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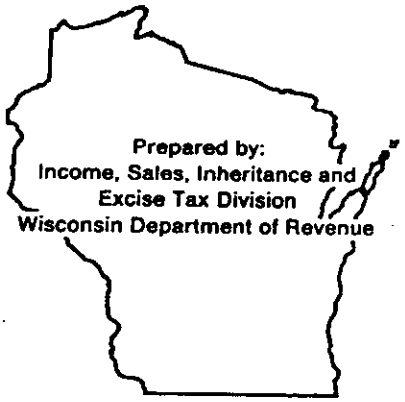

DEPARTMENT TO ISSUE PRIVATE LETTER RULINGS

The department has begun issuing private letter rulings with respect to income, franchise, withholding, sales/use, gift, inheritance, cigarette, tobacco, alcoholic beverage, and motor/special fuel tax matters, as well as homestead and farmland preservation credit matters.

To inform taxpayers of the new private letter ruling system and how to request a ruling, the department has developed a publication titled "How to Get a Private Letter Ruling From the Wisconsin Department of Revenue." A copy of this publication appears on pages 25 to 35 of this bulletin.

NEW TAX ON NONPROFIT ORGANIZATIONS REQUIRES NEW FORM

There is a new franchise or income tax on certain nonprofit organizations. Beginning with their 1988 taxable years, corporations, partnerships, and associations exempt from Wisconsin franchise or income taxation under s. 71.01(3), Wis. Stats., trusts exempt under IRC section 501(a), and individual retirement arrangements (IRAs), which are subject to tax on unrelated business income for federal tax purposes under section 511 of the Internal Revenue Code and file federal Form 990-T, are also subject to tax on unrelated business income for Wisconsin tax purposes.

Organizations subject to the Wisconsin tax on unrelated business income will report such income on Wisconsin Form 4T, Exempt Organization Business Franchise or Income Tax Return. This new form, which may be used by organizations taxed as corporations and organizations taxed as trusts, uses federal unrelated business taxable income from federal Form 990-T as the starting point in determining any Wisconsin tax liability. Form 4T will be available in October, 1988.

IN THIS ISSUE

LIMITED PARTNERS TAXED AS GENERAL PARTNERS

Prior to the 1988 taxable year, limited partners who, while they were nonresidents of Wisconsin, received distributions from a partnership where items of income, loss, or deduction were attributable to a business in, services performed in, or rental of property in Wisconsin, were not required to report the income or loss from the partnership for Wisconsin income tax purposes. General partners under the same circumstances were required to report such income or loss for Wisconsin income tax purposes.

Beginning with a partner's 1988 taxable year, both limited partners and general partners receiving distributions while nonresidents of Wisconsin from a partnership that has a business in Wisconsin, performs services in Wisconsin, or rents property in Wisconsin, must report that income or loss from the partnership for Wisconsin income tax purposes. This change results from an amendment to s. 71.07, Wis. Stats., by 1987 Wisconsin Act 399.

STATE OPENS NEW HOT-LINE IN CIGARETTE TAX FRAUD CRACKDOWN

The Michigan Department of Treasury in cooperation with Wisconsin and 12 other states has opened a new toll-free telephone hotline, 1-800-292-2824, to receive tips from the public on illegal interstate cigarette trafficking.

The Michigan Treasury Department estimates revenue losses could total more than $10 million per year for all the states involved in the hotline due to illegal cigarette trafficking. The loss in cigarette tax revenues results from distributors who buy cigarettes in low tax states, and then illegally transport and sell them in higher tax states at below market prices.

The National Association of Tax Administrators in the central region states cooperated to establish the hotline. The telephone number, 1-800-292-2824, can be dialed from any of the participating states, and will be answered by an agent in the Michigan Department of Treasury's tax fraud division who will process the tip information.

The states cooperating in the hotline effort with Wisconsin are: Ohio, Indiana, Michigan, Illinois, Minnesota, Kentucky, Iowa, Nebraska, Kansas, Missouri, North Dakota, South Dakota, and North Carolina.

"We hope the public will help us stop the illegal shipment of cigarettes across state lines by calling the hotline," Michigan State Treasurer Robert A. Bowman said. "We want to treat these tax cheaters like criminals, and promise to prosecute anyone caught dealing in illegal cigarettes to the fullest extent of the law on behalf of all the honest taxpayers in this State."

Penalties for possessing non-Wisconsin taxed cigarettes include fines of up to $10,000, imprisonment for up to 2 years, or both.

CRIMINAL ENFORCEMENT ACTIVITIES

Income or Franchise Taxes

A former Stoughton businessman has been ordered to pay $5,000 in fines and serve 7 years in prison for state income tax evasion and theft. He must also serve 8 years probation, make restitution of state income taxes that were evaded on funds he embezzled, and make restitution of the embezzled funds.

Gary W. Homberg was sentenced in Dane County Circuit Court, Branch 5, Madison, on two counts of state income tax evasion and two counts of theft. Judge Pekowsky sentenced Homberg to serve 2 years in Waupun State Prison on the first of the two tax evasion counts and 5 years in prison on the first of the two theft counts, to be served consecutively. He ordered Homberg to serve 8 years probation on the second count of theft and 3 years probation on the second count of tax evasion, to be served concurrently.

A Whitefish Bay man has been ordered to serve 6 months probation for violation of the Wisconsin state income tax law. Richard J. Schulhof, 4627 North Ardmore Avenue, Whitefish Bay, was sentenced Friday, April 22, in Milwaukee County Circuit Court, Branch 27, on one count of failing to file a state income tax return for the year 1985. He pled guilty to the charge January 7, 1988. Judge Doherty sentenced Schulhof to 30 days in jail, stayed execution of the sentence, and ordered him to serve 6 months probation. Under the conditions of probation, Schulhof must make restitution of tax, penalties, and interest in excess of $2,400 for the year 1985.

Sales/Use Taxes

A Sturgeon Bay man has been ordered to pay a fine of $200 and court costs for criminal violation of Wisconsin's sales and use tax law. Donald J. Boll, 3947 Riley Point Road, Sturgeon Bay, was sentenced March 21, 1988, in Door County Circuit Court after he entered a guilty plea to one count of filing a false sales and use tax report relative to registration of a boat in February 1987. Judge Keppler fined Boll $200 and ordered him to pay $116 in court costs and penalty assessments.

Filing a false sales and use tax return is a crime punishable by a fine of not more than $500 or imprisonment not to exceed 30 days or both. In addition to the criminal penalties, Wisconsin law provides for substantial civil penalties on the civil tax liability. Assessment and collection of the additional taxes, penalties and interest due follows conviction for criminal violation.

A Crawford County man has been ordered to serve 2 years probation and 90 days in jail for criminal violations of the Wisconsin state sales tax law. Roger L. Mills, Route 1, Soldiers Grove, Wisconsin, was found guilty on each of 11 counts of filing false and fraudulent sales tax returns by a Richland County jury after a trial in Richland Center. Judge Houck withheld sentence and ordered Mills to serve 2 years probation concurrently on each of the 11 counts. Under the conditions of probation, Mills must pay the sales tax which has been evaded and serve 90 days in the Crawford County jail.

Excise Taxes

John Simonson, agent for His & Hers Show Lounge, Inc., 215 Main Street, Menasha, plead "no contest" to violations of the state's liquor credit laws and possession of liquor from an unauthorized source on March 7, 1988. Simonson was fined $715 or given 50 days in jail in lieu of the fine.

Wizzard of Ozzies, Inc., a tavern located at 126-128 South 3rd Street, LaCrosse, was found guilty of purchasing liquor from other than a Wisconsin wholesaler on

February 1, 1988. The corporation was fined $155.

T. A. Young, Inc., a tavern at 229 North 3rd Street, LaCrosse, was found guilty of wholesaling liquor without a permit. The corporation was fined $327.50 on March 7, 1988.

General Beverage Sales Co., a beer wholesaler located at 2855 Oregon Street, Oshkosh, Wisconsin, was found guilty of 3 counts of commercial bribery on April 18, 1988, in Winnebago County. The charges included giving of free half-barrels of beer to local retailers. General Beverage was fined $897.

NEW ISI&E DIVISION RULES AND RULE AMENDMENTS IN PROCESS

Listed below, under Part A 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 June 30, 1988. Part B lists new rules and amendments which are adopted. ("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 sport 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
3.44 Organization and financing expenses—corporations-R&R
3.45 Bond premium, discount and expense—corporations-A
11.05 Governmental units-A
11.09 Medicines-A
11.10 Occasional sales-A
11.12 Farming, agriculture, horticulture and floriculture-A
11.16 Common or contract carriers-A
11.18 Dentists and their supplies-A
11.19 Printed material exemptions-A
11.26 Other taxes in taxable gross receipts and sales price-A
11.32 "Gross receipts" and "sales price"-A
11.40 Exemption of machines and processing equipment-A
11.41 Exemption of property consumed or destroyed in manufacturing-A
11.51 Grocers' guidelist-A
11.57 Public utilities-A
11.61 Veterinarians and their suppliers-A
11.66 Communications and CATV services-A
11.67 Service enterprises-A
11.68 Construction contractors-A
11.84 Aircraft-A
11.85 Boats, vessels and barges-A

B. Rules Adopted in 1988

3.095 Interest income from federal obligations-R&R (effective 5/1/88)
11.10 Occasional sales-A (effective 1/1/88)

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 the Commission's decision).

The following decisions are included:

Corporation Franchise or Income Taxes

Sales/Use Taxes

CORPORATION FRANCHISE OR INCOME TAXES

Interest and dividends—taxable. *American Telephone & Telegraph Co. v. Wisconsin Department of Revenue* (Court of Appeals, District IV, February 18, 1988). American Telephone & Telegraph Co., appeals an order of the Circuit Court affirming the Wisconsin Tax Appeals Commission's decision and order, as modified by its order on rehearing. The Commission affirmed the department's denial of AT&T's petition for redetermination of additional taxes for tax years ending December 31, 1972, through December 31, 1976.

AT&T claims that the failure of the department to tax AT&T as part of a unitary business violates ss. 71.07(2) and 71.07(2)(e), Wis. Stats., and the due process, commerce, and equal protection clauses of the United States Constitution because the apportionment formula by which the department determined AT&T's Wisconsin taxable income for tax years 1975 and 1976, taxed income earned outside the borders of the state.

Prior to this litigation, the department apportioned AT&T's business income by using in the apportionment formula the sales, property, and payroll of AT&T's Long Lines Department. Beginning in tax year 1975, pursuant to newly-created s. 71.07(1m), Wis. Stats., the department included in the apportionable business income of AT&T, income to its General Department from dividends and interest paid to it by its subsidiaries. However, the department made no change to the property, sales, and payroll factors of the apportionment formula. The Commission concluded that this was an error and ordered that for tax years 1975 and 1976 intangible income received by AT&T from its subsidiaries was to be included in the denominator of the sales factor.

