WISCONSIN TAX BULLETIN

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WITHHOLDING EXEMPTION CERTIFICATES

The federal employe withholding allowance certificate has been changed. Federal law requires all employes to complete and file a copy of the new certificate with their employer before October 1, 1987.

Questions have been raised as to whether the new federal certificate will also apply for Wisconsin withholding tax purposes and, if so, will it create problems for Wisconsin wage earners.

An employe may claim the same number of withholding allowances for Wisconsin withholding tax purposes as are allowable for federal (s. 71.20(9)(e), Wis. Stats.). Therefore, withholding allowances claimed on a new federal form will apply for Wisconsin unless a separate Wisconsin withholding exemption certificate (Form WT-4) is filed with the employer.

Generally, using the new federal withholding allowances for Wisconsin purposes will not cause underwithholding of Wisconsin tax. However, there is an exception. It involves taxpayers who base their federal withholding allowances on federal tax credits such as the child care credit. If a similar credit is not provided by Wisconsin law (and one is **not** in the case of the child care credit), the taxpayer should be cautioned that using federal withholding allowances for Wisconsin purposes could cause an insufficient amount of Wisconsin tax to be withheld.

IN THIS ISSUE

TEN NEW COUNTIES ADOPT COUNTY SALES TAX

On April 1, 1987, the 1/2% county sales and use tax begins in ten new counties: Buffalo, Iowa, Jackson, Lincoln, Marathon, Oneida, Rusk, Sawyer, St. Croix and Walworth. Barron and Dunn Counties had previously adopted the county tax beginning April 1, 1986. The Tax Report included with the January 1986 Wisconsin Tax Bulletin explains how this new county tax applies to retailers and other persons.

On page 12 of this Bulletin is a copy of the March 1987 Tax Report which was sent in late March to all retailers who have a seller's permit.

WISCONSIN TAX BULLETIN INDEX INCLUDES PAGE NUMBERS

Once each year the Wisconsin Tax Bulletin includes an index of articles, tax releases and other attachments that have appeared in past Bulletins.

For the convenience of its users, the April WTB includes page numbers for each issue number listed. The index may be found on pages 14 to 34 of this Bulletin.

CHANGE TO 1986 SCHEDULE I INSTRUCTIONS

Please refer to 1986 Schedule I instructions. Item 14 on page 2 of the instructions should be deleted. Further review of SEP contributions has indicated that the maximum SEP contribution for Wisconsin tax purposes is $30,000, the same as federal.

The 1986 Tax Reform Act did make a change in this area. However, it was a *clarification* that the $15,000 noted in IRC Section 219(b)(2)(c) should actually be $30,000. The IRS had allowed a maximum SEP contribution of $30,000 in previous years.

REFUND QUESTIONS

Do you have a question about your income tax or homestead credit refund check? First, wait at least 10 weeks after filing your tax return or homestead claim. Then, call or write to: Wisconsin Department of Revenue, P.O. Box 8903, Madison, Wisconsin 53708, (608) 266-8100.

In your inquiry be sure to include your name and social security number, the name and social security number of your spouse if you are married, your address, the approximate date you filed your return, and your phone number where you can be reached during the day.

EXTENSIONS TO FILE FOR INDIVIDUALS

Forms 1 and 1A

Any extension of time granted by the Internal Revenue Service for filing federal returns also extends the time for filing the corresponding Wisconsin individual income tax returns. A copy of the federal extension (Form 4868 for a 4-month extension, or Form 2688 for an additional extension) must be filed with the Wisconsin return. If the Internal Revenue Service for any reason refuses to grant an extension or terminates one previously granted, the Wisconsin income tax return is due on the same date as the federal return.

If you are not applying for a federal extension, but need extra time for a Wisconsin return, a 30-day extension of time to file may be requested on Wisconsin Form I-101, "Application for Extension of Time to File Wisconsin Individual Income Tax Return." The application for extension must be submitted on or before April 15, 1987.

If an individual who has been granted an extension files a Wisconsin return and has a tax due, the amount due is subject to 12% interest per year for the extension period (s. 71.10(5)(b), Stats.). To avoid interest charges, individuals may pay the tax due on or before the original due date of the return. A Wisconsin "Declaration Voucher," 1986 Form 1-ES, should be submitted with any payment. This will ensure that the payment is properly credited to the individual's account. Individuals using a federal extension can obtain a 1986 Form 1-ES from any Department of Revenue office. Individuals applying for a Wisconsin extension may use the 1986 Form 1-ES that is attached to the bottom of the application for the Wisconsin extension.

U.S. citizens who are not in the United States or Puerto Rico on April 15, 1987 are allowed an automatic extension until June 15 to file their returns. These persons do not have to request an extension, but should attach a statement to their returns indicating that they were out of the United States and Puerto Rico on April 15.

Applications for extensions and related correspondence should be sent to:

Wisconsin Department of Revenue
Post Office Box 8903
Madison, Wisconsin 53708

Schedules H (Homestead Credit) and FC (Farmland Preservation Credit)

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

1986 Homestead claims must be filed no later than December 31, 1987. Farmland Preservation Credit claims for 1986 must be filed no later than 12 months after the farmland owner's 1986 taxable year ends (e.g., December 31, 1987 for calendar year taxpayers).

INDIVIDUALS' 1987 ESTIMATED TAX REQUIREMENTS

Estimated income tax payments are tax deposits made during the year to prepay the tax that will be due when the individual's income tax return is filed. If the individual does not make the estimated tax payments when required, a penalty may be assessed.

Every individual, or married couple filing jointly, is required to file a 1987 declaration of Wisconsin estimated tax (Form 1-ES) if the individual or couple expects to have a balance due of $100 or more with their 1987 income tax return.

