or 50% for sales and use tax returns, of the underpayment of tax for failing to file a return or for filing an incorrect return, with intent in either case to defeat or evade the tax assessment required by law. (For 1969 through 1984, the penalty was 50% for income and franchise tax returns.)

Question 1: Is the negligence penalty provided for under s. 71.11(47) or 77.60(3), Wis. Stats., imposed on the entire additional tax finally determined or can it be applied to specific amounts only?

Answer: The negligence penalty provided by s. 71.11(47) or s. 77.60(3), Wis. Stats., may be imposed on the entire additional tax finally determined or on specific parts thereof, depending on the facts and circumstances of the particular case.

Example 1: A medium-sized corporation is field audited for sales and use tax purposes. The taxpayer has a good system in place for charging and collecting sales tax. During the last two audit years it incorporated a system for self-assessing use tax as well and remitted about $2,500 use tax to the Department. The audit results in a small amount of additional sales tax which is due primarily to clerical mix-ups. The first two years of the audit also result in about $3,000 of use tax. For the last two audit years additional use tax of $400 is assessed. The taxpayer's personnel responsible for sales and use tax compliance are knowledgeable about the Wisconsin sales and use tax laws. Pursuant to s. 77.60(3), Wis. Stats., a 25% negligence penalty will be imposed on the $3,000 use

tax assessed for the first two audit years. No penalty will be imposed on the additional $400 use tax liability for the last two audit years or on the additional sales tax assessed for all audit years because this additional liability is not due to neglect.

Example 2: A multistate corporation headquartered in Wisconsin with an Ohio division is field audited for franchise tax purposes. A number of adjustments are made to deductions claimed on the corporate returns. Adjustments are also made to the sales factor of the apportionment formula to include both Wisconsin destination and throwback sales in the numerator of this factor. The Department concludes that the adjustments to income as well as the throwback sales adjustments are not due to neglect. However, the Department concludes that failure to include sales shipped from the taxpayer's Ohio plant directly to Wisconsin customers in the sales factor numerator in accordance with s. 71.07(2)(c)2, 1983 Wis. Stats., is due to neglect. Accordingly, the 25% negligence penalty pursuant to s. 71.11(47), Wis. Stats., will be imposed on the portion of the additional tax directly attributable to this adjustment.

Question 2: Is the 100% or 50% penalty under s. 71.11(6)(b) or s. 77.60(5), Wis. Stats., imposed on the entire additional tax finally determined or can it be applied to specific amounts only?

Answer: The 100% or 50% penalty is imposed on the entire underpayment of tax for any year there is evidence of intent to defeat or evade the tax assessment required by law.

Question 3: How is the 25% negligence penalty computed when it is imposed on part of the additional tax assessed and the additional income is subject to graduated tax rates?

Answer: When only part of the adjustments are subject to penalty and the amount of the additional income is subject to graduated tax rates, the amount of the penalty is determined by considering that the adjustments penalized are at the top of the particular tax bracket.

Example: An individual taxpayer reported 1984 Wisconsin net taxable income of $10,000. Upon audit various adjustments which total to $20,000 are made increasing the Wisconsin net taxable income to $30,000. Only $10,000 of the adjustments are deemed subject to penalty, however. Thus the adjusted 1984 Wisconsin net taxable income not subject to penalty is $20,000 ($30,000 adjusted 1984 net taxable income minus $10,000 additional income due to negligence). The gross tax on $30,000 is $2,245 and on $20,000 is $1,318, resulting in a difference of $927. The 25% negligence penalty to be imposed is therefore $232 ($927 times 25%).

Question 4: Can the 25% negligence penalty under s. 71.11 (47), Wis. Stats., or the 100% penalty under s. 71.11(6)(b), Wis. Stats., be imposed even though a refund is due the taxpayer?

Answer: Yes, the negligence penalty under s. 71.11(47), Wis. Stats., or the 100% penalty under s. 71.11(6)(b), Wis. Stats., may be imposed even though a refund is due the taxpayer. The penalty would apply when a franchise or income tax return showing a refund due the taxpayer as filed is audited before the refund is issued, and the audit discloses adjustments due to negligence or intent to defeat or evade the law on the part of the taxpayer. The penalty is computed on the excess of the tax based on the corrected income over the liability reported on the return, without regard to the amount of tax withheld or paid by declaration of estimated tax.