AT&T claims that in order to comply with the commands of ss. 71.07(2) and 71.07(2)(e), Wis. Stats., and the United States Constitution, the department was required to treat AT&T and its subsidiaries as one entity and determine its tax liability by a combined report, or alternatively, was required to include in the property factor of the formula, its book cost investment in and advances to its subsidiaries which generated the dividend and interest income paid to it.

The department's contention is that the statutes and case law do not permit it to include in the apportionment formula, by combined reporting or otherwise, the value of AT&T's investment in the real and tangible personal property of its subsidiaries. The department argues:

A. The property from which AT&T's General Department derives its income is intangible property — stock and evidences of indebtedness — and that s. 71.07(2)(a)1, Wis. Stats., expressly excludes intangible property from the property factor.

B. Section 71.07(2)(a)1, Wis. Stats., includes only the "taxpayer's" real and tangible personal property and the subsidiaries are not the "taxpayer."

C. According to *Interstate Finance Corp. v. Dept. of Taxation*, 28 Wis. 2d 262, 137 N.W. 2d 38 (1965), and other cases, there is no statutory authority to include the sales, property, and payroll factors of subsidiaries in the apportionment formula.

The Court of Appeals concluded that neither the statutes nor Wisconsin case law excludes from the apportionment formula the value of AT&T's investment in the real and tangible personal property of its subsidiaries. The apportionment formula used by the department does not bear a reasonable relation to the corporate activities of the Bell System in Wisconsin; it apportions to Wisconsin far too much income of the Bell System in relation to its property located here, its sales here, or its payroll. The apportionment formula used by the department does not reflect a reasonable sense of how AT&T's income is generated and taxes value earned outside the borders of Wisconsin, contrary to ss. 71.07(2) and 71.07(2)(e), Wis. Stats., and the due process and commerce clauses of the United States Constitution. The Court does not, however, mandate a formula. The department should have flexibility in determining a formula which involves the least administrative inconvenience and expense, as long as the formula satisfies statutory and constitutional requirements. For this reason, the Court rejected AT&T's claim that a fair apportionment formula must include in the property factor the value of its investments in its subsidiaries.

The department appealed this decision to the Supreme Court which denied the department's petition for review. The case has been remanded to the Commission for further proceedings.

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Apportionment—property factor. *Fort Howard Paper Company vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, April 29, 1988). There are three issues raised in this case. The first issue relates to aircraft and how they are divided between Wisconsin and non-Wisconsin property in the property factor. The second issue relates to the State of Washington and the throwback of Washington sales to Wisconsin. The Department of Revenue has conceded this issue. The third issue raised relates to retroactive interest.

Fort Howard Paper Company contends that for purposes of the numerator in the property apportionment factor, found in s. 71.07(2)(a), Wis. Stats., and section Tax 2.39 (3)(a), Wis. Adm. Code, the value of the taxpayer's airplanes used both inside

and outside Wisconsin should be based on the ratio of air time in Wisconsin to total air time. The department's redetermination was based on the ratio of total time located in Wisconsin, regardless of whether the plane was being used, to total time in a year.

The airplanes were hangared at Austin Straubel Field in Green Bay, Wisconsin, and were used to carry the taxpayer's employes and others flying with them to and from various destinations in Wisconsin and outside Wisconsin. Some of the taxpayer's employes who flew in the planes were regularly located in Wisconsin and others were regularly located in Oklahoma.

"Air time" is actual time from take-off to landing. "Flight time" is the time the plane is moving under its own power, including taxi time. "Hands-on time" is flight time plus pre-flight time for exterior check, interior check, and boarding, and post-flight time for unloading, exterior check, cleaning, fueling, and hangaring. "Total time" means all time in the calendar year, 24 hours a day and 365 days a year.

The department's notice of action determined the numerator of the property factor on the basis of "total time." The taxpayer contends the numerator should be based on "air time," or in the alternative, on "flight time" or "hands-on time."

The taxpayer further contends that the department improperly retroactively applied a 12% interest rate to the taxpayer's assessment for periods prior to July 31, 1981. Throughout the period under review, the statutory rate of interest on income and franchise tax deficiencies was 9% per year. Pursuant to s. 1090n, Chapter 20, Laws of 1981, the interest rates were increased from 9% to 12%. It is the taxpayer's position that pursuant to s. 2203 (45)(g) and s. 2204, Chapter 20, Laws of 1981, the effective date of the higher interest rate was July 31, 1981, and therefore the department should have assessed interest on the alleged deficiencies at a rate of 9% until July 30, 1981, and thereafter at the rate of 12%.

The Commission concluded that the department incorrectly calculated the property factor for the taxpayer's airplanes on the basis of the ratio of total time the planes were located in Wisconsin to total time everywhere, rather than on the basis of "flight time" inside and outside Wisconsin. The Commission has jurisdiction to determine the retroactive interest rate issue. The department was correct in retroactively applying a 12% interest rate. The increased interest rate is not unconstitutional.

The taxpayer and the department have not appealed this decision but the department has filed a notice of nonacquiescence in regard to this matter.

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Franchise tax—imposition. *Savings League of Wisconsin, Ltd., Equitable Savings & Loan Association, Liberty Savings & Loan Association, and Marathon County Savings & Loan Association v. Wisconsin Department of Revenue* (Court of Appeals, District IV, October 15, 1987). This appeal is from a summary judgment declaring constitutional s. 71.01(2), Wis. Stats., which imposes on domestic corporations an annual franchise tax for the privilege of doing business in the state.

The taxpayers claim that s. 71.01(2), Wis. Stats., violates the supremacy clause, Art. VI of the federal constitution, the borrowing clause, Art. I, Sec. 8, Cl. 2 of the federal constitution, and 31 U.S.C. §3124 (1982), to the extent that a tax is imposed on income earned on federal obligations. They also argue that if s. 71.01(2), Wis. Stats., imposes what would otherwise be a valid corporate franchise tax, that the tax is nevertheless invalid because its principal purpose is to reach otherwise unreachable income earned on federal obligations.

The Court of Appeals concluded that s. 71.01(2), Wis. Stats., does not violate the supremacy or borrowing clauses of the United States Constitution or 31 U.S.C. §3124 and, therefore, affirmed the Commission and Circuit Court decisions.

The taxpayers have appealed this decision to the Supreme Court.

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Deferred income. *76th and Good Hope, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 2, 1988). The only unresolved issue raised in the taxpayer's petition for redetermination pertains to the manner in which the taxpayer treated income received by its restaurant for banquet room party deposits and gift certificates.

76th and Good Hope, Inc., is a corporation organized and existing under the laws of the State of Wisconsin, and as such is subject to the income tax provisions of Chapter 71 of the Wisconsin Statutes. Since October 1, 1979, the taxpayer has owned and operated Manning's Restaurant and Cocktail Lounge located in Milwaukee, Wisconsin.

Manning's Restaurant and Cocktail Lounge (Manning's) consists primarily of a restaurant, a bar, and four banquet rooms (two of which were added in 1983). In addition to serving food and beverages to "walk-in" customers during normal dining hours, the business also provides facilities, services, food, and beverages for private parties, banquets, and other social functions. The services included in the rental of a banquet room will depend upon the nature of the function. Among those services available to customers is the preparation and service of meals and drinks, clean up after meals, and cutting of wedding cakes.

Pursuant to the catering policies of Manning's, a specified deposit was required in advance when engaging one of the banquet rooms. In the case of weddings, an additional deposit was required six months before the date of the wedding. These deposits were subsequently applied toward the customer's final bill. Any cancellations received six months prior to the date of the function entitled the customer to a return of his/her deposit upon rebooking of the room. Customers cancelling less

than six months prior to the date of the function forfeited their deposits.

As part of the restaurant business, Manning's sold gift certificates which were redeemable at the restaurant for food or beverages. Those gift certificates were paid for at the time of purchase and had no specified expiration date.

During the entire time it has been owned by the taxpayer, including taxable years in question, Manning's has followed the accrual method of accounting. Under this method, as applied by Manning's, all banquet room party deposits it received from customers were recorded as income in the year the function was held, rather than the year of receipt. Likewise, payments received for gift certificates were recorded in the year the certificate was redeemed as opposed to the year purchased. In those instances when a deposit was forfeited, the income was recognized in the year of the forfeiture.

The advance payments received by Manning's for gift certificates and banquet room deposits were recorded separately from other revenues on the business' balance sheet. The money actually received for those items, however, was deposited in the business' general money market account together with other business receipts. Once received there were no apparent restrictions placed upon the use of those monies.

Upon field audit, the department disallowed the taxpayer's treatment of the advanced payments for gift certificates and party deposits received by Manning's during the years 1979 through 1983. The department ruled that the income from those items must be recognized in the year in which it was received, as opposed to the year in which the party was held, or certificate redeemed.

The taxpayer argues the department's disallowance of the taxpayer's method of accounting, whereby it deferred recognition of the income it received for party deposits and gift certificates, was improper in that the method "clearly reflected" the taxpayer's income, the method proposed by the department is contrary to established restaurant accounting principles, the department's treatment of the income would result in an unwarranted distortion in the costs of facilities, food, beverages, and services provided by the taxpayer, as well as the income derived therefrom, and section 451 of the Internal Revenue Code provides that advance payments for goods may be reported on an accrual basis.

The Commission concluded that generally for both cash and accrual basis taxpayers, payments received in advance are usually income in the year actually received, provided no restrictions have been placed upon their use. The Wisconsin Department of Revenue properly disallowed the manner in which the taxpayer applied its accrual method of accounting which deferred recognition of income it received from party deposits and gift certificates to the year the parties were actually held or certificates redeemed, rather than in the year of receipt. During the years in question for Wisconsin corporate franchise purposes, Wisconsin had not adopted section 451 of the Internal Revenue Code, nor to date has it adopted Internal Revenue Procedure 71-21, and, therefore, is not bound by the deferral of income provisions contained thereunder.

The taxpayer has not appealed this decision.

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SALES/USE TAXES

Leases—teleprinters. *Wisconsin Department of Revenue vs. Dow Jones & Company, Inc.* (Circuit Court of Dane County, April 13, 1988). The Wisconsin Department of Revenue has petitioned for judicial review of a decision and order of the Wisconsin Tax Appeals Commission. That order vacated a sales and use tax assessment against Dow Jones & Company, Inc., upon the gross receipts from equipment charges for its leasing of teleprinters to the subscribers of its news service. The central issue is whether the Commission properly concluded that the teleprinter leasing is not taxable as a separate transfer of tangible personal property.

Dow Jones has provided financial and business news to its subscribers since 1882. From 1897 until the late 1960's, the news service information was delivered exclusively via "hard copy" teleprinters. With the advent of sophisticated video display devices, some subscribers opted to receive the service on such equipment, which they had obtained from third parties, primarily for other purposes. Dow Jones subsequently broke out and itemized a separate, flat charge in billing those who continued to receive the service in the traditional way. This had the effect of reducing the cost of the news service to the customers who opted to use their own video display equipment from what it had been under the single monthly charge formerly billed to all customers. It is this broken out and itemized "equipment charge" on which the department assessed sales tax.