The due date for individuals and couples required to file a 1987 declaration during the first quarter of 1987 is April 15, 1987. Installment payments are also due on June 15, 1987, September 15, 1987 and January 15, 1988 for calendar year taxpayers.

Nonresidents as well as residents are required to file declarations of estimated tax. A trust or estate is required to file a declaration for 1987 (except that a declaration of estimated tax does not have to be filed for the first taxable year of an estate).

GIFT TAX REPORTS DUE APRIL 15

1986 Wisconsin gift tax reports must be filed if the total value of taxable gifts given by one donor (person giving the gift) to one donee (person receiving the gift) exceeds $10,000. Gift tax reports of the donee and donor for 1986 must be filed by April 15, 1987.

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

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

The gift tax due is figured on Form 6. In determining the 1986 gift tax due, an annual exemption of $10,000 is allowed for all gifts made during a calendar year by one donor to one donee. Gifts to a spouse are completely exempt from Wisconsin gift tax. A lifetime personal exemption of $50,000 is allowed for gifts to lineal issue (children, grandchildren), lineal ancestors (parents, grandparents), the wife or widow of a son, the husband or widower of a daughter, an adopted or mutually acknowledged child, and a mutually acknowledged parent. There is no lifetime exemption allowed to other donees.

DO YOU HAVE SUGGESTIONS FOR 1987 TAX FORMS?

Do you have suggestions for improving the Wisconsin tax forms and instructions? Send your suggestions to the Wisconsin Department of Revenue, Director of Technical Services, P.O. Box 8933, Madison, WI 53708. Please be specific and send your suggestions in early. The Department appreciates hearing from you.

PLEASE GIVE US YOUR COMMENTS

As a means of improving the Wisconsin Tax Bulletin, we need your help. Please take the time to answer the questions on page 35 of this Bulletin and send your reply to us.

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 state in the process as of March 15, 1987. Part C lists new rules and amendments which are approved but not yet effective. ("A" means amendment, "NR" means new rule, "R" means repealed and "R&R" means repealed and recreated.)

A. Rules at Legislative Council Rules Clearinghouse

2.16 Change in method of accounting for corporations-A
2.19 Installment method of accounting for corporations-A
2.20 Accounting for acceptance corporations, dealers in commercial paper, mortgage discount companies and small loan companies-A
2.21 Accounting for incorporated contractors-A
2.22 Accounting for incorporated dealers in securities-R&R
2.24 Accounting for incorporated retail merchants-A
2.25 Corporation accounting generally-A
2.26 "Last in, first out" method of inventorying for corporations-A
2.45 Apportionment in special cases-A
2.50 Apportionment of net business income of interstate public utilities-A
2.505 Apportionment of net business income of interstate professional sports clubs-A
2.53 Stock dividends and stock rights received by corporations-A
2.56 Insurance proceeds received by corporations-A
2.65 Interest received by corporations-A
2.72 Exchanges of property by corporations generally-A
2.721 Exchanges of property held for productive use or investment by corporations-A
2.83 Requirements for written elections as to recognition of gain in certain corporation liquidations-A
2.88 Interest rates-A
2.99 Minimum tax–individuals, estates and trusts-NR
3.03 Dividends received, deductibility of-A
3.08 Retirement and profit-sharing payments by corporations-A
3.10 Salesmen's and officers' commissions, travel and entertainment expense of corporations-R
3.12 Losses on account of wash sales by corporations-A
3.37 Depletion of mineral deposits by corporations-A
3.38 Depletion allowance to incorporated mines and mills producing or finishing ores of lead, zinc, copper or other metals except iron-A
3.44 Organization and financing expenses—corporations-R&R
3.45 Bond premium, discount and expense—corporations-A
3.47 Legal expenses and fines—corporations-R
3.54 Miscellaneous expenses not deductible–corporations-A
3.81 Offset of occupational taxes paid against normal franchise or income taxes-A
3.91 Petition for redetermination-A
3.92 Informal conference-A
3.93 Closing stipulations-A
3.94 Claims for refund-A

B. Rules at Legislative Standing Committees

2.395 Sales factor option-NR

C. Rules Approved by Legislative Standing Committee But Not Yet Effective

1.06 Application of federal income tax regulations for persons other than corporations-A
1.10 Depository bank requirements for withholding, motor fuel, general aviation fuel and special fuel tax deposit reports-A
1.13 Power of attorney-A
2.01 Residence-A
2.03 Corporation returns-A
2.05 Information returns, forms 8 for corporations-A
2.08 Returns of persons other than corporations-A
3.07 Bonuses and retroactive wage adjustments paid by corporations-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

Chris Culver
Business expenses—wages

Zeev Edelman
Travel expenses

St. Charles Lockett
Business expenses
Rental expenses
Sale of assets

Urban P. Van Sustern
Assessments—failure to file

John S. Wright
Individual retirement account—rollover

Corporation Franchise/Income Tax

American Telephone & Telegraph Co.
Dividends and interest—taxable

William Wrigley Jr. Company
Nexus

Sales/Use Tax

Frisch, Dudek and Slattery, Ltd.
Photocopies—lawyers

INDIVIDUAL INCOME TAXES

Business expenses—wages. *Chris Culver vs. Wisconsin Tax Appeals Commission, Department of Revenue* (Court of Appeals, District III, October 21, 1986). Chris Culver appealed a judgment affirming a Wisconsin Tax Appeals Commission decision. See WTB 41 and 46 for summaries of the Wisconsin Tax Appeals Commission and Circuit Court decisions.

Culver, a dairy farmer, claimed a $21,000 business expense deduction in 1979 for wages paid to his wife, Linda. The Commission ruled, however, that Culver failed to prove that he and Linda actually maintained an employer-employe relationship. Culver argued that he met his burden because he paid Linda a reasonable amount, pursuant to an employment contract, and kept accurate records of the work she performed.