Example: A taxpayer files a 1984 Wisconsin return showing a refund due of $559 based on net taxable income of $10,000, estimated tax credits and payments of $1,000 and a net tax after personal exemptions and other credits of $441. Before the refund is issued the taxpayer's return is audited and additional taxable income of $5,000 is determined. Additional tax of $428 is computed on the adjusted net taxable income of $15,000 ($10,000 per return plus $5,000 per audit). A 25% negligence penalty is also imposed on the additional tax of $428 resulting in a $107 penalty. The tax and penalty totaling $535 ($428 plus $107) is offset against the $559 refund requested, resulting in a net refund of $24 issued to the taxpayer.

Question 5: Section 71.11(21)(g)1, Wis. Stats., provides that if a taxpayer reports on its Wisconsin return less than 75% of the net taxable income properly assessable, an additional assessment may be made within six years of the date on which the return is filed, provided that the additional tax is in excess of $100. May the 25% negligence penalty imposed under s. 71.11(47), Wis. Stats., be used in arriving at the $100 amount?

Answer: No. The 25% negligence penalty imposed under s. 71.11(47), Wis. Stats., may not be used to reach the $100 amount and thereby open to additional assessment an otherwise closed year. However, under the provisions of s. 71.11(21)(c) or 77.59(8), Wis. Stats., filing a return with intent to defeat or evade the tax opens any year for assessment of the additional tax and penalty .

Example: A taxpayer filed a timely 1979 Wisconsin individual income tax return and reported a Wisconsin net taxable income of $2,975. Upon audit in 1985 a net Wisconsin taxable income of $4,750 is determined for the 1979 tax year. On this income there is a gross tax of $190 and, after personal exemptions of $100, additional net Wisconsin tax of $90 is computed. The reported net income ($2,975) is less than 75% of the amount properly assessable (75% of $4,750 = $3,563). A 25% negligence penalty of $23 ($90 net Wisconsin tax times 25%) when added to the $90 tax would increase the liability to $113, which is more than the amount required to open the 1979 tax year under s. 71.11(21) (g)1, 1983 Wis. Stats. However, since only the additional net Wisconsin tax of $90 may be used to compute whether the tax on the additional income is in excess of $100 as the statutes require, the tax may not be assessed even though all of the other requirements of the statute have been fulfilled.

Question 6: Is the failure of a person's tax practitioner to complete and file the required returns on time reasonable cause to avoid the imposition of the graduated negligence penalties under s. 71.11(46) or 77.60(4), Wis. Stats.?

Answer: No. The duty to file returns is personal and may not be delegated. For example, in the case of *Ruhl Enterprises, Inc. vs. Wis. Dept. of Revenue* (WTAC, Docket No. I-8075) a second accounting service engaged to bring the books up to date and file the returns failed to do so before the filing deadline after the first accountant had delayed for six months. The taxpayer's failure to act sooner was found to demonstrate lack of "ordinary business care and prudence" in conducting the corporate affairs and thus was not reasonable cause for the late filing. The negligence penalty under s. 71.11(46), Wis. Stats., was deemed appropriate under the circumstances. In another case financial inability to pay and disruption of the bookkeeping system because of moving were found not reasonable causes for late filing. (*Witt, Farr, and Frost, Inc. vs. Wis. Dept. of Revenue*, 6 WBTA 112).

CORPORATION FRANCHISE/INCOME TAXES

1. Deduction of Taxes By Corporations

Statutes: sections 71.01(4)(a)6 and 71.04(3), 1983 Wis. Stats.

Wis. Adm. Code: section Tax 3.24, March 1966 Register

Background: Section 71.04(3), 1983 Wis. Stats. provides in part that certain taxes paid during the taxable year upon the business or property from which the income to be taxed is derived are deductible. This section further provides that certain other taxes are not deductible.

The following is a listing and brief discussion of some of the taxes which are either deductible or nondeductible for Wisconsin corporate franchise/income tax purposes pursuant to s. 71.04(3), 1983 Wis. Stats. (or other Wisconsin law as noted):

DEDUCTIBLE TAXES (this list is not all-inclusive)

A. Real estate and personal property taxes

Real estate and personal property taxes that relate to a definite period of time may be accrued ratably over that period by accrual basis taxpayers.

B. Gross receipts taxes assessed as license fees

These taxes include telephone license fees assessed in lieu of property taxes under s. 76.38(8), 1983 Wis. Stats., and light, heat and power company license fees assessed under s. 76.28, 1983 Wis. Stats.

C. Ad Valorem taxes assessed under s. 76.07, 1983 Wis. Stats.

These taxes are assessed in lieu of local property taxes on such property.