The equipment charge was made up of Dow Jones' costs for depreciation of the teleprinter, ink, paper, parts and maintenance, and a "local loop" telephone cost. It also included a "display fee." Except for the display fee, Dow Jones realized no profit on the equipment charge, and all costs were merely passed through to the subscribers. The display fee is purely a service charge, and for teleprinter customers it was not separately billed but was a part of the equipment charge. For subscribers who did not use the teleprinter, the display fee was separately listed on the bill. For teleprinter customers, the display fee represented from 24-26% of the equipment charge. During the tax years in question, the overall equipment charge ranged from 41-52% of the total bill for teleprinter customers in 1978 to 41-50% in 1981.

The teleprinters remained the property of Dow Jones at all times, and it retained the right to remove them at any time. They had no use other than to receive the news service. They were self-actuating, and the only control which the customer could exercise over them was to "pull the plug" to turn them off. An Equipment Order Form was used for new customers who intended to use the traditional teleprinter mode of receiving the news service.

The position of the department in its assessment and in its arguments before the Commission and the court stressed the separate listing of charges in the bills to customers.

The Court concluded that the guidance provided by *Janesville Data, Kollasch,* and *Frisch* are sufficient to support the conclusion that the equipment charges billed to Dow Jones' teleprinter customers were incidental to the essence of a transaction where the customer's true objective was to receive the information which comprised the news service. Therefore, the department's petition for review was denied and the Commission's decision and order of August 21, 1987, was affirmed.

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

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Parking and storage. *Wisconsin Department of Revenue v. EAA Aviation Foundation, Inc.* (Court of Appeals, District IV, February 25, 1988). The Department of Revenue appeals that part of a judgment which affirms the Tax Appeals Commission's decision that fees charged by the EAA Aviation Foundation, Inc., for parking are exempt from sales tax under s. 77.54(9a), Wis. Stats.

The EAA Aviation Foundation, Inc., is a nonstock corporation organized under ch. 181, Wis. Stats. The foundation is exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Code. It is organized and operated exclusively for charitable and educational purposes under both the Internal Revenue Code and the Wisconsin Statutes. The foundation has no members.

Each summer the foundation and the Experimental Aircraft Association, Inc., co-sponsor the International EAA Convention and Sport Aviation Exhibition at Wittman Field in Oshkosh, Wisconsin. Besides other fees which are no longer an issue in this case, the foundation collects fees for providing parking to the public.

This case involves the parking fees for 1977 through 1980. The department agrees with the foundation that either version of s. 77.54(9a), Wis. Stats., can be read as exempting from sales tax gross receipts from the providing of services by tax-exempt organizations. It views the statute as ambiguous. A statute is ambiguous if it may be construed in different ways by reasonably well-informed persons.

The Court of Appeals concluded that the statute is not ambiguous, and that under the plain language of the statute, the foundation is not exempt from sales tax on gross receipts from services by the foundation. The phrase "services by" is conjunctive with "use or other consumption of tangible personal property." So construed the exemption is limited to services used by tax-exempt organizations and does not extend to services by such foundations. It is not necessary to further construe the statute. Under the plain meaning of the statute, gross receipts received by the foundation from the service of providing parking are not exempt from sales tax under s. 77.54(9a), Wis. Stats.

The taxpayer has appealed this decision to the Supreme Court.

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Exemptions—manufacturing, waste treatment facilities. *Fort Howard Paper Company vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, April 29, 1988). The issues for the Commission to determine are:

A. Whether the taxpayer's lime handling and conveying equipment, which were added to its chlor-alkali plant in 1977, are exempt from sales and use tax as manufacturing machinery and equipment under s. 77.54(6)(a), Wis. Stats.

B. Whether over-roof conveyor equipment consisting of fire doors, steel beams, anti-corrosion paint, and lumber is exempt from sales and use tax as manufacturing machinery and equipment under s. 77.54 (6)(a), Wis. Stats.

C. Whether sludge trucks used in the taxpayer's waste treatment program are exempt from sales and use tax under s. 77.54(26), Wis. Stats.

D. Whether the taxpayer's payments for computer software and services are free from sales and use tax as payments for nontaxable services and intangible property and not for tangible personal property.

E. Whether the department improperly applied retroactively a 12% interest rate to the taxpayer's assessment for periods prior to July 31, 1981.

As part of the taxpayer's business, it operates a chlor-alkali plant to produce caustic soda and calcium hypoclorite, which are used in the paper-making process. One of the principal raw materials used in the chlor-alkali plant is lime.

In 1977, the taxpayer doubled the capacity of its chlor-alkali plant. That made it necessary to augment its existing lime handling and conveying system, to keep up with the newly increased capacity. To do that, the taxpayer, in 1977 as Job 626, added the following equipment to its lime handling and conveying equipment at its chlor-alkali plant: a new outside feeder lime tank, including an upper bin and a lower bin connected by an automatic valve; another automatic valve at the bottom of the lower bin; a pneumatic tube for carrying lime from the lower bin of the new outside lime tank to the upper bin of the existing inside lime tank; bindicators and vibrators mounted on the outside lime tank; a blower to move the lime through the pneumatic tubes; a motor control center which, together with the bindicators, automatically operates the valves and blower; and miscellaneous associated equipment.

On its sales and use tax returns, the taxpayer treated the equipment described in the preceding paragraph as exempt machinery and equipment. The department disallowed the claimed exemption.

The lime handling and conveying equipment which is part of the taxpayer's chlor-alkali plant has two functions, one, to

convert a batch (truckload) arrival system to a controlled constant feed into the lime slakers, and two, to prevent hardening of the lime by keeping it agitated until it is fed into the lime slakers.

In 1979 as Job 919, the taxpayer constructed a conveyor running from the end of the manufacturing line, building 100 (converting), to the point of first storage, building 31 (shipping). This conveyor had to run over the roofs of eight existing intervening buildings. The department allowed most of Job 919 as exempt, treating the conveyor as machinery or equipment directly and exclusively used in manufacturing. However, the department disallowed the taxpayer's claimed exemption for four components of the conveyor. The department assessed tax on six fire doors purchased and installed by the taxpayer as part of the over-roof conveyor, the steel beams used to support the conveyor, the corrosion resistant paint used to coat the steel beams which were exposed to the weather, and the lumber used to frame the openings where the steel beams passed through the roofs of the existing buildings underneath. This wood framing would not have been needed for the buildings apart from the fact the new conveyor was erected above them. The fire doors, steel beams, corrosion resistant paint and lumber were component parts of the over-roof conveyor which was, as the department conceded, exempt under s. 77.54(6)(a), Wis. Stats.

The taxpayer operates a waste treatment facility at its Green Bay plant which consists of two parts, a waste treatment center located at the taxpayer's main plant, and a landfill site located 5 to 6 miles west of the waste treatment center.

The department has determined that the taxpayer's waste treatment facility, including both the waste treatment center and the landfill, is exempt from property taxes as a waste treatment facility under s. 70.11 (21)(a), Wis. Stats. The department, however, denied the taxpayer's claim of sales and use tax exemption for two truck tractors used to haul sludge, and also for a diesel engine overhaul (service plus parts) to another truck tractor used for the same purpose. The truck tractors in question are used exclusively to haul treated waste sludge from the waste treatment center to the landfill. The tractors are licensed for highway use and use public streets and highways to haul the sludge to the landfill.

In a later year, the department approved three identical sludge truck tractors as exempt components of the taxpayer's waste treatment facility for property tax purposes. Through oversight, however, the taxpayer did not apply for property tax exemption in 1978 for the two truck tractors or the engine overhaul in question.

In 1978, the taxpayer in the course of its business, entered into a contract with Oxford Software Corporation for the use of Oxford's TFAST computer software program and related services for a monthly fee of $250.

The TFAST program originally arrived encoded on a magnetic tape. The value of the tangible personal property, the magnetic tape, was $15-25. The taxpayer returned each tape to Oxford within one to two days. Oxford wanted the tapes back to reuse them as a physical medium, but not with the same message or program. It was not possible for Oxford to send the same contents to multiple customers, because the TFAST program had to be changed to fit each customer's situation, and the program was being constantly updated. Nevertheless, the tape itself could be used again and again with different contents.

The taxpayer regarded its monthly $250 payment as being primarily for this service and support function. Oxford's consulting services for the taxpayer under the contracts averaged 8 to 15 hours per month.

In 1978, the taxpayer also entered into a license agreement with Whitlow Computer Systems, Inc., licensing the SyncSort computer software program and related services for a fee of $150 per month. The taxpayer used SyncSort to sort and rearrange its computer file records. The facts as to the TFAST program also hold true for SyncSort, except for the following differences. Some of the improvements to the program were transferred to the taxpayer by telephone rather than by magnetic tape, Whitlow was available for telephone consultation concerning SyncSort seven days a week, 24 hours a day, the cost of SyncSort today would be $300 per month, or a one-time fee of $8,250 for a three-year period.

The Commission concluded that

A. The taxpayer's lime handling and conveying equipment added to its chlor-alkali plant in 1977 is exempt manufacturing machinery and equipment under s. 77.54 (6)(a), Wis. Stats.

B. The fire doors, steel beams, and corrosion resistant paint purchased and used as part of the taxpayer's over-roof conveyor installation were exempt components of the conveyor the department had conceded to be exempt under s. 77.54(6)(a), Wis. Stats. The lumber is not exempt.

C. The taxpayer's sludge trucks used in its waste treatment program are component parts of an exempt waste treatment facility.

D. The taxpayer's payments for computer software and services were not subject to sales or use tax because the essence of the transaction was the purchase of services and intangible property, with the transfer of tangible property being merely incidental.

E. The Commission has jurisdiction to determine the retroactive interest rate issue. The department was correct in retroactively applying a 12% interest rate. The increased interest rate is not unconstitutional.

The taxpayer and the department have not appealed this decision but the department has filed a notice of nonacquiescence in regard to this matter.

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Exemptions—manufacturing. *Wisconsin Department of Revenue vs. Pavelski Enterprises, Inc.* (Circuit Court of Dane County, May 13, 1988). On July 12, 1984, the department issued against the taxpayer

an assessment for sales and use taxes allegedly due on two of the taxpayer's Lor-Al Air Flow Filter machines for the years 1981, 1982, and 1983. This assessment was overturned by the Tax Appeals Commission on October 16, 1986. The Commission found the machines to be instruments of manufacture, exempt from the sales and use taxes under s. 77.51(27), Wis. Stats.

Pavelski Enterprises, Inc. (Pavelski) manufactures agricultural fertilizer compounds at three different locations in Wisconsin. Pavelski's business format is to perform soil analysis for farmers and after being informed of what crop the farmer intends to plant, Pavelski then custom mixes a fertilizer product to meet the specific needs of the farmer's crop.