The Court of Appeals affirmed the judgement affirming the Wisconsin Tax Appeals Commission's decision.

The taxpayer has not appealed this decision.

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Travel expenses. *Zeev Edelman vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, October 24, 1986). The issue before the Commission is whether the taxpayer is an indefinite employe under the test stated in Revenue Ruling 83-82, 1983-1 C.B. 1983, with his tax home in Wisconsin and therefore is not permitted travel deductions under IRC Section 162(a)(2) unless he is away from home.

From 1975 through 1982, the taxpayer was employed as a nuclear engineer with the Israeli Institute of Technology, Israel, at a salary of $4,000 to $5,000 annually. Under the date of October 29, 1981, Mary M. Henszey, personnel director, Sentry Equipment Corporation (Sentry) made a written offer of employment to the taxpayer. Pursuant to Sentry's October 29, 1981, written offer of employment, the duration of the taxpayer's employment was to be for a period of 15 to 18 months, as a mechanical project engineer at a salary of $25,000 annually. Sentry petitioned the Immigration and Naturalization Service (INS) to classify the taxpayer as a temporary worker for a 15 to 18 month period, thus, allowing the taxpayer to be employed at Sentry's Oconomowoc, Wisconsin office. Under the date of October 28, 1981, the INS granted Sentry's petition requesting that the taxpayer be classified as a temporary worker for a 15 to 18 month period. Sentry petitioned the INS for, and was granted, the following extensions of the taxpayer's and his family's visas: January 7, 1983, January 1984, January 7, 1985, May 4, 1985.

The taxpayer has continuously resided in the United States from 1982 until the present.

In the years 1982, 1983 and 1984, the taxpayer filed a 1040 nonresident tax form in the State of Wisconsin. Since moving to the United States in 1982, the taxpayer has purchased a car and furniture. During the period under review, the taxpayer owned an apartment and maintained bank accounts and stock accounts in Israel. During the period under review, the taxpayer's children attended the Glendale Public Schools in Glendale, Wisconsin.

In 1982, 1983 and 1984, the taxpayer claimed employe business deductions for travel, meals, and lodging pursuant to IRC Section 162(a)(2).

The taxpayer has petitioned the INS requesting that he and his family be granted permanent resident status. The taxpayer was offered, and accepted, permanent employment with Sentry in April or March of 1985.

The Commission concluded the taxpayer is an indefinite employe and his tax home is Wisconsin. Travel deductions under IRC Section 162(a)(2) are not permitted unless the taxpayer is away from the tax home.

The taxpayer has not appealed this decision.

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Business expenses, rental expenses, sale of assets. *St. Charles Lockett vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, October 14, 1986). The issues before the Commission are:

A. Whether the taxpayer is entitled to reduce her gain by $4,500 on the sale of 3904 N. 77th/7610 W. Melvina Street in the 1979 tax year.

B. Whether the taxpayer had a $7,000 gain or a $6,450 gain upon the repossession of the 1719 W. Capitol Drive property in the 1977 tax year.

C. Claimed rental expenses related to 1719 W. Capitol Drive for the 1978 tax year.

D. Claimed Schedule C expenses for 1978, 1979 and 1980 tax years. The question to be determined by the Commission is whether New York was the taxpayer's tax home in those years.

E. Capital loss carryover in the 1978 tax year.

The taxpayer provided no substantiation of the claim that $4,500 was spent by her in capital improvements on the 3904 N. 77th/7610 W. Melvina Street property.

The department assessed a gain on repossession of $7,000 based upon the statements of the taxpayer's representative that she only received $7,000 and not the $10,000 downpayment required by the land contract. The taxpayer presented an uncorroborated, unsigned letter saying the amount received was $6,450 based on money collected.

The taxpayer claimed rental expenses of $8,796.43 in repairs, $190.30 for insurance, $1,300.97 interest, $835.82 for

taxes and $2,984.95 in depreciation. No income was reported so the taxpayer claimed a total loss of $13,908 on the 1719 W. Capitol Drive property. The department disallowed the claimed loss citing the expenditures to be either personal expenses or capital costs.

During the period of 1978-1982, the taxpayer was a resident of Wisconsin and was employed by Nicholas Laboratories headquartered in New Berlin, Wisconsin. However, most of her work was directed at the East Coast market area. Her base of employment was New York.

The Commission concluded:

A. The taxpayer failed to meet her burden of proof as to whether she would be entitled to reduce her gain on the sale of 3904 N. 77th/7610 W. Melvina Street in the 1979 tax year.

B. The taxpayer failed to meet her burden of proof as to the gain on the 1719 W. Capitol Drive property.

C. The taxpayer failed to meet her burden of proof as to the disallowed rental expenses on the 1719 W. Capitol Drive property for the 1978 tax year.

D. In 1978, 1979 and 1980, New York was the tax home of the taxpayer.

E. The loss incurred in 1975 was disallowed by the department in a separate assessment not before the Commission at this time, that assessment was not appealed to the Commission and is, therefore, final and determinative as to that issue of the loss carry forward. The department's motion to dismiss this part of the appeal is granted based on lack of jurisdiction.

The taxpayer has not appealed this decision.

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Assessments—failure to file. *Urban P. Van Sustern vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, November 20, 1986). The disputed issue for the Commission to determine is whether the taxpayer failed to make Wisconsin income tax reports for the calendar years 1979, 1980, 1981 and 1982 with intent, in any case, to defeat or evade the income tax assessment required by law as set forth in s. 71.11(6)(b), Wis. Stats.

During the period here under review (1979-1982), Urban P. Van Sustern was a resident of the State of Wisconsin and a long-term Circuit Judge for Outagamie County, Wisconsin.

