WISCONSIN TAX BULLETIN

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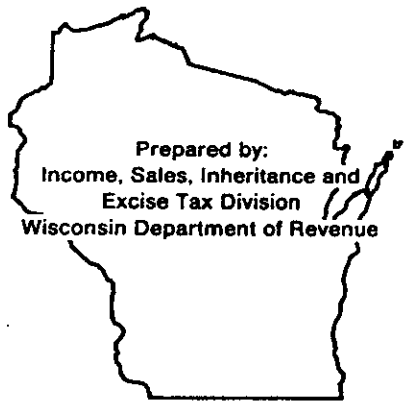

NEW TAX LAWS TO BE ADDRESSED IN SPECIAL ISSUE

The Governor's budget bill and other tax bills were still pending before the Wisconsin Legislature at the time this bulletin went to press. If any of these bills become law, a special issue of the *Wisconsin Tax Bulletin* will be published to provide information about the tax law changes.

SIX NEW COUNTIES ADOPT COUNTY SALES/USE TAX

On April 1, 1989, the 1/2% county sales and use tax begins in six new counties: Burnett, Columbia, Marquette, Portage, Richland, and Waupaca. The counties of Ashland, Barron, Buffalo, Door, Dunn, Iowa, Jackson, Langlade, Lincoln, Marathon, Oneida, Pierce, Polk, Rusk, Sawyer, St. Croix, Vilas, and Walworth had previously adopted the county tax. The Tax Report included with *Wisconsin Tax Bulletin* 59 (January 1989) explains how this new county tax applies to retailers and other persons.

On pages 18 and 19 of this bulletin is a copy of the March 1989 Tax Report which was sent in late March to all retailers who have a seller's permit.

IN THIS ISSUE

PAYMENT OF WISCONSIN TAXES BY CREDIT CARD SUSPENDED

In the *Wisconsin Tax Bulletin* 59 (January 1989), the department announced an experimental program utilizing the acceptance of credit cards for tax payments in southeastern Wisconsin. This pilot project began on November 1, 1988.

The initial results have been modest but encouraging. Since the inception of this program the department has become aware of technical difficulties with the contractual language between the department and vendor (Comdata Network). On January 20, 1989, the department ceased accepting credit card payments and has suspended this project.

Because this pilot program has shown potential merit, the department hopes to resolve the technical problems and resume this project at a later date. Further announcements will be made as more information becomes available.

EXTENSIONS OF TIME TO FILE FOR INDIVIDUALS

Wisconsin law provides that any extension of time granted by the Internal Revenue Service (IRS) for filing a federal return will also extend the time for filing the corresponding Wisconsin return provided a copy of the federal extension is attached to the Wisconsin return at the time it is filed. Taxpayers are allowed the same 10-day grace period to file a return for Wisconsin as for the IRS when a federal extension request is denied. Again, the denial must be attached to the Wisconsin return when filed in order to be recognized.

In lieu of the federal extension, a taxpayer may request from the Wisconsin Department of Revenue a 30-day extension of time to file a Wisconsin return. If a federal extension is requested, it is not necessary to request this separate Wisconsin extension. Neither is it necessary to submit a copy of the federal extension request to Wisconsin at the time the federal request is made.

Reminders

DO NOT submit copies of federal extension requests to the Department of Revenue.

DO NOT request a Wisconsin extension when a federal extension is requested.

Attach a copy of all approved extensions to the corresponding Wisconsin tax return at the time the Wisconsin return is filed.

Use Wisconsin estimated tax vouchers (Form 1-ES) to submit Wisconsin extension payments. Be sure the Form 1-ES is for the proper year.

1989 ESTIMATED TAX REQUIREMENTS FOR INDIVIDUALS, ESTATES, AND TRUSTS

Estimated income tax payments are tax deposits made during the year to prepay the income tax and minimum tax that will be due when an income tax return is filed. Every individual, married couple filing jointly, estate, or trust is required to pay 1989 Wisconsin estimated tax if they expect to owe $200 or more on their 1989 Wisconsin income tax return. Form 1-ES, "1989 Wisconsin Estimated Tax Voucher," is filed with each estimated tax payment.

For calendar year taxpayers, the first estimated tax payment is due on April 17, 1989. Installment payments are also due on June 15, 1989, September 15, 1989, and January 15, 1990. For fiscal year taxpayers, installment payments are due on the 15th day of the 4th, 6th, and 9th months of the fiscal year, and the 1st month of the following fiscal year.

Full-year residents, part-year residents, estates, and trusts are subject to the estimated tax requirements for 1989. However, an estate is not required to pay estimated tax during the first two years of its existence.

If an individual, married couple filing jointly, estate, or trust does not make the estimated tax payments when required, or underpays any installment, interest may be assessed.