The fertilizer product which Pavelski manufactures at its plant consists of chemicals such as potash, nitrogen, zinc, boron, sulfur, phosphate, and also includes numerous pesticides. When these ingredients are blended at Pavelski's plant, the chemical configuration of their final product is different in chemical composition than the beginning ingredients.

Pavelski transports the customized fertilizer product to the farmer's field by truck. During this shipping process, the product segregates and is out of specification. To remedy this problem at the field site, Lor-Al Air Flow Filter machines are used. This machine remixes the fertilizer to the formula originally designated. The material is then funneled through a pneumatic air process to distribution nozzles and spread on the field through a process termed impregnation.

The Department of Revenue argues the field process using the Air Flow machine for mixing and spreading the fertilizer on the farmer's field does not make the Air Flow machine exempt as manufacturing under s. 77.54(6m), Wis. Stats.

The Circuit Court upheld the Tax Appeals Commission decision which determined the use of the Air Flow machine was a continuation of the manufacturing process which the Department of Revenue concedes at the plant is exempt manufacturing. The facts earlier cited by the court, referring to need for use of the Air Flow machines to remix the fertilizer compound which breaks down and segregates in shipping, are a sufficient factual base to support the Tax Appeals Commission decision.

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

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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

Individual and Corporation Franchise or Income Taxes

Corporation Franchise or Income Taxes

Farmland Preservation Credit

Sales/Use Taxes

County Sales/Use Taxes

INDIVIDUAL INCOME TAXES

1. Determining Required Estimated Tax Payments of Trusts

Statutes: Section 71.21(1) and (14), 1985 Wis. Stats., as amended by 1987 Wis. Act 27.

Note: This Tax Release applies for purposes of determining the estimated tax payments for taxable year 1988 of trusts that were required to change their taxable year to a calendar year as a result of the federal Tax Reform Act of 1986.

Background: Section 71.21(1), 1985 Wis. Stats., as amended by 1987 Wis. Act 27, requires trusts deriving taxable income to make estimated tax payments. With certain exceptions, the amount of each required payment is 25% of the lower of the following amounts:

a. Ninety percent of the tax for the taxable year.
b. The tax shown on the return for the preceding year.

Alternative b., the prior year alternative, does not apply if the preceding taxable year was less than 12 months, if the trust did not file a return for the preceding taxable year, or if the trust has taxable income of $20,000 or more.

Facts and Question: A trust had been reporting its income on the basis of a fiscal year ending October 31. As a result of the federal Tax Reform Act of 1986, the trust was required to change to a calendar year. The trust filed a Wisconsin return for the fiscal year beginning November 1, 1986, and ending October 31, 1987. In addition, the trust filed a short-period return for the short taxable year beginning November 1, 1987, and ending December 31, 1987.

If the trust, which was required to change its taxable year to a calendar year, has less than $20,000 of income for 1988, may the trust determine its required estimated tax payments for 1988 under the prior year alternative?

Answer: Yes. Since the short taxable year in 1987 was preceded by a taxable year of 12 months, the trust may use the prior year alternative. However, the tax shown on the return for the preceding short taxable year must be increased by dividing the tax by the number of months in the short taxable year and multiplying the result by 12.

If the short taxable year in 1987 had not been preceded by a taxable year of 12 months, the trust could not use the prior year alternative to determine its 1988 estimated tax payments.

Example: The tax shown on the trust's Wisconsin return for the short taxable year beginning November 1, 1987, and ending December 31, 1987, is $150. For purposes of determining the trust's required estimated tax payments for 1988, the tax shown on the return for the preceding year is $900 ($150 tax shown on the short-period return divided by 2 months; the result multiplied by 12 months).

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2. Educational Assistance Program Benefits - Wisconsin Tax Treatment

Statutes: Section 71.02(2)(d)12, 1985 Wis. Stats., and s. 71.02(2)(d)13, Wis. Stats., as created by 1987 Wis. Act 27 and amended by 1987 Wis. Act 399.

Background: Section 127 of the Internal Revenue Code (IRC), provides that gross income of an employe does not include amounts paid or expenses incurred by an employer for educational assistance to the employe if the assistance is furnished pursuant to a qualified educational assistance program. An educational assistance program is a separate written plan of an employer to provide educational assistance to employes. Educational assistance includes payments for tuition, fees and similar payments, books, supplies, and equipment. It does not include payments for meals, lodging, transportation, or tools and supplies that the employe may keep after completing the course.

Prior to the Tax Reform Act of 1986 (Act), the maximum annual exclusion for educational assistance program benefits was $5,000. The exclusion was to expire for taxable years beginning after December 31, 1985, however, the Act extended the exclusion for two years (that is, the exclusion is not effective for taxable years beginning after December 31, 1987). The Act also increased the maximum annual exclusion to $5,250.

Generally, the Wisconsin statutes require that Wisconsin individual income taxpayers use the IRC as amended to December 31 of the prior year to determine Wisconsin net income. For example, for the 1986 taxable year, the IRC as amended to December 31, 1985, is used to determine Wisconsin net income. For the 1987 taxable year, the IRC as amended to December 31, 1986 (which includes the changes made by the Act), is used to determine Wisconsin net income.

Facts and Question 1: Joe Brown, a calendar year taxpayer, received $3,000 from his employer during 1986 pursuant to a qualified educational assistance program. Is the $3,000 excludable from Joe Brown's 1986 Wisconsin gross income?

Answer 1: No. For the 1986 taxable year, Wisconsin follows the IRC as amended to December 31, 1985, and because IRC section 127, as amended to December 31, 1985, provides that the exclusion did not apply to taxable years beginning after December 31, 1985, the exclusion is not available for Wisconsin.

Question 2: Mary Smith, a calendar year taxpayer, received $6,000 from her employer during 1987 pursuant to a qualified educational assistance program. Is any of the $6,000 excludable from Mary Smith's 1987 Wisconsin gross income?

Answer 2: Yes. For the 1987 taxable year, Wisconsin follows the IRC as amended to December 31, 1986. Therefore, Mary Smith may exclude $5,250 of the $6,000 of educational assistance program benefits received.

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3. Effect of Transitional Adjustments on Married Couple Credit Computation

Statutes: Section 71.09(7m), 1985 Wis. Stats., as amended by 1987 Wis. Act 27.

Background: Section 71.09(7m), 1985 Wis. Stats., as amended by 1987 Wis. Act 27, provides that qualified earned income, for purposes of computing the Wisconsin married couple credit, is the same as defined in section 221(b) of the Internal Revenue Code as amended to December 31, 1985, plus employe business expenses under section 62(2)(b), (c), or (d) of that Code, allocable to Wisconsin under s. 71.07, 1985 Wis. Stats., minus the amount of disability income excluded under s. 71.05(1)(b)8m, 1985 Wis. Stats., and minus any other amount not subject to tax under Chapter 71 of the Wisconsin Statutes.

Question: Are transitional adjustments, reported on Wisconsin Schedule T, amounts not subject to taxation under Chapter 71 of the Wisconsin Statutes and, therefore, subtracted to determine Wisconsin qualified earned income for purposes of computing the Wisconsin married couple credit?

Answer: No. A Schedule T transitional adjustment should not be used to reduce earned income for purposes of computing the Wisconsin married couple credit.

Example: A taxpayer reports $10,000 of income on federal Schedule C and on federal Schedule SE. In computing the income on Schedule C, the taxpayer claimed depreciation on a business asset which has a federal basis of $8,000 and a Wisconsin basis of $10,000. He or she determined on Wisconsin Schedule T that he or she must make a subtraction adjustment of $400 for the difference in basis of the changing basis asset. The $400 does not reduce earned income for purposes of computing the married couple credit.

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4. Exclusion for Retirement Benefits

Statutes: Section 71.03(2)(d), 1983 and 1985 Wis. Stats.

Background: Section 71.03(2)(d), 1983 Wis. Stats., provided for an exclusion from taxable income of "All payments received from the employe's retirement system of the City of Milwaukee, Milwaukee county employes' retirement system, sheriff's annuity and benefit fund of Milwaukee County, police officer's annuity and benefit fund of Milwaukee, fire fighter's annuity and benefit fund of Milwaukee, or the public employe trust fund as successor to the Milwaukee public school teachers' annuity and retirement fund and to the Wisconsin state teachers retirement system, which are paid on the account of any person who was a member of the paying or predecessor system or fund as of December 31, 1963, or was retired from any of the systems or funds as of December 31, 1963."

During the 1970s, the Milwaukee Board of School Directors established the Early Retirement Supplement and Benefit Improvement Plan for administrators. The employe does not contribute to this plan. Benefits under this plan are not payments from the retirement funds, but are funded by the City of Milwaukee general funds.

Facts and Question: A taxpayer began employment with the Milwaukee school system in 1951. Upon retirement in 1984, the taxpayer received benefits from the Early Retirement Supplement and Benefit Improvement Plan.

Does the income from this supplemental plan qualify for exclusion from Wisconsin taxable income?

Answer: No. Income from the Milwaukee Board of School Directors' Early Retirement Supplement and Benefit Improvement Plan does not qualify for exclusion from Wisconsin taxable income. Section 71.03(2)(d), 1983 Wis. Stats., grants exemption from taxation for all payments received from the various Milwaukee based funds and systems which are specified. The supplemental benefits, even though they may be dispensed by one of the retirement systems, are not payments from one of the specified retirement funds or systems, but are payments provided by the City of Milwaukee. Thus the supplemental benefits do not qualify for exclusion under s. 71.03(2)(d), 1983 Wis. Stats. This position was upheld in the Circuit Court case of *Wisconsin Department of Revenue vs. Andre Le Veque* and further clarified through amend-

ment of s. 71.03(2)(d), by 1985 Wisconsin Act 29, which added that the exemption for certain retirement benefits provided shall not exclude tax sheltered annuity benefits from gross income tax.

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5. Married Couple Credit When Spouse Is Reporting Income of a Deceased Spouse

Statutes: Section 71.09(7m), 1985 Wis. Stats., as amended by 1987 Wis. Act 27.

Background: Section 61(a)(14) of the Internal Revenue Code provides that gross income shall include income in respect of a decedent. Therefore, under s. 71.02(2)(d), 1985 Wis. Stats., such income is also includable in Wisconsin gross income. Income in respect of a decedent is items of gross income not properly includable on the deceased's final return but attributable to him or her personally. Such income must be reported for the tax year received by:

a. The decedent's estate, if it acquired the right to receive the item of income from the decedent

b. The person who, by reason of the decedent's death, acquires the right to income whenever the right is not acquired by the decedent's estate from the decedent, or

c. Any person to whom the estate properly distributes the right to receive the amount.

Question: If a widowed spouse is required to include in his or her gross income, in a year subsequent to the year of death of the spouse, income in respect of a decedent (deceased spouse), may the taxpayer claim the Wisconsin married couple credit?