The taxpayer filed his 1979 Wisconsin income tax return with the department, late, on November 18, 1981, after repeated requests to do so. The taxpayer filed his 1980 Wisconsin income tax return with the department, late, on October 1, 1982, once again after repeated requests to do so. The taxpayer filed his 1981 Wisconsin income tax return with the department, late, on April 6, 1983, again after repeated requests and also after a criminal complaint for his failure to file was issued against him by the department. The taxpayer filed his 1982 Wisconsin income tax return with the department, late, on February 7, 1984. The taxpayer was aware of his income tax filing requirements during the period here under review.

The taxpayer's excuse for his non-timely filing was his busy schedule as a circuit judge, his many outside activities and his reliance on his accountant.

The Commission concluded the department has met its burden of proof to show by clear and convincing evidence that the taxpayer's failure to file his Wisconsin individual income tax returns for the years 1979, 1980, 1981 and 1982 within the time allowed by law was with the intent "to defeat or evade the income tax assessment required by law" as that term is used in s. 71.11(6)(b), Wis. Stats. The taxpayer's taxable income for each of the years under review was subject to the assessment of an added 50% of the tax on the entire underpayment as provided in s. 71.11(6)(b), Wis. Stats.

The taxpayer has appealed this decision to the Circuit Court.

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Individual retirement account—rollover. *John S. Wright vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, October 24, 1986). The only issue raised by the taxpayer is the department's inclusion in the taxpayer's 1980 taxable income of $18,700 from an IRA which was transferred by the taxpayer from one account to another in that year.

In 1980, the taxpayer transferred $18,700 from an Individual Retirement Account with INA Life Insurance Company of North America to an account with Nationwide Insurance Co. The account at Nationwide Insurance Co. did not qualify as an IRA. On the face of the check dated September 10, 1980, from INA, it is stated that the check is F/B/O John S. Wright's IRA Account #70-0700-075844. Although the taxpayer believed this account was a qualified IRA, it was not a qualified IRA. The taxpayer did not rollover his INA account within the 60-day rollover period as provided for by IRC 401.

The Commission concluded the department's inclusion of $18,700 in the taxpayer's 1980 taxable income was correct.

The taxpayer has not appealed this decision.

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CORPORATION FRANCHISE/INCOME TAXES

Dividends and interest—taxable. *American Telephone & Telegraph Co. vs. Wisconsin Department of Revenue* (Circuit Court of Dane County, September 10, 1986). The issues include a challenge to the Wisconsin Tax Appeals Commission's Decision and Order as violating Wisconsin statutes by taxing dividend and interest income from business not transacted in and property not located in Wisconsin and the contention is raised that the taxing apportionment formula violates constitutional requirements. (See WTB 46 for a summary of the Commission's decision.)

The issues in this case require the court to look first at whether AT&T is a unitary business. AT&T does not dispute that the Bell System, consisting of AT&T and its subsidiaries, may be regarded as a unitary business. However, the taxpayer's entire argument is based on its presumption that the Long Lines and General Department are separate businesses. The taxpayer is willing to concede that AT&T is a unitary business provided that Long Lines and General

Department are treated as discrete businesses.

American Telephone and Telegraph Company (AT&T) is a New York corporation having its principal place of business in New York City. During the years in question, AT&T was the parent corporation of 21 operating telecommunications companies. AT&T is divided into the Long Lines Department ("Long Lines") and the General Department. Long Lines is responsible for the construction, operation and maintenance of a nation-wide network of telecommunications facilities. The General Department is responsible for the investment and holding of stock in its subsidiaries, the provision of capital to them and the rendering of technical assistance, advice and research to them in all aspects of the telecommunications business. Long Lines maintained its own set of books, records and accounts in which it separately recorded property, revenues and expenses attributable to the interstate business in accord with Federal Communications Commission (FCC) rules. AT&T's single largest income source was its dividend income, derived from its equity investment in its subsidiaries. The custody and control of the stock held in these subsidiaries was maintained by the General Department. The General Department also received another major type of income from fees for the provision of technical advice and assistance pursuant to license contract agreements, which included the services of professionals such as engineers, technicians and specialists in the fields of telecommunications. Royalty income was also received from persons licensed to use AT&T's patents.

The taxpayer argues that the so-called multiform method accurately reflects AT&T's income taxable by Wisconsin and argues that because the department accepted this method for over 50 years, it should continue to do so. This argument fails to account for the change in the Wisconsin statutes which resulted in the increased imposition of tax—the inclusion of intangible types of income including those derived from mortgages, stocks, bonds and securities as apportionable income.

The taxpayer next argues that the Commission erred in concluding that the department acted properly in applying its Rule 2.50 to apportion AT&T's dividend and interest income. The essence of this argument is that the Long Lines and General Departments are discrete business entities.

The taxpayer repeatedly states that Rule 2.50 results in a distorted result because the tax imposed results in a 400% increase. The taxpayer also argues that Rule 2.50 results in a tax on property which is not located in and business not transacted in Wisconsin.

The taxpayer argues that a combined report should be accepted as a reasonable measure of AT&T's tax liability for the years 1975 and 1976. The taxpayer next argues that the department's assessment violates the Constitution. The Due Process Clause and the Commerce Clause require that there be a reasonable relationship between income taxed and the taxpayer's activities in the taxing state.

The taxpayer also argues that the Wisconsin apportionment scheme violates the Commerce Clause and denies equal protection by imposing greater burdens on economic activities taking place outside the state than were placed on similar activities within the state.

The taxpayer also argues that s. 71.07 (1m), Wis. Stats., discriminates in favor of a personal holding company so as to create an unreasonable classification.

The Circuit Court affirmed the Commission's decision and order.