FIELD AUDIT STAFF AUTOMATED

Department field auditors are replacing ledger paper and mechanical pencils with new lap top computers.

Over the past 2 years, 90 lap top computers have been assigned to the Audit Bureau for use on corporation franchise or income, sales/use, and individual income tax field audits. In addition, the Excise Tax Bureau has 6 lap tops for use by its field agents in audits of motor fuel and special fuel tax returns. Seven portable printers have also been obtained for use at businesses where a printer is not otherwise available for the auditor's use.

Auditors use the lap top computers to generate the bulk of their audit workpapers as well as the proposed and final field audit report. Each field auditor, as well as supervisory and technical support staff, have received in-depth, in-house PC training by the Computer Audit Specialist (CAS) Unit (experienced field auditors who have extensive PC training and background) which has enabled the auditors to become proficient on the PC in a short period of time.

Audit report and workpaper templates (using the Lotus 1-2-3 software package) have been developed in-house by the CAS Unit which enable auditors to merely fill in and enlarge pre-designed exhibits and schedules. The templates are set up to automatically and instantly bring forward numbers from subsidiary exhibits and schedules to the final exhibit and to compute the tax and interest. Libraries of standard audit adjustment explanations have also been developed. However, auditors have the option of preparing non-standard explanations to fit their particular situations.

The lap tops are a tremendous asset for the department. More uniform, consistent, and professional appearing audit reports and workpapers are generated in less time than in the "old days" of pencil and eraser. Data entered on the lap tops can be sorted, shifted, revised, or deleted quickly and efficiently, cutting down tremendously the "number crunching" required of auditors. Less time is spent at the taxpayer's place of business, the quality of the audit report has been improved, and auditors and taxpayers can discuss differences and instantly determine the tax effect of such. Printouts of exhibits, schedules, or even the entire preliminary audit report can be furnished to the taxpayer while the auditor is at the business location.

The department's long term investment in computer technology for its field auditors will result in a more efficient field audit program and better service to the public.

INFORMATION OR INQUIRIES?

Madison - Main Office
Area Code (608)

Beverage, Motor Fuel, Cigarette, Tobacco Products	266-6701
Corporation Franchise or Income	266-3645
Fiduciary, Inheritance, Gift	266-1231
Homestead Credit	266-8641
Individual Income	266-2486
Property Tax Deferral Loan	266-1983
Sales, Use, Withholding	266-2776
Audit of Returns: Corporation, Individual, Homestead, Sales	266-2772
Appeals	266- 0185
Refunds	266-8100
Delinquent Taxes	266-7879
Copies of Returns:	
Homestead, Individual	266-2890
All Others	266-0678
Forms Request:	
Taxpayers	266-1961
Practitioners	267-2025

District Offices

Appleton ..... (414) 832-2727
Eau Claire ..... (715) 836-2811
Milwaukee ..... (414) 227-4000

REFUND QUESTIONS

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

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

GIFT TAX REPORTS DUE APRIL 17

A Wisconsin gift tax is imposed upon all gifts by a donor who is a Wisconsin resident (regardless of the donee's residence) and gifts of Wisconsin real estate or tangible personal property located in Wisconsin (regardless of where the donor or donee resides).

1988 Wisconsin gift tax reports must be filed if the total value of taxable gifts given in 1988 by one donor (person giving the gift) to one donee (person receiving the gift) exceeds $10,000. Gift tax reports of the donee and donor for 1988 must be filed by April 17, 1989. A return does not have to be filed if the value of the gift is $10,000 or less.

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

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

The gift tax due is figured on Wisconsin Form 6. In determining the 1988 gift tax due, an annual exemption of $10,000 is allowed for all gifts made during a calendar year by one donor to one donee. Gifts to a spouse are completely exempt from Wisconsin gift tax. A lifetime personal exemption of $50,000 is allowed for gifts to lineal issue (children, grandchildren), lineal ancestors (parents, grandparents), the wife or widow of a son, the husband or widower of a daughter, an adopted or mutually acknowledged child, and a mutually acknowledged parent. There is no lifetime exemption allowed to other donees.

DO YOU HAVE SUGGESTIONS FOR 1989 TAX FORMS?

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

WISCONSIN TAX BULLETIN INCLUDES INDEX

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

For the convenience of its users, the WTB index includes page numbers for each issue number listed. The index can be found on pages 20 to 45 of this Bulletin.

DOOR COUNTY TAXPAYER FINED $1,100

Income Taxes

A Door County man has been ordered to pay $1,100 in fines for criminal violations of Wisconsin tax laws. Bruce C. Weightman, 12405 Gooseberry Lane, Ellison Bay, was sentenced after he pled no contest to two counts of failing to timely file state income tax returns in Door County Circuit Court, Sturgeon Bay. Weightman was charged with failing to timely file state income tax returns on gross income in excess of $29,000 for 1984 and $27,000 for 1985.