Answer: No. Section 71.09(7m), 1985 Wis. Stats., as amended by 1987 Wis. Act 27, provides that the Wisconsin married couple credit may be claimed only by married persons filing a Wisconsin joint return. Even though the widowed spouse must report income of his or her deceased spouse, the widowed spouse may not file a Wisconsin joint return with the deceased spouse for any year subsequent to the year of death of the spouse.

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6. Standard Deduction of Dependent Receiving Taxable Scholarship or Fellowship Income

Statutes: Section 71.02(2)(km)6, 1985 Wis. Stats., as amended by 1987 Wis. Act 92.

Background: Section 71.02(2)(km)6, 1985 Wis. Stats., as amended by 1987 Wis. Act 92, provides that for taxable year 1979 or thereafter, the Wisconsin standard deduction for a taxpayer claimed as a dependent under s. 71.09(6p), 1985 Wis. Stats., shall not exceed the taxpayer's earned income, as defined under section 911(b) of the Internal Revenue Code as of December 31, 1976. Section 911(b) of the Internal Revenue Code as of December 31, 1976, defines earned income to include compensation for personal services such as wages, salaries, and professional fees included in gross income. Therefore, the taxable portion of any scholarship or fellowship grant that represents payment for teaching, research, or other services is earned income for Wisconsin standard deduction purposes.

The conference agreements of the Tax Reform Act of 1986 further provide that earned income for purposes of the federal standard deduction used by a student who is claimed as a dependent, includes any amount of a noncompensatory scholarship or fellowship grant that is includable in gross income. This provision, however, is not included in the Internal Revenue Code.

Question: Is taxable noncompensatory scholarship and fellowship income earned income for purposes of the Wisconsin standard deduction used by a student who is claimed as a dependent?

Answer: No. The basic concept of "earned income" is that it is compensation for personal services. By its very name, noncompensatory scholarship or fellowship income is not compensation for services performed. The fact that the conference agreement of the Tax Reform Act of 1986 provides a special provision for scholarship or fellowship income received by a student who is claimed as a dependent has no effect on the definition of earned income that Wisconsin uses for standard deduction purposes. Therefore, taxable noncompensatory scholarship or fellowship income is not earned income for purposes of the Wisconsin standard deduction used by a student who is claimed as a dependent. Only the taxable portion of any scholarship or fellowship grant that represents payment for teaching, research, or other services is earned income for Wisconsin standard deduction purposes.

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7. Taxability of Interest from Veterans Administration Life Insurance Policy

Statutes: Section 71.05(1)(b)1, 1985 Wis. Stats., as amended by 1987 Wis. Acts 27 and 399.

Question: Is interest received from the Veterans Administration on a life insurance policy taxable by Wisconsin?

Answer: Yes. The interest from a veteran's life insurance policy does not qualify for exemption under 31 U.S.C. §3124, which provides that stocks and obligations of the United States Govern-

ment are exempt from taxation by a state, as life insurance policies are not of the same nature as treasury bills and other items exempted by 31 U.S.C. §3124. Therefore, no subtraction modification is allowed under s. 71.05(1)(b)1, 1985 Wis. Stats., as amended by 1987 Wis. Acts 27 and 399, for interest received from a life insurance policy issued by the Veterans Administration.

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INDIVIDUAL AND CORPORATION FRANCHISE OR INCOME TAXES

1. Statute of Limitations for Adjustments Resulting from Internal Revenue Service Adjustments and Amended Federal Returns

Statutes: Section 71.11(21)(g)2 and (21m), 1985 Wis. Stats., and 71.11(21)(g)2, 1985 Wis. Stats., as amended by 1987 Wis. Act 27

Wis.Adm.Code: Section Tax 2.105, July 1987 Register

Background: Section 71.11(21m), 1985 Wis. Stats., provides that if the amount of taxable income for any year of any taxpayer as reported to the Internal Revenue Service is changed or corrected by the Internal Revenue Service or other officer of the United States, the taxpayer must report such changes or corrected income to the department within 90 days after its final determination and shall concede the accuracy of such determination or state how the determination is erroneous. Such changes or corrections need not be reported unless they affect the amount of Wisconsin net income reportable or franchise or income tax payable. Any taxpayer filing an amended return with the Internal Revenue Service, or with another state if there has been allowed a credit against Wisconsin taxes for taxes paid to that state, shall file, within 90 days of such filing date, an amended federal or other state return with the department if any information contained on the amended return affects the amount of Wisconsin income reportable or franchise or income tax payable.

Section 71.11(21)(g)2, 1985 Wis. Stats., as amended by 1987 Wis. Act 27, provides that if a taxpayer reports such adjustments or amended returns to the department within the required 90 days, the department may make an assessment or refund within 90 days of the date on which the department receives a report from the taxpayer under s. 71.11(21m), 1985 Wis. Stats., or within such other period specified in a written agreement entered into by the taxpayer and the department prior to the expiration of 90 days. If the taxpayer does not report to the department as required under s. 71.11(21m), 1985 Wis. Stats., the department may make an assessment against the taxpayer or refund to the taxpayer within 4 years after discovery by the department.

Note: Prior to being amended by 1987 Wisconsin Act 27, s. 71.11(21)(g)2, 1985 Wis. Stats., provided that if the taxpayer did not report to the department as required under s. 71.11(21m), 1985 Wis. Stats., the department could make an assessment against the taxpayer, after discovery by the department of the requirement of such reports within 10 years after the date on which the affected return was filed or within 2 years after the date when the federal determination of tax became final, whichever is later.

Question: What is the effective date of the change made by 1987 Wisconsin Act 27 to s. 71.11(21)(g)2, 1985 Wis. Stats.?

Answer: The change to s. 71.11(21)(g)2, 1985 Wis. Stats., by 1987 Wisconsin Act 27, which allows the department to make an assessment against or refund to a taxpayer within 4 years after discovery by the department if the taxpayer did not comply with the reporting requirement of s. 71.11(21m), 1985 Wis. Stats., is effective for the 1987 tax year and thereafter (that is, taxable years which end after June 30, 1986). This means that the 4 year time period in s. 71.11(21)(g)2, 1985 Wis. Stats., as amended by 1987 Wis. Act 27, is effective for amended returns or Internal Revenue Service adjustments which affect a 1987 or later tax year.

Section 71.11(21)(g)2, 1985 Wis. Stats., which allows the department to make an assessment against the taxpayer within 10 years after the date on which the affected return was filed or within 2 years after the date when the federal determination of tax becomes final, whichever is later, if the taxpayer did not comply with the reporting requirement of s. 71.11(21m), 1985 Wis. Stats., is still effective for amended returns or Internal Revenue Service adjustments which affect a 1986 and prior tax year.

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CORPORATION FRANCHISE OR INCOME TAXES

1. Applicability of Federal Regulations, Rules, and Court Cases to Wisconsin Corporate Franchise or Income Tax Law

Statutes: Section 71.02(1)(bg), Wis. Stats., as created by 1987 Wis. Act 27

Note: This Tax Release applies only with respect to taxable year 1987 and thereafter.

Background: Beginning with the 1987 taxable year, Wisconsin corporate franchise and income tax law uses the federal Internal Revenue Code in the determination of Wisconsin net income. For the 1987 taxable year, Wisconsin follows, with certain exceptions, the Internal Revenue Code as amended to December 31, 1986, as it applies to the 1987 taxable year.

Question: Will federal regulations, rules, and court cases apply when determining the proper treatment of an item of income,

expense, etc., for Wisconsin corporate franchise or income tax purposes?

Answer: Yes. The department will apply federal regulations, rules, and court cases that apply to the Internal Revenue Code as defined in the Wisconsin Statutes. Thus, if a deduction is allowable for federal purposes, it generally would be allowable for Wisconsin tax purposes, unless Wisconsin has not adopted that particular section of the Internal Revenue Code.

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2. Federal Transitional Rules for Depreciation

Statutes: Section 71.02(1)(bg)27, Wis. Stats., as created by 1987 Wis. Act 27 and ss. 3047 and 3203(47)(za), 1987 Wisconsin Act 27

Background: As part of the Tax Reform Act of 1986 (P.L. 99-514), the federal Accelerated Cost Recovery System (ACRS) was replaced with the Modified Accelerated Cost Recovery System (MACRS). MACRS is generally effective for assets first placed in service on or after January 1, 1987. However, sections 203 and 204 of the Tax Reform Act of 1986 provide transitional rules which allow ACRS to be utilized for certain property first placed in service on or after January 1, 1987.

For property first placed in service on or after January 1, 1987, Wisconsin allows the deduction for depreciation to be determined under the Internal Revenue Code (IRC) as amended to December 31, 1986, or the IRC in effect for Wisconsin purposes for the taxable year for which the return is filed. Therefore, for Wisconsin purposes, MACRS is available for all assets (regardless of location) first placed in service on or after January 1, 1987 (s. 71.02(1)(bg)27, Wis. Stats., as created by 1987 Wis. Act 27 and section 3203(47)(za), 1987 Wisconsin Act 27).

Facts and Question: On June 12, 1987, Corporation A, a calendar year taxpayer, placed property in service which was eligible to be depreciated under ACRS for federal purposes. Can Corporation A claim the ACRS deduction on its 1987 Wisconsin corporate franchise or income tax return?

Answer: No. For Wisconsin purposes, Corporation A must claim depreciation on the property placed in service on June 12, 1987, under MACRS. Since sections 203 and 204 of the Tax Reform Act of 1986 are not part of the IRC, the federal transitional rules provided in these sections do not apply for Wisconsin corporate franchise or income tax purposes.

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3. How Are "Dock Sales" Assigned to Various States for Purposes of the Sales Factor in the Apportionment Formula

Statute: Section 71.07(2)(c)2, 1985 Wis. Stats.

Wis.Adm.Code: Section Tax 2.39(5)(c), Wis. Adm. Code, January 1978 Register

Background: Generally, the apportionment formula to be used by corporate taxpayers engaged in business in Wisconsin and elsewhere contains, as one of its elements, a sales factor. Special apportionment formulas, lacking a sales factor as such, apply to financial institutions, air and motor carriers, and pipeline companies. The sales factor is a fraction, the numerator of which is the taxpayer's total sales in Wisconsin and the denominator of which is the taxpayer's total sales everywhere.

Sales of tangible personal property are in Wisconsin if the property is delivered or shipped to a purchaser in Wisconsin. Similarly, if products are delivered or shipped to a purchaser in another state, the sale is assigned to that other state, assuming that the taxpayer, besides being subject to Wisconsin franchise tax, was also within the taxing jurisdiction of the other state. This test for assigning sales of tangible personal property to one state or another is commonly called the "destination test." It is contained in both s. 71.07(2)(c)2, 1985 Wis. Stats., and Section 16 of the Uniform Division of Income for Tax Purposes Act (UDITPA). Such provisions also provide that the f.o.b. point or other conditions of the sale do not affect the assignment of the sale to one state or the other under the destination test.