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

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Nexus. *William Wrigley Jr. Company vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, November 18, 1986). The issues for the Commission to determine in the order of their relative importance are:

A. Whether the business activities of Wrigley in Wisconsin during the years 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" protected by P.L. 86-272; and

B. Whether the tax assessed, if found to be due, is subject to delinquent or simple interest, and whether the $10 late filing penalty was properly imposed.

The William Wrigley Jr. Company (Wrigley) is an Illinois corporation, headquartered in Illinois, which manufactures and sells various chewing gum products throughout the United States.

Wrigley did not file Wisconsin corporate franchise/income tax returns or pay any taxes to Wisconsin for the years 1973-1978. It did file in its home state of Illinois and in those states where it had offices and/or manufacturing facilities. Because Wrigley had not filed or paid taxes in Wisconsin the department, on October 6, 1980, issued a franchise tax assessment against it in the total amount of $246,641.04 covering the years 1973-1978. Said assessment included a late filing penalty, a negligence penalty and delinquent interest.

Wrigley petitioned the DOR for redetermination on the grounds that (a) Wrigley did not engage in business within Wisconsin in a manner sufficient to subject it to the taxing jurisdiction of the State of Wisconsin under Wis. Adm. Code s. Tax 2.82, and that Wrigley was protected from Wisconsin income tax liability by federal law, P.L. 86-272, 15 U.S.C. Sec. 381 ("P.L. 86-272") and the United States Constitution; and (b) the assessment of delinquent interest and negligence penalties violated both Wisconsin's tax code and the DOR's regulations.

The department in its brief filed with the Commission "concedes that Wrigley's non-filing of returns and declarations of estimated tax was due to reasonable cause and not due to willful neglect, since it did not file upon the advice of counsel that Wrigley was exempt from taxation by Wisconsin under federal law ... and that the evidence shows that the figures used by the department in the computation of the property factor in the apportionment formula should be modified in the assessment notice ... to show that each employe maintained on average a supply of chewing gum valued at $1,000 and promotional literature valued at $200".

Wrigley sells its gum products nationwide through a sales staff comprised of field representatives, key account managers, regional sales managers and district managers. During the 1973 to 1978 peri-

od Wrigley had 7 or 8 geographical sales districts in the United States. At that time its Chicago based Midwestern District was comprised of Illinois, Wisconsin, Minnesota, North Dakota, South Dakota, and parts of Iowa, and the Upper Peninsula of Michigan. The Wisconsin sales region of the Midwestern District was managed by a regional manager who lived in Wisconsin along with 4-5 sales representatives who lived in Wisconsin and were each responsible for a geographic territory within the State.

During 1973-1976, two of these sales representatives worked exclusively in territories within the boundaries of Wisconsin, one spent a portion of his working time in various Upper Michigan counties, and another spent approximately one-third of his working time in the State of Iowa. In addition one representative, who resided in Minnesota, worked in some of the western counties of Wisconsin which were included in Wrigley's Minnesota region. In 1977 the boundaries of the Wisconsin region were redrawn. Certain southern Wisconsin counties became part of the Peoria, Illinois region and were handled by a sales representative who lived in Illinois, and certain western Wisconsin counties became part of the Iowa region and were handled by a sales representative living in Iowa.

During the period in dispute, each sales representative received from Wrigley a leased vehicle, usually a station wagon, and a supply of gum, display racks and promotional literature. The gum was carried on Wrigley's books as inventory, the display racks were not, as they were given away to the accounts serviced. The gum, display racks and promotional literature were kept in the representative's home except for one representative who received special permission to rent storage space at Reynolds Transfer and Storage, in Madison. Each sales representative was reimbursed by his employer for business expenses connected with the automobile and for overnight lodging, meals and long distance telephone calls.

Each sales representative spent the large majority of his time calling on customers or potential customers in an effort to sell Wrigley's products. During a typical call to an indirect retail account, the sales representative would survey the display of Wrigley gum products and its package and flavor distribution, check the products for freshness, replacing stale gum if necessary, and make a sales presentation regarding a particular Wrigley promotion or the need to modify distribution or display of Wrigley products.

The majority of sales were made in the following manner: Direct accounts would submit their orders to Wrigley's office in Illinois for approval or rejection and then Wrigley would ship the gum to the direct account by common carrier. Occasionally, on the average of once a month, sales representatives would erect a display stand in an indirect account's (retailer's) store and stock it from his supply of sample gum. He would then report the transaction to Wrigley's Chicago office by "agency stock check" who would then bill the retailer's wholesaler, who would in turn bill the retailer. The average retail value of the gum transferred in such a transaction ranged from between $8 to $16.

Although the sales representative played no direct role in the credit worthiness of his customers, he did routinely receive copies of any credit type letters sent by his employer.

The first regional manager employed by Wrigley during the years 1973-1978 resided in Wisconsin, maintained a business office in the basement of his home and held yearly training sessions there. He kept his files in a company-issued file cabinet as well as a supply of gum, display racks and promotional literature. He did not receive reimbursement from Wrigley for the use of a portion of his home for an office but did claim an income tax deduction for it. He also held a training session at a local hotel.

Wrigley's credit department in Chicago possessed the sole discretion as to whether credit was to be granted to a customer and virtually all credit transactions were handled there. All payments for Wrigley products were mailed directly to Chicago and it was Wrigley's credit department which followed up on delinquent accounts.

During the years 1973-1978, Wrigley purchased extensive advertising on television and radio programs in Wisconsin and in newspapers printed and sold in Wisconsin. Newspaper advertising included the printing of a coupon, which the reader could clip out to receive a special premium or to purchase gum from a retailer at a reduced price. In 1973, 1974, and 1975, Wrigley purchased spot television and radio advertising in Green Bay, LaCrosse, Madison, and Milwaukee. In 1976, it purchased spot television advertising in the same cities and also in Wausau. In 1977 and 1978, it purchased spot television advertising only in Milwaukee.