Circuit Judge John Koehn sentenced Weightman to 30 days in jail on the first count, stayed execution of the sentence, ordered to him to pay a fine of $100 plus costs and also ordered 80 hours community service to be completed within 6 months. Judge Koehn fined Weightman $1,000 on the second count.

Homestead Credit

Three women and two men, all Appleton area residents, have been charged in Calumet County with criminal violations of the Wisconsin homestead credit law. Marion E. Hoffman, 2729 South Greenview Street, Appleton, was charged with 2 counts of filing fraudulent homestead credit claims for 1983 and 1984 and 9 counts as a party to a crime in filing fraudulent homestead credit claims for Cheri L. Cross, 1234 East Sylvan, Appleton; Thomas L. Cross, 1234 East Sylvan, Appleton; and Roger A. Fahrenkrug, 2729 South Greenview Street, Appleton. She was also charged with filing fraudulent state income tax returns for 1984 and 1985.

Cheri L. Cross was charged with filing fraudulent homestead credit claims for 1982 and 1983 and Thomas L. Cross was charged with filing fraudulent homestead credit claims for 1983, 1984, and 1985. Roger A. Fahrenkrug was charged with filing fraudulent homestead credit claims

for 1982, 1983, 1984, and 1985. Cara S. Techlin, 2015 Ceil Lane, Little Chute, was charged with filing a fraudulent homestead credit claim for 1984.

Filing or assisting in the filing of a fraudulent homestead credit claim or filing a false state income tax return is a crime punishable by a $10,000 fine or imprisonment for 5 years or both. In addition, Wisconsin law provides substantial civil penalties for violations.

Sales/Use Taxes

A Burlington man has been ordered to pay a fine of $200 for criminal violation of Wisconsin's sales and use tax law. William T. Lee, 29516 - 31st Street, Burlington, Wisconsin was sentenced in Dane County Circuit Court, Branch 6, Madison, after he pled no contest to one count of filing a false Motor Vehicle Registration Application, Form MV-1. He was charged with reporting the purchase price of a vehicle he bought from a private party to be less than the actual purchase price to evade the state sales and use tax due.

Circuit Judge James C. Boll fined Lee $200 and ordered him to pay $70 court costs and penalty assessment. Lee must also make restitution of tax, penalty, and interest due the Wisconsin Department of Revenue in excess of $450.

Excise Taxes

Mike's Towne & Country, Inc., 520 East Northland Avenue, Appleton, was fined $500 on December 12, 1988, for placing an illegal liquor advertisement.

Good Co. of Wausau, Inc., a liquor retailer located at 110 North Richmond Street, Appleton was fined $250 in December 1988 for possessing liquor from an unauthorized source. In addition to the fine, the liquor was forfeited to the department's Alcohol & Tobacco Enforcement Section for disposal.

Michael T. Green, d/b/a "Airport Lounge," of Route 5, Black River Falls, was found guilty of selling liquor, beer, and cigarettes without a license on January 23, 1989. Green was ordered to pay $510 by Circuit Court Judge Robert Radcliffe.

NEW ISI&E DIVISION RULES AND RULE AMENDMENTS IN PROCESS

Listed below, under Parts A, B, and C, are proposed new administrative rules and amendments to existing rules that are currently in the rule adoption process. The rules are shown at their state in the process as of March 15, 1989. Part D lists new rules and amendments which were adopted in 1989, but not yet effective. Part E lists emergency rules. ("A" means amendment, "NR" means new rule, "R" means repealed and "R&R" means repealed and recreated.)

A. Rules at Legislative Council Rules Clearinghouse

2.41 Separate accounting method-A
2.46 Apportionment of business income of interstate air carriers-R&R
2.47 Apportionment of net business income of interstate motor carriers of property-A
2.49 Apportionment of net business incomes of interstate finance companies-R&R
3.03 Dividends received, deductibility of-R&R
3.08 Retirement and profit-sharing payments by corporations-A
3.10 Salesmen's and officers' commissions, travel and entertainment expense of corporation-R
3.12 Losses on account of wash sales by corporations-R&R
3.37 Depletion of timber by corporations-A
3.38 Depletion allowance to incorporated mines and mills producing or finishing ores of lead, zinc, copper or other metals except iron-A
3.47 Legal expenses and fines—corporations-R
3.54 Miscellaneous expenses not deductible—corporations-R&R
3.81 Offset of occupational taxes paid against normal franchise or income taxes-A
3.91 Petition for redetermination-A
3.92 Informal conference-A
3.93 Closing stipulations-A
3.94 Claims for refund-A
11.05 Government 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 suppliers-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
14.01 Administrative provisions-R&R
14.02 Qualification for credit-R&R
14.03 Household income-R&R
14.04 Property taxes accrued-R&R
14.05 Rent constituting property taxes accrued-R&R