Another recognized principle in the administration of formula apportionment is that if the purchaser directs the taxpayer to deliver or ship the tangible personal property to a designated recipient, then the sale shall be assigned to the state of the recipient. See section Tax 2.39(5)(c)4, Wis. Adm. Code.

In summary, under the destination test, the sale is assigned to the state where tangible personal property is shipped or delivered to a purchaser or, if it is not shipped or delivered to the purchaser, then to the purchaser's designee, regardless of the conditions of the sale.

This tax release relates to the application of these general principles to "dock sales." "Dock sales" are those sales where a purchaser uses its owned or rented vehicles or a common carrier it has made arrangements with to take delivery of the product at the seller-taxpayer's shipping dock.

In *Pabst Brewing Co. v. Wisconsin Department of Revenue* (Ct. App. Dist. IV, 1986), 130 Wis. 2d 291, the taxpayer sold beer to an Illinois distributor who picked it up in its own truck at the taxpayer's Wisconsin shipping dock and hauled it to Illinois. The Court held that the sales were not Wisconsin sales, since the location of the purchaser, rather than the location of the pickup of the product, controlled the determination of where the sale was as-

signed for purposes of the sales factor. The Court noted that if the sales were assigned to Wisconsin, the method of delivery, a condition of the sale, would be the determinative, which is contrary to statute.

The department will apply the destination test to dock sales in the same manner it is applied to other sales. If a taxpayer makes dock sales to a purchaser that has a Wisconsin location to which it returns with the product, the sale will be assigned to Wisconsin. If a taxpayer makes dock sales to a purchaser that returns with the product to its out-of-state location, the sale will be assigned to the state of the purchaser's location. If the purchaser, after picking up the goods at the dock, delivers them to another recipient, then the recipient's business location is substituted for the purchaser's as the state to which the sale is assigned and that state becomes the destination state. Accordingly, whether, in the dock sales situation, a purchaser delivers the product to its customer or, in the more usual situation, the purchaser directs that the taxpayer ship it to the customer by common carrier, the state where the customer receives delivery is the destination state to which the sale is assigned for purposes of the seller-taxpayer's sales factor.

Dock sales will also be governed by the "throwback" rule. This rule is contained in the same statutory provisions cited previously. The rule is that a sale shall be assigned to Wisconsin if the taxpayer ships the product from Wisconsin to a purchaser or designated recipient in a state without jurisdiction to impose an income or franchise tax on the taxpayer. The throwback rule is an exception to the destination test. Therefore, if a purchaser delivers goods it picked up at a Wisconsin taxpayer's dock to an out-of-state customer in a state that cannot tax the taxpayer, the dock sale is a Wisconsin sale under the throwback rule. The throwback rule applies equally to a taxpayer's sales shipped to a purchaser or a purchaser's customer in a nontaxing state and to dock sales delivered by the purchaser itself in a nontaxing state. The reason is that dock sales and other sales differ only with respect to how delivery occurs, which is a condition of the sale that under the statute is to be disregarded in assigning the sale to the destination state. The throwback rule, as it appears in s. 71.07(2)(c)2, 1985 Wis. Stats., contains broad language of general applicability and applies to all cases where the destination state, as determined under the destination test, is a nontaxing state.

Facts and Question 1: The taxpayer is a Wisconsin brewer that sells beer to an Illinois purchaser to be picked up at the brewer's shipping dock in Wisconsin. The purchaser is a beer distributor which used its own vehicle to pick up the beer and haul it back to Illinois. The taxpayer is subject to tax by the State of Illinois. Are these dock sales assigned to Wisconsin in the taxpayer's sales factor in its apportionment formula for Wisconsin tax purposes?

Answer 1: No. The sales are assigned to Illinois, since the purchaser's location is in Illinois and the product is shipped to Illinois. Therefore, the taxpayer, for Wisconsin franchise tax purposes, will not include the amount of this dock sale in the numerator of its sales factor, but will include it in the denominator of the sales factor.

Facts and Question 2: The taxpayer is a Minnesota brewer that sells beer to a Wisconsin purchaser to be picked up at the brewer's shipping dock in Minnesota. The purchaser is a beer distributor which used its own vehicle to pick up the beer and haul it back to Wisconsin. The taxpayer is subject to the tax by the State of Wisconsin. Are these dock sales assigned to Wisconsin in the taxpayer's sales factor in its apportionment formula for Wisconsin tax purposes?

Answer 2: Yes. Since the purchaser's location is in Wisconsin and the product is shipped to Wisconsin, the dock sales are assigned to Wisconsin. Therefore, the taxpayer, for Wisconsin franchise tax purposes, will include the amount of this dock sale in both the numerator and the denominator of the sales factor.

Facts and Question 3: The taxpayer is a Wisconsin manufacturer that sells plumbing ware to an Illinois wholesaler and retailer to be picked up at the manufacturer's shipping dock in Wisconsin. The purchaser has its corporate headquarters in Illinois and a number of retail stores throughout the Midwest. The purchaser uses its own vehicle to pick up the plumbing ware and hauls it to the purchaser's retail store in Iowa. The taxpayer is subject to tax by the State of Iowa. Are these dock sales assigned to Wisconsin in the taxpayer's sales factor in its apportionment formula for Wisconsin tax purposes?

Answer 3: No. The sales are assigned to Iowa, since one of the purchaser's business locations is in Iowa and the product is shipped to Iowa. If the taxpayer was not subject to tax by the State of Iowa, the sales would be thrown back to Wisconsin. Therefore, under the facts set forth, the taxpayer, for Wisconsin franchise tax purposes, will not include the amount of this dock sale in the numerator of the sales factor, but will include it in the denominator of the sales factor. If Iowa lacked jurisdiction to tax, this dock sale would be included in both the numerator and the denominator of the sales factor.

Facts and Question 4: The taxpayer is a Wisconsin manufacturer that sells plumbing ware to an Illinois wholesaler and retailer to be picked up at the manufacturer's shipping dock in Wisconsin. The purchaser has its corporate headquarters in Illinois. The purchaser uses its own vehicle to pick up plumbing ware and haul it to the job site of the purchaser's customer. The customer is a plumbing contractor that is working on a new motel being constructed in Madison, Wisconsin. Are these dock sales assigned to Wisconsin in the taxpayer's sales factor in its apportionment formula for Wisconsin tax purposes?

Answer 4: Yes. Since the purchaser's customer's location is in Wisconsin and the product is shipped to Wisconsin, the dock sales are assigned to Wisconsin. The delivery to the plumbing contractor was at the designation of the purchaser and that is where the product was delivered. Therefore, the taxpayer, for Wisconsin franchise tax purposes, will include the amount of this dock sale in both the numerator and the denominator of the sales factor.

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4. Return Requirements

Statutes: Section 71.10(1), 1985 Wis. Stats.

Background: Corporations chartered by the State of Wisconsin (domestic corporations) are required to file Wisconsin corporate franchise or income tax returns unless they are specifically exempt. Corporations which are not chartered by the State of Wisconsin (foreign corporations) are required to procure a Certificate of Authority from the Wisconsin Secretary of State if they wish to transact business in Wisconsin. Every foreign corporation licensed to do business in Wisconsin must file a return whether or not business was transacted in Wisconsin. Also, any unlicensed foreign corporation which does business in Wisconsin must file a return.

Facts and Question: Is a corporate entity that filed Articles of Incorporation with the Wisconsin Secretary of State during 1987 required to file a 1987 Wisconsin corporate franchise or income tax return if no capital was transferred for the stock and the corporate entity was inactive?

Answer: Yes. Since the corporation is organized under the laws of Wisconsin, a Wisconsin corporate franchise or income return is required to be filed for 1987. However, since the corporation was inactive for all of 1987, a declaration of inactivity (Form 4H) may be filed in lieu of a regular corporate franchise or income tax return.

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5. Withdrawal of Election Not to Be a Tax-Option (S) Corporation for Wisconsin

Statutes Section 71.042(4), Wis. Stats. as created by 1987 Wis. Act 27 and amended by 1987 Wis. Act 92

Background: Beginning with the 1987 taxable year, a corporation that is an S corporation for federal income tax purposes may elect not to be a tax-option (S) corporation for Wisconsin corporate franchise or income purposes. This "opt-out" election requires the consent of persons who hold more than 50% of the shares of the tax-option (S) corporation on the day on which the "opt-out" election is made.

The election is made by filing a Wisconsin Form 5E, "Election by an S Corporation Not to Be Treated as a Tax-Option Corporation," on or before the due date or extended due date of the corporation's Wisconsin franchise or income tax return for the first year affected by the election. Once the election is completed, the corporation or its successor may not claim Wisconsin tax-option status for the next 4 taxable years after the taxable year to which the "opt-out" election first applies. Corporations which make the "opt-out" election are treated as regular (C) corporations for Wisconsin and must file Wisconsin Form 4 or 5 rather than Form 5S.

Facts and Question: A properly completed Form 5E was filed with the department on February 1, 1988, for the 1987 taxable year of Corporation X, a calendar year S corporation. Can the "opt-out" election be withdrawn prior to the date the Wisconsin corporate franchise or income tax return is filed?

Answer: Yes. An "opt-out" election is not completed until the filing of the Wisconsin corporate franchise or income tax return of the first taxable year affected by the "opt-out" election. To withdraw the election, a letter should be sent to the department requesting the withdrawal. This letter must contain the signatures of shareholders that hold more than 50% of the shares of the corporation. Once a Wisconsin corporate franchise or income tax return has been filed in accordance with the "opt-out" election, that election is completed and remains effective for at least the next 4 taxable years of the corporation or its successors.

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6. Wisconsin Compensation for Purposes of the Payroll Factor

Statutes: Section 71.07(2)(b), 1985 Wis. Stats., as repealed and recreated by 1987 Wis. Act 27

Wis. Adm. Code: Section Tax 2.39(4), January 1978 Register

Note: The references to s. 71.07(2)(b), Wis. Stats., in the following tax release are to that section as repealed and recreated by 1987 Wis. Act 27.

Background: The payroll factor, one of the factors in the standard three-factor apportionment formula used by most unitary, multistate corporations in arriving at Wisconsin net income, is the ratio of compensation paid in Wisconsin during the year to total company compensation paid during the year. The payroll factor is also utilized by certain types of businesses which apportion their income to Wisconsin on the basis of an apportionment formula other than the standard three-factor apportionment formula. These include interstate pipeline companies, interstate financial organizations, and interstate public utilities.

Compensation includes wages, salaries, commissions, and any other form of remuneration paid to employes for personal services. Compensation also includes the value of board, rent, housing, lodging, and other benefits or services furnished to employes by the taxpayer in return for personal services, provided that such amounts constitute income to the recipient under the federal Internal Revenue Code. Additionally, compensation includes any deductible management or service fees paid to a related corporation as consideration for the performance of personal services. Payments made to an independent contractor or any other person not properly classifiable as an employe are excluded.