The Commission concluded the ongoing business activities of the William Wrigley Jr. Company in the State of Wisconsin during the years 1973 through 1978 exceeded the "solicitation of orders" protected by 15 U.S.C. Sec.381 (P.L. 86-272).

The taxpayer had "nexus" with the State of Wisconsin and its income for the years 1973 through 1978 was subject to apportionment and taxation by the State of Wisconsin, within the intent and meaning of s. 71.01(2), Wis. Stats.

The $10 late filing penalty contained in s. 71.11(40), Wis. Stats., is mandatory and not subject to review by this Commission.

Due to the provisions of s. 71.13(2), Wis. Stats., the taxes due hereunder are subject to the interest rates contained in s. 71.09(5)(a), Wis. Stats., not the delinquent interest rates imposed by s. 71.13 (2), Wis. Stats.

The taxpayer and the department have appealed this decision to the Circuit Court.

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SALES/USE TAXES

Photocopies—lawyers. *Frisch, Dudek and Slattery, Ltd. vs. Wisconsin Department of Revenue* (Court of Appeals, District IV, September 18, 1986). The Department of Revenue appealed from an order reversing a decision of the Wisconsin Tax Appeals Commission. The issue is whether the law firm is required to pay sales taxes on photocopy charges it bills to clients. (See WTB 46 for a summary of the Circuit Court's decision.)

The dispute is whether the law firm is a "retailer" and whether it makes "sales" of photocopies to its clients. Frisch bills clients only for photocopies made for the clients' benefit. Because photocopying

expenses can vary significantly from case to case and client to client, Frisch elected to include these charges in its itemization of out-of-pocket costs and disbursements, billing them separately from the legal fees, in order to fairly distribute the costs among all clients. Copies billed to clients represent roughly one-half of all copies made by the firm. The billed copies are those made for opposing counsel, courts, government agencies, and for the firm's own internal use. The clients themselves receive only a small portion of the billed copies. All decisions on photocopy billing are made by the attorney handling the case.

Only a very few copies ever find their way to the client, and when they do, it is only as an incident to their use in the firm's representation of the client. In addition, the copies are not "produced ... to the special order of the [client]"; the decision to copy is the firm's alone.

The Court of Appeals concluded the firm was not a "retailer" of photocopies and thus no sales tax may be imposed on its client photocopying charges under s. 77.52(1), Wis. Stats., and in doing so affirmed the order of the Circuit Court.

The department has not appealed this decision.

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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.)

The following Tax Releases are included:

Individual Income Taxes

1. Interest Received from Community Development Authority Bonds
2. Manufacturer's Sales Tax Credit Allowable to Shareholders of Tax-Option (S) Corporations
3. Wisconsin Tax Treatment of Section 1256 Contracts

Sales/Use Taxes

1. Voice Messaging Business (Gross Receipts and Purchases)

INDIVIDUAL INCOME TAXES

1. Interest Received From Community Development Authority Bonds

Statutes: Section 71.05(1)(a)1, 1985 Wis. Stats.

Background: Wisconsin Administrative Code section Tax 3.095 (4) provides that interest received from public housing authority bonds of Wisconsin municipalities is exempt from Wisconsin income tax. However, public housing authorities no longer exist upon the adoption of an ordinance creating a community development authority, as a result of Chapter 273, Laws of 1967 (s. 66.4325(1), 1985 Stats.). In creating the community development authorities, the legislature made no provision in Chapter 66, Wis. Stats., that interest received from bonds issued by community development authorities would be tax exempt.

Facts and Question: 42 U.S.C. Section 1437i(b) exempts from federal income tax interest issued by public housing authorities, defined as any state, county, municipality or other governmental entity or public body which is authorized to engage in or assist in the development or operation of low income housing.

In addition, Federal Revenue Ruling 82-56 states interest paid on bonds issued by municipal housing authorities that are exempt from federal income taxation under 42 U.S.C. Section 1437i(b) is excluded from the gross income of the bondholders without regard to the provisions of Section 103 of the Internal Revenue Code, relating to interest from government obligations.

Is interest received from a bond issued by a community development authority taxable for Wisconsin income tax purposes under s. 71.05(1)(a)1, 1985 Wis. Stats.?

Answer: Section 71.05(1)(a)1, 1985 Wis. Stats., provides an add back modification of any state or municipal interest excluded from federal income by reason of Section 103 of the Internal Revenue Code. However, Revenue Ruling 82-56 provides that community development bond interest received is excluded from federal income *without* regard to IRC Section 103. Therefore, the interest received from bonds issued by a community development authority, which is excluded from federal income under 42 U.S.C. Section 1437i(b), is not taxable for Wisconsin because there is no add back modification provided for in s. 71.05(1)(a), 1985 Wis. Stats.

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2. Manufacturer's Sales Tax Credit Allowable to Shareholders of Tax-Option (S) Corporations

Statutes: Section 71.043, 1985 Wis. Stats.

Facts: Section 71.043(2), 1985 Wis. Stats., states: "The tax imposed upon or measured by corporation net income ... pursuant to s. 71.01(1) or (2) may be reduced by an amount equal to the sales and use tax under ch. 77 paid by the corporation in such taxable year on fuel and electricity consumed in manufacturing tangible personal property in this state." In addition, s. 71.043(3) provides in part that "such credit, to the extent not offset by the tax liability of the same year may be offset against the tax liability of the subsequent year." A credit, to the extent not used, may be carried forward 15 years.