B. Rules at Revisor of Statutes Office for Publication of Hearing Notice

1.001 Definition-A

2.14 Aggregate of personal exemptions-A
2.57 Annuity payments received by corporations-A
2.60 Dividends on stock sold "short" by corporations-A
2.61 Building and loan dividends on installment shares received by corporations -R
2.63 Dividends accrued on stock-A
2.70 Gain or loss on capital assets of corporations; basis of determining-A
2.956 Historic structure and rehabilitation of nondepreciable historic property credits-NR
3.01 Rents paid by corporations-A
3.05 Profit-sharing distributions by corporations-A
3.07 Bonuses and retroactive wage adjustments paid by corporation-A
3.09 Exempt compensation of military personnel-A
3.095 Income tax status of interest and dividends from municipal, state and federal obligations received by individuals and fiduciaries-A
3.098 Railroad retirement supplemental annuities-A
3.14 Losses from bad debts by corporations-A
3.17 Corporation losses, miscellaneous-A
3.35 Depletion, basis for allowance to corporations-A
3.36 Depletion of timber by corporations-A
3.43 Amortization of trademark or trade name expenditures-A
3.48 Research or experimental expenditures-A
3.52 Automobile expenses-corporations-R&R
3.82 Evasion of tax through affiliated interests-A
3.83 Domestic international sales corporations (DISCs)-A

C. Rules at Legislative Standing Committee

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
2.90 Withholding; wages-A
2.91 Withholding; fiscal year taxpayers-A
2.92 Withholding tax exemptions-A
2.93 Withholding from wages of a deceased employe and from death benefit payments-A
3.44 Organization and financing expenses—corporations-A
3.45 Bond premium, discount and expense—corporations-A

D. Rules Adopted in 1989 But Not Yet Effective

11.10 Occasional sales-A

E. Emergency Rules

2.956 Historic structure and rehabilitation of nondepreciable historic property credits-NR (effective 12/28/88; expires 5/27/89)
3.095 Income tax status of interest and dividends from municipal, state, and federal obligations received by individuals and fiduciaries-A (effective 1/1/89; expires 5/31/89)

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:

Individual Income Taxes

Corporation Franchise or Income Taxes

INDIVIDUAL INCOME TAXES

Gain or loss—property transferred by gift. *John Clifford v. Wisconsin Department of Revenue* (Court of Appeals, District I, November 8, 1988). The Circuit Court had entered an order affirming the decision and order of the Wisconsin Tax Appeals Commission adverse to Clifford on June 29, 1988. On July 15, 1988, the state served a notice of entry of judgment on Clifford and filed it with the Court. Upon the entry of such notice, the time for Clifford to appeal the Circuit Court's judgment was shortened to 45 days of the entry of the judgment.

The time for filing Clifford's notice of appeal expired on August 15, 1988. Clifford filed his notice of appeal on August 16, 1988.

Clifford filed a document entitled "WRIT OF ERROR (*Coram Nobis*)" arguing that his notice of appeal was timely filed. He argued that because the notice of entry of judgment was served by mail, he was entitled to an additional 3 days to the prescribed period to file his notice of appeal.

The Court of Appeals concluded that because the prescribed period under sec. 808.04(1), Wis. Stats., runs from the date of entry of the order or judgment, and not from the date of notice of entry, sec. 801.15(5), Wis. Stats., is not applicable and, therefore, Clifford's "WRIT OF ERROR (*Coram Nobis*)" is denied.

The taxpayer has not appealed this decision.

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Credits—taxes paid to other states. *Arthur P. and Katherine A. Garst v. Wisconsin Department of Revenue* (Circuit Court of Dane County, August 31, 1988). The taxpayers request a Chapter 227 review of the department's decision which disallowed $353.43 of the claimed credit for income tax paid to the State of Illinois.

The taxpayers filed a federal income tax return which showed a capital gain of $24,812 from the sale of property in Illinois. They filed income tax returns in Illinois and Wisconsin. Wisconsin taxed 40% of the capital gain, or $9,924, as did the federal government. Illinois taxed the capital gain at 100%, or $24,812. On their Wisconsin return, the taxpayers claimed credit for the tax paid to the State of Illinois. The department, based on its reading of sec. 71.09(8)(c), Wis. Stats., disallowed credit for 60% of the tax paid to Illinois because Wisconsin does not consider that portion income for tax purposes.