Section 71.07(2)(b)2, Wis. Stats., provides that compensation is paid in Wisconsin (that is, it is included in the numerator of the payroll factor) if:

a. The individual's service is performed entirely in Wisconsin; or

b. The individual's service is performed in and outside Wisconsin, but the service performed outside Wisconsin is incidental to the individual's service in Wisconsin; or

c. A portion of the service is performed in Wisconsin and the base of operations of the individual is in Wisconsin; or

d. A portion of the service is performed in Wisconsin and, if there is no base of operations, the place from which the individual's service is directed or controlled is in Wisconsin; or

e. A portion of the service is performed in Wisconsin and neither the base of operations of the individual nor the place from which the service is directed or controlled is in any state in which some part of the service is performed, but the individual's residence is in Wisconsin; or

f. The individual is neither a resident of nor performs services in Wisconsin but is directed or controlled from an office in Wisconsin and returns to Wisconsin periodically for business purposes and the state in which the individual resides does not have jurisdiction to impose income or franchise taxes on the employer.

An individual is considered to be performing a service in Wisconsin during the year if that individual spends any portion of at least 5 days during the corporation's taxable year in Wisconsin performing services. Because of the statutory requirements, the compensation of any one employe cannot be split between two or more states during the year, unless the employe is transferred or changes positions during the year. Management fees can be allocated between states; the allocation is based on where the service is performed.

Facts: Corporation A has its headquarters, a sales office, and a manufacturing plant located in Wisconsin. Corporation A also has a sales office in California and a manufacturing plant and sales office in Indiana. In addition, various employes of the corporation work out of their homes, which are located throughout the United States.

Question 1: If an Illinois resident works at the manufacturing plant located in Wisconsin, is this employe's compensation included in the numerator of the payroll factor as Wisconsin compensation?

Answer 1: Yes. Since the employe's service is performed entirely in Wisconsin, the compensation is included in the numerator of the payroll factor as Wisconsin compensation (s. 71.07(2)(b)2.a, Wis. Stats.).

Question 2: The manager of the Wisconsin manufacturing plant spent 2 weeks during the tax year in Indiana training the new plant manager of the Indiana plant. Does this affect the assignment of the Wisconsin plant manager's compensation to Wisconsin?

Answer 2: No. The Wisconsin plant manager's compensation is included in the numerator of the payroll factor as Wisconsin compensation. The service performed in Indiana is incidental to the service performed in Wisconsin (s. 71.07(2)(b)2.b, Wis. Stats.). In addition, the employe's compensation is assignable only to one state. Therefore, the compensation is not split between Wisconsin and Indiana.

Question 3: A salesperson, who is based in the Wisconsin sales office, solicits sales in Wisconsin and Minnesota. Is the salesperson's compensation included in the numerator of the payroll factor as Wisconsin compensation?

Answer 3: Yes. The salesperson's compensation is included in the numerator of the payroll factor as Wisconsin compensation since a portion of the service is performed in Wisconsin and the base of operations of the salesperson is in Wisconsin (s. 71.07(2)(b)2.c, Wis. Stats.).

Question 4: A salesperson, who works out of his home in Iowa, solicits sales in Iowa and Nebraska. Corporation A doesn't have nexus in either Iowa or Nebraska. The salesperson is directed from the Wisconsin sales office and spends 10 working days a year in that office for meetings and training. To which state is this employe's compensation assigned?

Answer 4: The employe's compensation is assigned to Wisconsin (that is, it is included in the numerator of the payroll factor) since his service is directed or controlled from Wisconsin and he spent at least 5 days in Wisconsin during the year for business purposes (s. 71.07(2)(b)2.d, Wis. Stats.).

Question 5: The facts are the same as in Question 4 except that Corporation A has nexus (that is, the activities of the corporation in the state are sufficient to allow the state to impose a franchise or income tax on the corporation) in both Iowa and Nebraska due to the employe's activities in these states exceeding sales solicitation. Would the employe's compensation still be included in the numerator of the payroll factor?

Answer 5: No. Since the employe's residence is in a state that has jurisdiction to impose income or franchise taxes on Corporation A, the employe's compensation is not included in the numerator of the Wisconsin payroll factor (s. 71.07(2)(b)2.f, Wis. Stats.).

Question 6: A salesperson, residing in Wisconsin, solicits sales in Wisconsin and Michigan. The salesperson is directed from the Indiana sales office, but performs no services in Indiana. To which state is this employe's compensation assigned?

Answer 6: Since the employe resides in Wisconsin and performs no service in the state from which the service is controlled or

directed, the employe's compensation is assigned to Wisconsin (that is, it is included in the numerator of the payroll factor) (s. 71.07(2)(b)2.e, Wis. Stats.).

Question 7: A salesperson, who resides in Nevada, solicits sales in Nevada and is directed from the California sales office. Corporation A does not have nexus in Nevada. If the salesperson spent 2 weeks a year in Wisconsin for meetings and training, would her compensation be included in the numerator of the payroll factor as Wisconsin compensation?

Answer 7: No. Since the services of the employe are directed or controlled from California and the employe is not a resident of Wisconsin, the compensation is not included in the numerator of the payroll factor as Wisconsin compensation (s.71.07(2)(b)2.d and e, Wis. Stats.).

Question 8: If a Wisconsin resident works at the manufacturing plant located in Indiana, is that employe's compensation included in the numerator of the payroll factor as Wisconsin compensation?

Answer 8: No. Since no part of the employe's service is performed in Wisconsin, the compensation is not included in the numerator of the payroll factor as Wisconsin compensation.

Question 9: Corporation B owns 100% of the stock of Corporation A and is headquartered in Illinois. Employes of Corporation B perform all the accounting functions for Corporation A. For these services, Corporation A paid Corporation B $30,000 in management fees during the year. The employes of Corporation B that performed the accounting services for Corporation A spent 20% of their time in Wisconsin while performing these services. What amount, if any, of these management fees is included in the numerator of the payroll factor as Wisconsin compensation?

Answer 9: Since the employes of Corporation B spent 20% of their time in Wisconsin performing services for Corporation A, 20% of the $30,000, or $6,000, is includable in the numerator of the payroll factor as Wisconsin compensation. The entire $30,000 of management fees is includable as total company compensation in the payroll factor denominator.

It should be noted that Corporation B cannot include in its computation of a Wisconsin payroll factor the compensation paid to its employes which pertain to the performance of services for Corporation A (section Tax 2.39(4), Wis. Adm. Code).

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FARMLAND PRESERVATION CREDIT

1. Noncompliance With Soil and Water Conservation Follows Claimant

Statutes: Section 71.09(11)(o), 1985 Wis. Stats.

Background: Section 71.09(11)(o), 1985 Wis. Stats., provides that a farmland preservation credit may not be allowed if a notice of noncompliance with an applicable soil and water conservation plan or standard is in effect with respect to the claimant at the time the claim is filed.

Facts and Question: A farmland preservation claimant may have farmland where a portion of the land is in noncompliance with a soil and water conservation standard, and a portion of the land is in compliance with the conservation standard. For example, this may occur because the farmland is located in two counties and the land meets the conservation standard in one county, but not the other. If a farmer who is notified that he or she is in noncompliance with a soil and water conservation plan or standard claims farmland preservation credit on farmland which is not covered by the notice, may the credit be allowed?

Answer: No. The farmland preservation credit may not be allowed since a notice of noncompliance with a soil and water conservation plan or standard is in effect with respect to the claimant.

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SALES/USE TAXES

1. Bicycle Tours

Statutes: Sections 77.52(2)(a)2, 1985 Wis. Stats.

Wis. Adm. Code: Section Tax 11.65(1), July 1987 Register

Facts and Question: Bicycle riders taking a tour must register in advance through the mail. Participants drive to the starting point of each tour. The operator of the tour advertises that the tour fee provides lodging, meals, snacks, and a welcome wine and cheese party. A full breakfast and dinner are provided each day of the tour and lunch is at the participant's own expense. The operator is prepared to assist with flat tires and minor bike problems.

In addition to lodging and meals, all tours include two qualified tour leaders, van support, trail and park admissions, boat and ferry fares, and a t-shirt. Tour prices do not include admissions to plays, concerts, or museums. Information on obtaining tickets for cultural events is included in each confirmation packet sent to a participant.

Most participants provide their own bikes, but bikes may also be rented from the tour operator for $30 a weekend or $60 for a mid-

week tour. Helmets and handlebar bags may also be rented from the tour operator.

Are the gross receipts of the bicycle tour operator taxable recreational receipts?

Answer: No. The gross receipts of a bicycle tour operator are not subject to the sales tax under s. 77.52(2)(a)2, 1985 Wis. Stats. The tour operator is paid for arranging and coordinating the tour and providing other services to the riders. These are not taxable services.

NOTE: Since the gross receipts are not taxable, the tour operator must pay sales tax on its purchases of meals from restaurants, lodging from motels, and any other purchases of taxable items provided by the tour operator to tour registrants. The tour operator's rental receipts from bicycles, helmets, and handlebar bags are subject to the sales tax.

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2. Cardboard Used Under Manufacturing Machines

Statutes: Sections 77.54(2), 1985 Wis. Stats.

Wis. Adm. Code: Section Tax 11.41(3), July 1987 Register

Facts and Question: A company is engaged in the business of manufacturing and selling fiberglass boats. The tangible personal property at issue is cardboard which is placed on the floor of the company's factory to collect the fiberglass overspray which occurs in the course of manufacturing fiberglass boats. This overspray accumulates at the rate of one to two inches per week. The cardboard and overspray is disposed of when the accumulation reaches approximately two inches. New cardboard is then placed on the floor.

The cardboard is essential to the manufacturing operation. Without it, the overspray would bond to the floor and the accumulation would make the plant inoperable in a matter of a few months.

Is the purchase of this cardboard by the company exempt under s. 77.54(2), 1985 Wis. Stats.?

Answer: Yes. This cardboard is an essential part of the company's manufacturing operation and the exemption in s. 77.54(2), 1985 Wis. Stats., for items consumed or destroyed or losing their identity in the manufacture of tangible personal property applies to this cardboard.

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3. Purchases of Telephone Service and Equipment by a Cellular Radio Telephone Company

Statutes: Sections 77.51(13)(p) and (14)(m), 77.52(2)(a)4 and (13), and 77.54(24), 1985 Wis. Stats.

Wis. Adm. Code: Sections Tax 11.14 and 11.66, July 1987 Register

Background:

Purchases of Telephone Service - A Radio Common Carrier (RCC) purchases telecommunication service from a regulated telephone company. This RCC is in the business of providing two-way telecommunication services to its customers which is described as cellular-mobile communications. A cellular-mobile service usually provides a telecommunication connection between an automobile (or airplane) and the landline telephone system. RCC's are regulated by the Federal Communication Commission (FCC). The FCC has determined that RCC's are not subject to "access service" charges by telephone companies even though they receive services from the local telephone company which are similar.