In *Wisconsin Department of Revenue v. Edwin F. Gordon*, 127 Wis. 2d 71 (1985), the Court of Appeals held that "the portion of Gordon's personal income tax that is measured by the net income of the tax-option corporation can be reduced by an amount equal to the corporation's tax credit under ch. 77, Stats."

Question 1: What is included in a shareholder's share of the net income of a tax-option (S) corporation?

For example, a shareholder receives the following income from a tax-option (S) corporation:

Salary	$30,000
Interest on loan to the corporation	1,000
Taxable dividend of pre-1979 earnings	3,000
Rent from assets leased to the corporation (after deducting rental expenses, the shareholder incurs a $2,500 loss)	5,000
Distributive share of tax-option corporation net income (based on line 25 of 1986 Wisconsin Form 4)	15,000

Answer 1: The shareholder's share of the net income from the tax-option (S) corporation which may be used to compute his or her allowable manufacturer's sales tax credit is $15,000, the distributive share of tax-option corporation net income from line 25, 1986 Wisconsin Form 4.

Question 2: May a credit for 1980 which could have been used in that year but was not claimed because the year was closed to adjustment at the time the *Gordon* decision was issued, be carried forward to 1981 and subsequent years?

For example, a shareholder's share of a tax-option (S) corporation's 1980 manufacturer's sales tax credit was $2,500. The shareholder followed Department of Revenue instructions and did not claim any portion of this credit on his or her 1980 Wisconsin Form 1. The shareholder's 1980 personal income tax measured by tax-option corporation net income was $750.

Answer 2: Yes, the shareholder may carry forward to 1981 and subsequent years the entire $2,500 credit because no part of the credit was actually used in 1980.

Question 3: May a tax-option (S) corporation pass through to its shareholders unused manufacturer's sales tax credits from years in which the corporation had been a regular C corporation?

For example, a corporation was a C corporation for the 1983 through 1985 taxable years. In each of these years, the corporation incurred a loss. At the beginning of its 1986 taxable year, the corporation had $2,000 of unused manufacturer's sales tax credits from its 1983 through 1985 taxable years. The corporation elects subchapter S status effective for its 1986 taxable year. For 1986, the corporation has net income of $50,000 and a manufacturer's sales tax credit of $750.

Answer 3: Yes, a tax-option (S) corporation may pass through to its shareholders unused manufacturer's sales tax credits from C corporation years. In the example, the corporation may pass through the $2,000 of unused manufacturer's sales tax credits from its 1983 through 1985 taxable years, in addition to the $750 credit from its 1986 taxable year.

Question 4: May a tax-option (S) corporation elect not to pass through the manufacturer's sales tax credit to the shareholders, and instead, use the credit itself in a year when the corporation returns to C corporation status?

Answer 4: Yes, a tax-option (S) corporation may elect whether or not to pass the manufacturer's sales tax credit through to its shareholders. However, only so much of the manufacturer's sales tax credit is passed through to the shareholders as is needed to offset the tax on the tax-option (S) corporation income. The rest of the credit is retained by the corporation and may be carried forward for use by the shareholders or by the corporation if it returns to C corporation status.

Example 1: A tax-option (S) corporation incurred losses for 1980 through 1985 which were passed through to the shareholders. Although the corporation had a manufacturer's sales tax credit available for each of these years, the shareholders didn't receive a benefit from these credits. If the corporation revokes its subchapter S election effective for the 1986 taxable year, the corporation may carry forward the credits from 1980 through 1985 and claim them on its 1986 corporation franchise/income tax return.

Example 2: A tax-option (S) corporation had income for 1985 which it passed through to the shareholders. The manufacturer's sales tax credit available for 1985 exceeded the shareholders' individual Wisconsin income tax liabilities on the tax-option (S) corporation income. If the corporation revokes its subchapter S election effective for the 1986 taxable year, the corporation may carry forward the unused portion of the 1985 credit and claim it on the corporation's 1986 franchise/income tax return.

Example 3: The stock of a Wisconsin tax-option (S) corporation is held by nonresident shareholders, none of whom file Wisconsin income tax returns because their income is below the filing requirement. If the corporation revokes its subchapter S election, the corporation may claim the unused manufacturer's sales tax credits.

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3. Wisconsin Tax Treatment of Section 1256 Contracts

Statutes: Section 71.02(2)(d)8, 9 and 11, 1985 Wis. Stats.

Background - Federal Law: The Economic Recovery Tax Act of 1981 (P.L. 97-34) added Internal Revenue Code Section 1256, which provided that all regulated futures contracts must be marked-to-market at year end. The Technical Corrections Act of 1982 (P.L. 97-448) provided that the term "regulated futures contract" includes foreign currency contracts.

The Tax Reform Act of 1984 (P.L. 98-369) extended the mark-to-market rule to nonequity options and dealer equity options. In addition, the Tax Reform Act of 1984 designated regulated futures contracts, foreign currency contracts, nonequity options

and dealer equity options, which are defined in Internal Revenue Code Section 1256(g), as "Section 1256 contracts."

Under the mark-to-market rule, each Section 1256 contract is treated as if it were sold for fair market value on the last business day of the taxable year. Any gain or loss on the contract is included in income for the taxable year, together with the gain or loss on other contracts which were held during the year but closed out before the last business day. In the year these contracts are settled, the taxpayer must adjust the gain or loss actually realized on these contracts to reflect any gain or loss taken into account with respect to the contracts in a prior year.

Any capital gain or loss on a Section 1256 contract which is marked-to-market is treated as if 40% of the gain or loss is short-term capital gain or loss and 60% is long-term capital gain or loss.

In addition, the Economic Recovery Tax Act of 1981 added Internal Revenue Code Section 1212(c), which provided that net commodity futures capital losses may be carried back three years and applied against net commodities futures capital gains during such period. The Tax Reform Act of 1984 extended this treatment to all net Section 1256 contract losses and gains.