The decision was upheld by the Wisconsin Tax Appeals Commission. The taxpayers contend that Wisconsin considers 100% of the capital gain in computing taxable income but unlike Illinois, does not tax at 100%.

The Court concluded that under sec. 71.09(8)(c), Wis. Stats., the 60% deduction is not "considered income for Wisconsin tax purposes" and, therefore, affirmed the decision of the Tax Appeals Commission.

The taxpayers have not appealed this decision.

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Personal residence, sale of. *Harry F. Peck v. Wisconsin Department of Revenue* (Court of Appeals, District II, September 14, 1988). This is an appeal, pursuant to ch. 227, Wis. Stats., of an assessment by the Department of Revenue of capital gains tax following the sale of a one-half interest in real property. Harry Peck argues that the tax was improper because, although he acquired sole title to the property from his ex-wife, Patricia Peck (Patricia), and conveyed the property in joint tenancy to himself and his fiancee, Attorney Lynn Carey (Carey), he nonetheless was never the owner. Instead, he argues that he acted throughout the transaction as an undisclosed agent through whom Carey purchased the property from Patricia.

The facts of the case reveal that the Shepard Street property in question was owned by Peck and Patricia as joint tenants. It came on the market following Peck's divorce from Patricia. While the divorce decree ordered the property sold, Patricia was reluctant to sell it, and eventually Peck and Carey decided that they could both assist Patricia and improve their own living situation if they acquired and lived in the property themselves. Subsequent to this decision, Peck learned that his ex-wife was emotionally unable to cope with Carey's purchasing Patricia's one-half interest in the property. Peck therefore purchased the one-half interest himself, using money placed in his account by Carey, and using money that Peck himself borrowed. Patricia's interest was conveyed to Peck, and title was in Peck's name as of July 30, 1980. On August 11, 1980, Peck formally conveyed the property from himself to himself and Carey as joint tenants.

The Court found that Peck failed to carry his burden of showing that he was not the property owner at the time he conveyed the property to Carey, and affirmed the decision of the trial court.

The taxpayer has not appealed this decision.

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CORPORATION FRANCHISE OR INCOME TAXES

Appeals, petition for redetermination; interest—assessments, 12%. *Brunswick Corporation v. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 17, 1988). Brunswick Corporation (Brunswick) is a Delaware corporation with its principal place of business in Skokie, Illinois, and is engaged in the manufacture and sale of products relating to health, defense, recreation, and education.

During and prior to 1960, neither Brunswick nor any subsidiary of Brunswick conducted any material activity in Wisconsin other than the solicitation of orders which were accepted outside of Wisconsin. Brunswick's first material activity in Wisconsin occurred in September 1961 when it acquired the Kiekhaefer Corporation which manufactured and sold Mercury outboard motors and accessories. Kiekhaefer, which had plants in Wisconsin, was merged into Brunswick in 1966. The only other activities conducted by Brunswick in Wisconsin from 1960 through 1974 involved the operation of a leisure mart and four bowling centers. The leisure mart, which primarily sold billiard equipment, was started in 1974 and was deactivated in 1978. The Wisconsin bowling centers were acquired in 1965, 1966, and 1970.

In 1960, Brunswick entered into a joint venture with Mitsui Bussan K.K., a large Japanese trading company, to form a new company Nippon-Brunswick K.K. (NBK) for the purpose of selling Brunswick brand bowling equipment in Japan.

During the period of 1970 through 1974, Brunswick's Wisconsin operations did not in any way contribute to or depend on the NBK operations. On December 19, 1977, the department issued to Brunswick a notice of assessment of additional franchise tax which resulted from the dividends Brunswick received from NBK in 1970, 1971, 1973, and 1974 but not 1972. Applying the "interest offset" provision in sec. 71.07(2), Wis. Stats., the department determined that in 1970, 1971, 1973, and 1974 the total interest and dividends received by Brunswick did not exceed the total interest paid and, therefore, the dividends were includable in apportionable income. In those years, a portion of the NBK dividends, to the extent of Brunswick's apportionable percentage, was subject to tax in Wisconsin. For the year 1972, the department determined that the total interest and dividends received by Brunswick exceeded the total interest paid and, therefore, a sum larger than the total dividends received was treated as nonapportionable income and not taxed by Wisconsin.

Brunswick claimed that the NBK dividends should have been allocated outside Wisconsin and that the department's failure to do so in every year in the audit period constituted a violation of the Wisconsin and federal constitutions.