D. Net proceeds occupation tax on mining of metallic minerals under s. 70.3 75, 1983 Wis. Stats.

Although this tax is based on net mining proceeds, its deductibility is specifically provided for under s. 71.04(3), 1983 Wis. Stats.

E. Other occupational taxes imposed under Chapter 70, 1983 Wis. Stats., on the following:

1. Iron ore concentrates (s. 70.40).
2. Scrap iron, scrap steel and all other steel (s. 70.415).
3. Coal (s. 70.42).
4. Petroleum and petroleum products refined in Wisconsin (s. 70.421).
5. Owners of domestic mink farms (s. 70.425).

Note: Refer to Item E under Nondeductible Taxes for the treatment of occupational tax on grain storage (s. 70.41).

The laws imposing the taxes on Items 1 through 4 above specifically provide that the tax is deductible under s. 71.04(3), 1983 Wis. Stats., and are in lieu of other property taxes.

The tax imposed on Item 5 is a tax on the owner or operator of a domestic mink farm. This tax is in addition to all other property taxes.

F. Sales and use taxes (including room taxes and wheel taxes)

These taxes include taxes imposed by Wisconsin, any other state and the District of Columbia, and any political subdivisions thereof. However, sales and use taxes used in computing the manufacturing sales tax credit are not deductible. (Refer to Item G under Nondeductible Taxes.)

G. Taxes imposed by cities, municipalities or other political subdivisions on or measured by net income, gross income, gross receipts or capital stock

Section 71.04(3), 1983 Wis. Stats., specifically prohibits the deduction of such taxes imposed by Wisconsin or any other state including the District of Columbia. However, this section does not prohibit a deduction of such taxes when imposed by political subdivisions thereof.

H. Payroll taxes

Payroll taxes include FICA (social security tax), FUTA (federal unemployment compensation tax), and any state unemployment tax.

I. Excise and other taxes

These taxes include taxes paid to the federal government or to any political subdivision thereof. Examples are motor fuel, tobacco, alcohol and beverage, and manufacturer's excise, privilege, license and business taxes. Import or tariff duties are also deductible if incurred in connection with the operation of a corporation's trade or business.

J. Fire department dues paid by insurance companies under s. 601.93, 1983 Wis. Stats.

NONDEDUCTIBLE TAXES (this list is not all-inclusive)

A. Income, excess profit, war profits and capital stock taxes imposed by the federal government

B. Windfall profits tax under Section 4986 of the Internal Revenue Code

C. Taxes imposed by Wisconsin or any other state or the District of Columbia on or measured by net income, gross income, gross receipts or capital stock pursuant to ss. 71.04(3) and 71.01(4)(a)6, 1983 Wis. Stats.

Included in these taxes are the net worth taxes paid to the States of Texas and Georgia and the single business tax paid to the State of Michigan. The Texas and Georgia taxes are referred to as a franchise tax and are imposed on or measured by the value of a corporation's capital stock and surplus. The Michigan single business tax is measured by net income, gross income, and gross receipts.

Premium taxes paid by insurance companies to Wisconsin or any other state including the District of Columbia are also not deductible. These include taxes based on gross premiums under ss. 76.60 and 76.63, 1983 Wis. Stats.; taxes based on gross income or gross premiums under s. 76.65, 1983 Wis. Stats.; and taxes paid to other states under similar laws.

D. Special improvement taxes

These taxes (e.g., water, sewer or sidewalk) represent an increase in basis of the property assessed.

E. Occupational tax on grain storage (s. 70.41, 1983 Wis. Stats.)

This tax is allowed as an offset against the net franchise/income tax liability of the corporation at the time the original corporate franchise/income tax return is filed for the year of payment.

F. Addition to the tax imposed under s. 71.22, 1983 Wis. Stats. (s. 71.23, 1983 Wis. Stats.)

This addition to the tax is an underpayment penalty for failing to file required declarations of estimated tax in a timely manner.

G. Sales and use taxes paid during the taxable year which under s. 71.043(2) and (3), 1983 Wis. Stats., are used in computing the manufacturing sales tax credit

These taxes are not deductible even if a benefit is not received from the credit.

OTHER

A. Assessments by Wisconsin Public Service Commission

The Wisconsin Public Service Commission (PSC) is supported by all the utilities operating within Wisconsin which they regulate. It bills each utility directly for the cost of an audit or investigation of the utility. At the end of the year the PSC assesses all utilities under s. 196.85(2), 1983 Wis. Stats., for the costs not directly related to any corporation. This assessment is called a remainder assessment and is based on the gross receipts of each utility. Although based on gross receipts, it is not a tax. Rather, this is an ordinary expense of doing business for a regulated utility corporation and is deductible under s. 71.04(2), 1983 Wis. Stats.