The carryback applies only if, after netting Section 1256 contracts and other positions subject to the mark-to-market rule with capital gains and losses from other sources, there is a net capital loss for the taxable year which, but for the election, would be a capital loss in the succeeding year. The lesser of such net capital loss or the net loss resulting from the application of the mark-to-market rule constitutes a net Section 1256 capital loss which may be carried back.

The amount carried back may be applied only against net gains resulting from application of the mark-to-market rule in the carryback year. The gains must be reduced by any net capital loss to which the mark-to-market rule did not apply in the carryback year, so that only to the extent the taxpayer had a net gain in the carryback year would any portion of the loss be allowed.

Amounts carried back under this election are treated as if 40% of the losses are short-term capital losses and 60% are long-term capital losses. The losses must be absorbed in the earliest year to which they may be carried back and any remainder is then carried forward to the next year in the same proportions of 40% and 60%. Losses are not allowable to the extent they would create or increase a net operating loss in the carryback year.

For federal income tax purposes, the changes made by the Economic Recovery Tax Act of 1981 relating to regulated futures contracts were generally effective for property acquired and positions established after June 23, 1981, in taxable years ending after that date. However, taxable year 1981 was the earliest year to which net commodity futures capital losses could be carried back.

Federally, the law change made by the Technical Corrections Act of 1982 relating to foreign currency contracts generally applied with respect to contracts entered into after May 11, 1982.

Finally, for federal income tax purposes, the changes made by the Tax Reform Act of 1984 relating to nonequity options and dealer equity options are generally effective for positions established after July 18, 1984, in taxable years ending after that date.

Question 1: Does Wisconsin follow the federal mark-to-market rule for regulated futures contracts?

Answer 1: Yes. Section 71.02(2)(d)8, 1985 Wis. Stats., provides that for the 1982 taxable year Wisconsin follows the Internal Revenue Code in effect on December 31, 1981. Beginning with the 1982 taxable year, regulated futures contracts must be marked-to-market for Wisconsin income tax purposes. Any capital gain or loss is treated as if 40% of the gain or loss is short-term capital gain or loss and 60% is long-term capital gain or loss.

Question 2: Does Wisconsin permit the three-year carryback of net commodity futures capital losses?

Answer 2: Yes. Pursuant to s. 71.02(2)(d)8, 1985 Wis. Stats., net commodity futures capital losses may be carried back three years and applied against net commodities futures capital gains during such period. For Wisconsin income tax purposes, taxable year 1982 is the earliest year to which net commodities futures capital losses may be carried back.

Question 3: Does Wisconsin follow the federal treatment for foreign currency contracts?

Answer 3: Yes. Beginning with the 1983 taxable year, the federal treatment of foreign currency contracts applies for Wisconsin income tax purposes [s. 71.02(2)(d)9, 1985 Wis. Stats.].

Question 4: Does Wisconsin follow the federal mark-to-market rule for nonequity options and dealer equity options and permit the three-year carryback of net Section 1256 contract losses?

Answer 4: Yes. Section 71.02(2)(d)11, 1985 Wis. Stats., provides that for the 1985 taxable year Wisconsin follows the Internal Revenue Code in effect on December 31, 1984. Beginning with the 1985 taxable year, nonequity options and dealer equity options must be marked-to-market for Wisconsin income tax purposes. Any capital gain or loss is treated as if 40% of the gain or loss is short-term capital gain or loss and 60% is long-term capital gain or loss.

Additionally, net Section 1256 contract losses may be carried back three years and applied against net Section 1256 contract gains. For Wisconsin income tax purposes, taxable year 1985 is the earliest year to which net losses from nonequity options and dealer equity options may be carried back.

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SALES/USE TAXES

1. Voice Messaging Business (Gross Receipts and Purchases)

Statutes: Sections 77.52(2)(a)4 and 77.54(24), 1985 Wis. Stats.

Wis. Adm. Code: Sections Tax 11.66(1)(c), January 1983 Register and 11.71(3)(a) and (d), February 1986 Register

Facts and Question: An EVX Office Message System computer is located in the office of this service provider, and customers gain access to the computer by using any touch-tone telephone. The service provider describes the business as voice messaging, a new technology. The service is available 24 hours a day and a customer deposits or retrieves telephone messages by using a national 800 number or local access. Customers using the taxpayer's 800 number are required to pay by the minute for the use of the company's circuits.

An advertising brochure indicates voice messaging may be (a) used as a message center, (b) used as a call forwarding service, or (c) used as an answering service. Messages are stored in the computer and the service allows the customer to send or retrieve messages, reply to a message directly, save selected messages, cancel messages no longer needed, redirect or reroute message to other users or broadcast group messages with group distribution codes.

(a) Is this voice messaging service a taxable telephone service under s. 77.52(2)(a)4, 1985 Wis. Stats.?

(b) Is this service provider required to pay sales tax on its purchases of equipment and telephone circuits (800 numbers) used to provide voice messaging service?

Answer: (a) This voice messaging business is not engaged in providing telephone services to its customers which are taxable under s. 77.52(2)(a)4, 1985 Wis. Stats. Mechanical or non-mechanical telephone answering services, providing messages by computer and call forwarding services are not taxable under s. 77.52(2)(a)4, 1985 Wis. Stats, when provided as part of a voice messaging business.

(b) The taxpayer's purchases of equipment are taxable because it is not a "telephone company," which is a requirement to obtain a sales/use tax exemption provided under s. 77.54(24), 1985 Wis. Stats., for equipment used in transmitting traffic and operating signals. The company's purchases of telephone services are also taxable because the telephone circuits, which consist of 800 numbers, provided to certain customers located outside the local calling area are used incidentally in providing its nontaxable voice messaging service.

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