On July 2, 1982, the department issued to Brunswick a notice of franchise tax assessment for the calendar years 1975 through 1979, indicating additional tax due of $605,111.88 and interest due of $408,680.62. In response to this notice of franchise tax assessment, Brunswick filed with the department a petition for redetermination. On August 27, 1986, the department issued a notice of action granting the portion of the petition for redetermination that contended that Brunswick's sales of International Mercury Outboard, Ltd., should be excluded from the numerator of Brunswick's sales factor. The remainder of the petition for redetermination including Brunswick's objection to the application of a 12% as opposed to a 9% interest rate under sec. 71.09(5)(a), Wis. Stats., was denied.

On January 6, 1987, at the same time it filed its election to use sec. 71.07(1m) as amended by 1985 Wisconsin Act 120, Brunswick also filed with the department claims for refunds as offsets under the doctrine of equitable recoupment as set forth in *American Motors Corporation v. Wisconsin Department of Revenue*, 64 Wis. 2d 337, 219 N.W. 2d 300 (1974) for the years 1972, 1973, and 1974. The basis for these claims for refunds as offsets were the sales to International Outboard, Ltd., a wholly owned subsidiary, which the department in its notice of action conceded should not have been treated as Wisconsin sales for purposes of the sales factor in the apportionment formula. At the January 8, 1987, hearing before the Commission, Brunswick asserted for the first time that it was entitled to offset the refunds it claimed against the taxes assessed.

After a payment by Brunswick on August 26, 1986, of additional tax of $92,052.39 and interest of $137,552.89, the only issue remaining with respect to the August 31, 1982, petition for redetermination was whether a 12% or a 9% tax deficiency interest rate would apply for the period prior to August 1, 1981.

On October 20, 1986, Brunswick filed a timely appeal with the Commission objecting to the application of the 12% interest rate on the grounds that the department's interpretation of sections 2203 and 2204 of Chapter 20, Laws of 1981, relating to the effective date of the interest rate change under sec. 71.09(5)(a), Wis. Stats., was incorrect and would violate the Due Process and Equal Protection clauses of the United States Constitution.

At the January 8, 1987, hearing before the Commission and in its subsequent briefs, Brunswick argued a number of issues which were based upon its election to apply the law under sec. 71.07(1m), Wis Stats., as amended by 1985 Wisconsin Act 120, and its claims for refunds as offsets under the equitable recoupment doctrine, despite the fact that none of these issues had been previously raised or addressed in its petition for redetermination.

The Commission concluded that it lacked jurisdiction to consider or decide claims which have not been timely and properly raised by the taxpayer in its petition for redetermination, or during the redetermination. The only claim timely and properly raised in the taxpayer's petition for redetermination or during the redetermination process was the taxpayer's constitutional challenge to the department's interpretation of sec. 71.07(2), Wis. Stats., and accordingly the Commission lacks jurisdiction to address or decide any other issues subsequently raised by taxpayer.

The 12% interest rate on unpaid income taxes under sec. 71.09(5)(a), Wis. Stats., as amended by Laws of 1981, Chapter 20, section 1090n applies to all assessments made on or after August 1, 1981, "regardless of the taxable period to which they pertain." The Commission has construed parallel language pertaining to interest on income and franchise taxes as well as sales and use taxes to require the 12% rate to cover all the years those taxes have been outstanding, or in other words, from the original due date. While the Commission lacks jurisdiction to do so, the constitutionality of sections 2203(45)(g) and 2204 which mandate that the 12% interest rate under sec. 71.09(5)(a), Wis. Stats., apply to all assessments made on or after August 1, 1981, has been reviewed and upheld.

The taxpayer has appealed a portion of this decision to the Circuit Court in regard to the Commission's conclusion that it lacks jurisdiction to decide the taxpayer's argument of equitable recoupment.

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Nexus—not established. *General Robotics de Puerto Rico, Inc. v. Wisconsin Department of Revenue* (Court of Appeals, District IV, December 8, 1988). The Wisconsin Department of Revenue appeals from a judgment reversing the Wisconsin Tax Appeals Commission's decision that General Robotics de Puerto Rico, Inc. (GRPR) was engaged in business within Wisconsin. The issue is whether the Commission's decision depends on findings of fact which are not supported by substantial evidence.

GRPR was a corporation organized under the laws of the State of Wisconsin whose headquarters and principal place of business during 1978-81 was Puerto Rico. It was a wholly-owned subsidiary of General Robotics Corporation (GRC), whose headquarters and principal place of business is Hartford, Wisconsin.

GRPR manufactured and assembled microcomputers, subassemblies, and component parts. All of its products were manufactured or assembled at the direction and order of GRC, and all products were sold and shipped by GRPR to GRC. GRPR purchased some of the parts used in the manufacturing and assembly process from GRC. GRPR conducted its business activities in rented facilities in Puerto Rico. All of its personal property was located in Puerto Rico. At the close of business in 1981, all 12 people on GRPR's payroll were residents of and employed at the plant in Puerto Rico. GRPR employed an accountant in Puerto Rico who performed certain functions. However, its tax returns were prepared by Price Waterhouse. All of GRPR's manufacturing and assembly activities were conducted in Puerto Rico. Its products were warehoused in Puerto Rico until shipped to GRC. GRPR's Puerto Rico employes arranged the shipment.