The regulated landline telephone company charges the cellular-mobile service for the use of trunk lines which consist of 100 individual telephone numbers used to provide the cellular-mobile service. These trunk lines feed into the cellular-mobile company's terminal. The cellular-mobile company's equipment is able to "seize" the phone number being called and direct it to the appropriate cell site, or that which is closest to the mobile phone being called. These access trunks carry all network services, including short and long distance calling (within cell site range). The cellular-mobile service has numerous cell sites and phone calls can be carried anywhere within the cell site area.

Equipment Used by RCC - The cellular telephone system uses radio, control, and switching equipment to connect mobile telephone users (in motor vehicles) to one another and to the landline telephone network. The three major components of each system are (1) mobile end-user equipment in the motor vehicle, (2) the central switching office connected to the landline telephone system, and (3) cell-site (base station) equipment located at various locations throughout a several county area.

The typical cellular radio telephone company has one main office staffed by employes. This office is the point of interconnection with the landline telephone system and it contains the company's Mobile Telephone Switching Office (MTSO). The MTSO is a computer which is the primary control point for the transmission of messages within the local area covered by cellular service. Every call in the system is switched and transmitted through the MTSO. It acts as a central processing unit used to record data concerning every call made within the system. The subscriber must be identified and the duration of each call recorded in order to bill each customer. Data is also collected and evaluated regarding traffic, usage, and peaks for each billing period in the MTSO.

A cell-site is comprised of a small structure housing radio transmission equipment and a radio tower and antenna.

The National Association of Regulator Utility Commissioners developed a uniform system of accounts for cellular communication licensees in 1985 and the Wisconsin Public Service Commission has adopted this system of accounts. Using this system of accounts, a cellular company's computer (Electronic Mobile Exchange 250; EMX-250) and other control center equipment is classified in Acct. 307. Equipment at the cell-sites is classified in Acct. 310.

Questions:

A. Can the cellular-radio telecommunication carrier purchase its telephone service without tax for resale?

B. Is cell-site equipment, user equipment in motor vehicles, and mobile telephone switching office (MTSO) equipment of a cellular-radio telephone company exempt under s. 77.54(24), 1985 Wis. Stats., as "central office equipment?"

Answers:

A. The cellular-radio telecommunication carrier may purchase without tax for resale the telephone trunk and access line telephone service it purchases from the telephone company and which are incorporated into the cellular-mobile telecommunication service the RCC provides its customers.

B. The equipment classified in Acct. 307 located at the company's mobile telephone switching office and used in transmitting traffic and operating signals is exempt under s. 77.54(24), 1985 Wis. Stats. Equipment in Acct. 307 not used in transmitting traffic and operating signals is taxable. Equipment located at the cell-sites and user equipment in motor vehicles are not exempt under s. 77.54(24), 1985 Wis. Stats.

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4. Tax Payable on Items Given Away by Manufacturer

Statutes: Sections 77.51(19), 77.53(1), and 77.57, 1985 Wis. Stats.

Wis. Adm. Code: Section Tax 11.28(2)(intro.), July 1987 Register.

Facts and Question: A manufacturer of sporting goods has its main office and manufacturing plant in Wisconsin. It gives away some of its manufactured items to employes as gifts and to customers as samples. This manufacturer purchases its raw materials used in production without tax under s. 77.54(2), Wis. Stats., and produces sporting goods from these raw materials. It then takes manufactured goods from finished goods inventory in Wisconsin to give away to persons in Wisconsin and out-of-state as described below.

1. It sends sporting goods to a Michigan retailer via UPS.

2. The manufacturer's salesperson takes sporting goods along when he or she flies to New York to call on a potential customer. The goods are given away in New York to the potential customer.

3. The manufacturer's trade show staff take sporting goods with them to Atlanta where they are given away at a trade show.

4. The manufacturer sends sporting goods to a retailer located in Wisconsin.

5. A customer from Illinois comes to the Wisconsin plant and tours the plant. At that time the customer is given sporting goods as a gift or sample.

6. A gift is given to each employe during the Christmas season.

In which of these six factual situations described above, where sporting goods are given away, is a Wisconsin use tax payable on the transaction and what is the measure of the tax?

Answer: The Wisconsin use tax is payable under s. 77.53(1), 1985 Wis. Stats., measured by the manufacturer's cost of materials in the sporting goods given away. In examples 4, 5, and 6, the Wisconsin use tax is payable because in each of those examples the items were given away in this state. In the factual situations described in examples 1, 2, and 3, the items were given away out-of-state and in that case the Wisconsin use tax does not apply.

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5. Telephone Company's Billing and Collection Services

Statutes: Section 77.52(2)(a)4, 1985 Wis. Stats.

Wis. Adm. Code: Section Tax 11.66(1)(b), July 1987 Register.

Facts and Question: In the newly restructured telephone industry, the local landline telephone company, which provides the basic local exchange telephone service, may provide billing and collection services for interexchange long-distance telecommunication carriers. This interexchange long-distance service is primarily interstate service but also involves some intrastate service.

Section 77.52(2)(a)4, 1985 Wis. Stats., imposes the sales tax on the gross receipts from "The sale of telephone services of whatever nature including, in addition to services connected with voice communication, any services connected with the transmission of

sound, vision, information, data or material other than by voice communication, and connection, move and change charges . . ."

Are the gross receipts received by the local telephone company for providing billing and collection services to an interexchange telecommunication carrier subject to the sales tax?

Answer: Yes. The gross receipt from billing and collection services are subject to the sales tax because they are included in the broad definition of taxable telephone services found in s. 77.52(2)(a)4, 1985 Wis. Stats.

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6. Tree Trimming on a Utility's Right-of-Way

Statutes: Section 77.52(2)(a)20, 1985 Wis. Stats.

Wis. Adm. Code: Section Tax 11.86(5), September 1984 Register.

Note: This Tax Release supersedes the Tax Release titled "Landscaping or Lawn Maintenance on a Utility's Right-of-Way" which appeared in WTB 32, page 9.

Facts and Question: Tree trimming services are performed on a utility's right-of-way. Rights-of-way are easements over land owned by others and are used by utilities for their transmission and distribution lines. Before the right-of-way can be used by the utility, it must be cleared of trees to provide access and safety in the construction of power lines. Trees on rights-of-way are trimmed periodically to prevent interference with overhead distribution lines or as a result of storm damage where limbs have fallen on power lines.

Are the gross receipts from tree trimming on a utility's right-of-way subject to the sales tax under s. 77.52(2)(a)20, 1985 Wis. Stats.?

Answer: No. The gross receipts from tree trimming on the right-of-way are not taxable services under s. 77.52(2)(a)20, 1985 Wis. Stats., pursuant to the decision of the Wisconsin Tax Appeals Commission in the *Capital City Tree Experts, Inc.* case of June 19, 1987, as modified by Stipulation and Order, dated September 21, 1987,

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7. U.S. Government Bankcard Charges

Statutes: Section 77.55(1), 1985 Wis. Stats.

Wis. Adm. Code: Section Tax 11.05(4), October 1987 Register

Facts and Question: An individual federal employe may use a numbered U.S. Government bankcard when traveling. The individual employe's name is embossed on the card and the card clearly states that it is a U.S. Government purchasing card which only can be used for official business purposes. The card indicates "U.S. Government Tax Exempt." Payment of all purchases will be made by the federal government. The U.S. Government Bankcard may **not** be used for:

A. Rental or lease of motor vehicles, when on official travel.

B. Rental or lease of land or buildings.

C. Purchase of airline, bus, boat, or train tickets.

D. Purchase of meals, drinks, or lodging.

E. Purchase of gasoline or oil for vehicles except: aircraft, vessels, and Department owned vehicles.

F. Repair of GSA leased vehicles.

G. Purchase of janitorial, yard, or maintenance services.

H. Purchase of telecommunications (telephone) equipment.

I. Purchase of clothing or footwear (except for emergency purposes identified as required for safety).

J. Purchase of non-expendable property as defined by the federal government Department/Agency.

K. Supplies, furniture, and equipment available from mandatory sources such as the General Services Administration (GSA) except in quantities required for immediate or emergency needs.

L. Cash advance through bank teller or automated teller machines, unless separately authorized.

Are the gross receipts from sales of tangible personal property or taxable services by Wisconsin retailers to federal employes using the U.S. Government Bankcard exempt sales to the federal government under s. 77.55(1), 1985 Wis. Stats.?

Answer: Yes. These sales qualify for the exemption under s. 77.55 (1), 1985 Wis. Stats., because they are considered sales to the federal government, provided the retailer makes out the billing or invoice in the name of the federal government agency and the retailer receives a purchase order or similar written document from that agency. The retailer should keep copies of its billing and the federal agency's purchase order as evidence of the exempt sale.

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COUNTY SALES/USE TAXES

1. County Tax: Exemption Certificate Given - Lumber Used in Construction Activities

Statutes: Sections 77.52(13) and 77.71(3), 1985 Wis. Stats.

Wis. Adm. Code: Section Tax 11.68(7) and (12), July 1987 Register.

Facts and Question: Purchaser A gives a resale certificate to Seller B for the purchase of lumber. Purchaser A obtains possession of the lumber in a taxable county. Purchaser A had validly issued the resale certificate to Seller B under the sales and use tax law because Purchaser A makes retail sales of lumber and uses lumber in real property construction activities. Purchaser A uses $100 of the lumber in construction activities in a taxable county.

A. Is this $100 subject to the use tax in the taxable county?

B. Would the answer to A. be different if the $100 of lumber, for which Purchaser A obtained possession in a taxable county, is later used in construction activities in a nontaxable county?

C. If Purchaser A validly issues a resale certificate to Seller B and obtains possession of the lumber in a **nontaxable** county, would the county tax apply if that lumber is used in construction activities in (a) a taxable county or (b) a nontaxable county?

Answer:

A. When Purchaser A uses $100 of the lumber in real property construction activities in a taxable county, the county tax of that county is imposed under s. 77.71(3), 1985 Wis. Stats.

B. If the same lumber is used in real property construction activities in a nontaxable county, the county tax does not apply to the use of this lumber.

C. When Purchaser A uses the lumber in construction activities in a taxable county, the county tax of that county is imposed under s. 77.71(3), 1985 Wis. Stats. If the same lumber is used in real property construction activities in a nontaxable county, the county tax is not imposed on the use of this lumber.

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2. County Tax: Location of Mobile Telephone Service

Statutes: Section 77.72(3), 1985 Wis. Stats.

Facts and Question: The situs of a service for county sales tax purposes is at the location where it is furnished to the customer, except that a communication service has a situs where the customer is billed for the service if the customer calls collect or pays by credit card. A customer using cellular radio or other mobile communication service may start using the communication service in a cell located in one county and continue to use the service as he or she travels into other cells which may be located in another county. Both counties have adopted the 1/2% county sales/use tax. If this is not a collect or credit card call, which county is entitled to the county sales tax on a telephone conversation that takes place in two counties?

Answer: The county entitled to the sales tax on the charge for the mobile communication service used in two counties is the county where the call originated.

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