SALES/USE TAXES

1. Nexus for State and County Sales/Use Taxes

Statutes: sections 77.51(7g), 77.72 and 77.73, 1985 Wis. Stats.

Wis. Adm. Code: section Tax 11.97, August 1985 Register

A. NEXUS FOR STATE SALES/USE TAX

Facts and Question: A seller located in Minnesota uses a common carrier to transport taxable tangible personal property to a buyer located in Wisconsin. The seller contacted the common carrier in Minnesota and made all the arrangements to have the goods delivered into Wisconsin. The only activity of this seller in Wisconsin is that the seller used a common carrier to deliver the goods into Wisconsin. Does the use of the common carrier to deliver goods into Wisconsin create "nexus" for the seller and therefore require the seller to collect and report the Wisconsin sales/use tax on the transaction?

Answer: No, arranging with a common carrier and having that common carrier deliver taxable goods into Wisconsin does not create "nexus" for Wisconsin sales/use tax purposes. The seller also would not have nexus if the seller had used the postal service (rather than a common carrier) to make deliveries into Wisconsin. However, there would be nexus (jurisdiction to tax) if the seller used company-operated vehicles to deliver taxable tangible personal property to purchasers in Wisconsin.

B. NEXUS FOR COUNTY SALES/USE TAX

Facts and Question 1: A seller located in a Wisconsin county which has no county tax (County B) uses a common carrier to transport taxable tangible personal property to a buyer located in County A, a Wisconsin county which has adopted the county 1/2% sales/use tax. The seller contacted the common carrier and made all the arrangements to have the goods delivered into County A. The only activity of this seller in County A is the fact that the seller used a common carrier to deliver the goods into County A.

Does the use of the common carrier to deliver goods into County A create "nexus" for the seller in County A and therefore require the seller to collect and report the county tax on the transaction?

Answer: No, arranging with the common carrier and having that common carrier deliver taxable goods into County A does not create "nexus" for county sales tax purposes. The same answer would apply if the seller had used the postal service to make deliveries into County A. (Note: The seller would be liable for the 5% Wisconsin state sales tax on this sale because the seller has "nexus" in the state.)

However, nexus would be created (jurisdiction to tax) for county sales tax purposes in County A if the seller had used company-operated vehicles to deliver tangible personal property to purchasers in County A.

Facts and Question 2: A seller located in Minnesota uses a common carrier to transport taxable tangible personal property to a buyer located in County A, a Wisconsin county which has adopted the county 1/2% sales/use tax. The seller contacted the common carrier and made all the arrangements to have the goods delivered into County A. The only activity of this seller in County A is that the seller used the common carrier to deliver the goods into County A. However, this seller does have nexus in County B, which has no county tax, because it makes regular deliveries into County B with its own delivery trucks.

Does the use of the common carrier to deliver goods into County A create "nexus" for the seller in County A and therefore require the seller to collect and report the 1/2% county use tax on the transaction?

Answer: No, arranging with a common carrier and having that common carrier deliver taxable goods into County A does not create "nexus" in County A for county sales tax purposes. The same answer would apply if the seller had used the postal service to make deliveries into County A. (Note: The seller would be liable for the 5% Wisconsin state tax on this sale because the seller has nexus in the state, that is, in County B which has no county tax.)

However, nexus would be created (jurisdiction of tax) in County A for county sales tax purposes if the seller had used company-operated vehicles to deliver tangible personal property to purchasers in County A.

FARMLAND PRESERVATION CREDIT

1. Proration of Property Taxes Between Buyer and Seller

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

Facts and Question: Taxpayer X purchased farmland during the year. Although the sale was not closed until March 30, Taxpayer X had made an offer to purchase on January 1 that was accepted. In the closing agreement pertaining to the sale it was agreed that Taxpayer X would be liable for 100% of the property taxes for the year.

Can Taxpayer X claim 100% of the property taxes levied on the farmland for the year for purposes of farmland preservation credit, or must the property taxes be prorated in proportion to the number of months of actual ownership during the year?

Answer: Pursuant to s. 71.09(11)(a)7, 1983 Wis. Stats., Taxpayer X can claim 100% of the property taxes levied on the farmland because 100% of the property taxes were prorated to Taxpayer X in the closing agreement pertaining to the sale.