GRPR did not engage in any sales or marketing activities either within or outside of Puerto Rico and it did not directly engage in any business activities outside of Puerto Rico.

GRPR objects to the Commission's finding that GRPR and GRC shared some, if not all, corporate officers who were headquartered in GRC's home office in Wisconsin and that all orders for GRPR's products originated in Wisconsin and were accepted and approved in Wisconsin, and that this constituted sales activities in Wisconsin where management functions were undertaken by GRPR's officers and other administrative duties were performed on its behalf.

The Court concluded that it could not set aside these findings if they are supported by substantial evidence. The parties stipulated that GRPR was not engaged in any sales activities within or outside Puerto Rico. A finding that GRPR is not involved in any sales activities coupled with a finding that GRPR did not directly engage in business activities outside of Puerto Rico precludes a conclusion that it was engaged in business within the state under sec. 71.07(2), Wis. Stats. Inferences drawn by the Commission from the exhibits cannot override this stipulation.

The department has not appealed this decision.

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Manufacturer's sales tax credit. *L & W Construction Co., Inc. v. Wisconsin Department of Revenue* (Circuit Court of Waukesha County, May 24, 1988). The matter is before the Court for judicial review of a decision and order by the Wisconsin Tax Appeals Commission dated January 21, 1987.

L & W Construction Co., Inc., is a corporation duly organized under the laws of the State of Wisconsin. The taxpayer is also one of two co-equal general partners in North Lake Sand and Gravel Co. (North Lake) and is one of three general partners in Standard Asphalt Products (Standard Asphalt).

North Lake and Standard Asphalt each deducted the amount of sales and use tax paid on fuel and electricity in arriving at the partnership's ordinary income or loss. The taxpayer contends that it is entitled to a sales tax credit under sec. 71.043(2), Wis. Stats., equal to its prorated share of the sales and use tax paid by the partnerships under Chapter 77 of the Statutes on fuel and electricity consumed in manufacturing tangible personal property in this state.

The Court concluded that the statute is clear and unambiguous. The tax must be paid by the corporation itself. The taxpayer did not pay the sales tax itself. It remained liable only if the partnerships could not pay the tax. The taxpayer did not bring itself within the clear terms of sec. 71.043(2), Wis. Stats., as it paid no sales or use tax itself. Therefore, the taxpayer is not entitled to the sales and use tax credit under sec. 71.043(2), Wis. Stats.

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

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Liquidating corporations—distributions. *Jeanne F. Polan v. Wisconsin Department of Revenue and State of Wisconsin Tax Appeals Commission* (Court of Appeals, District IV, November 23, 1988). (See Wisconsin Tax Bulletin 44, page 8, for a summary of the decision of the Wis-

consin Tax Appeals Commission.) The Wisconsin Department of Revenue appeals from an order of the Circuit Court of Dane County declaring that sec. 71.337(1), Wis. Stats. (1975-76), violates the constitutional rights of Jeanne F. Polan. This statute provides that a gain or a loss by a liquidating corporation on the sale of its property is not recognized to the corporation for purposes of computing the Wisconsin franchise tax, to the extent that the gain or loss is participated in by Wisconsin resident shareholders. Polan is a nonresident shareholder of the corporation. The order reverses the decision of the Wisconsin Tax Appeals Commission which had affirmed an assessment of the corporation's tax (which the corporation had not paid) against the shareholder under sec. 71.11(21n), Wis. Stats. (1975-76).

The issues are:

A. Whether the assessment against the shareholder is barred by the 4-year statute of limitations in sec. 71.11(21)(bm), Wis. Stats. (1975-76).

B. Whether sec. 71.337(1), Wis. Stats. (1975-76), applies so as to recognize gain to the corporation when its nonresident and only shareholder will sustain a loss by reason of the liquidation distribution.

C. Whether the shareholder has standing to challenge the constitutionality of sec. 71.337(1), Wis. Stats. (1975-76).

D. Whether the shareholder is estopped from raising the constitutional issue.

E. Whether sec. 71.337(1), Wis. Stats. (1975-76), violates the rights of nonresident shareholders under the privileges and immunities clause of the United States Constitution.

The assessment against the taxpayer is made under sec. 71.11(21n), Wis. Stats. (1975-76). That statute provides that if all or substantially all of the property of a corporation is transferred to one or more persons and the corporation is liquidated, any tax imposed by Chapter 71 (which imposes the franchise tax) on the corporation may be assessed against the transferees. The statute provides for notice of the additional assessment under sec. 71.11(22), Wis. Stats. (1975-76).

The shareholder contends that because the notice was given more than 4 years from the date the franchise tax return was filed, the assessment against her is barred under sec. 71.11(21)(bm), Wis. Stats. (1975-76). The department contends that the appropriate statute of limitations is 6 years under sec. 71.11(21)(g)1, Wis. Stats. (1975-76). Notice was given within that period.

The shareholder submits that sec. 71.337(1), Wis. Stats. (1975-76), is ambiguous because it can be differently understood when, as here, the liquidating corporation has a gain on a sale but its nonresident and only shareholder will sustain a loss on the final distribution. She asserts that the legislative history of sec. 71.337(1), Wis. Stats. (1975-76), shows a purely remedial purpose: to allow Wisconsin to capture a tax which would otherwise not be collected from nonresidents. She concludes that the statute was not meant to create a new tax on nonresident shareholders or to tax a nonresident shareholder when a similarly situated Wisconsin shareholder would not be taxed, and that the statute should be construed accordingly.

The shareholder contends, and the trial court agreed, that as applied to her, sec. 71.337(1), Wis. Stats. (1975-76), violates her rights under U.S. Const. Article IV, sec. 2, cl. 1, which provides, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

The trial court followed the privileges and immunities analysis outlined in *Taylor v. Conta*, 106 Wis. 2d 321, 327-36, 316 N.W. 2d 814, 818-822 (1982). That analysis examines the distribution of the tax burden between citizens and noncitizens to determine whether the law disadvantages noncitizens, determines whether the discrimination violates a fundamental right, and determines whether the state's discriminatory treatment of noncitizens is within the bounds set by the Constitution.

The trial court concluded that when a corporation realizes a gain and its only shareholder a loss, the practical effect of sec. 71.337(1), Wis. Stats. (1975-76), is to place a substantially more onerous tax burden on a nonresident shareholder than on a similarly situated resident shareholder. The court noted that had shareholder Polan resided within Wisconsin, she would have escaped taxation entirely. The court concluded that the statute, as applied, disadvantages nonresidents.

The state argues that sec. 71.337, Wis. Stats. (1975-76), imposes no tax. It simply prescribes the circumstances under which a gain or loss is recognized to a liquidating corporation and imposes no tax upon either resident or nonresident shareholders. If, however, as here, the liquidating corporation fails to pay the franchise tax resulting from recognition of gain to the corporation, then the nonresident shareholder may be assessed the amount of the unpaid tax under sec. 71.11(21n), Wis. Stats. (1975-76).

The Court of Appeals concluded that the 4-year statute of limitations is inapplicable; sec. 71.337(1), Wis. Stats. (1975-76), applies whether or not a nonresident shareholder has a loss; the shareholder has standing to challenge sec. 71.337(1), Wis. Stats. (1975-76), and is not estopped from raising the constitutional issue; and under the circumstances, the statute denies to the shareholder the privileges and immunities guaranteed to her by the Constitution. Therefore, the Circuit Court order was affirmed.

The department and the taxpayer have not appealed this decision.

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SALES/USE TAXES

Services—incidental sale of property. *Wisconsin Department of Revenue v. Dow Jones & Company, Inc.* (Court of Appeals, District IV, January 26, 1989). The Department of Revenue appeals from a judgment affirming an order of the Wisconsin Tax Appeals Commission. The issue is whether Dow Jones Company, Inc., is required to pay sales tax on the teleprinters

it provided to certain of its "news service" clients. The Commission concluded that the provision of the teleprinters to Dow Jones' clients was incidental to the performance of a service within the meaning of sec. Tax 11.67(1), Wis. Adm. Code, and was therefore exempt from sales tax.

Dow Jones is the publisher of the Dow Jones News Service. Until the mid-1960's, all news service subscribers received the news service information exclusively from teleprinters. These teleprinters worked automatically, were not interactive, and were used solely to deliver the news service. Subscribers paid a single charge for the news service, including its delivery on a teleprinter. Dow Jones owned, insured, repaired, and maintained the teleprinters, and retained the right to replace or remove them at any time.

Later, some subscribers preferred to receive the news service on video display devices instead of teleprinters. Dow Jones began to itemize on its invoices a separate, flat "equipment charge" for providing and maintaining the teleprinters to those subscribers who still used them. However, complete "hard copy" news service was available only on the teleprinters. Dow Jones would terminate the news service to any subscriber found using unauthorized equipment and would not hook up a subscriber to the news service if the subscriber wanted to get a hard copy of the news service information through a delivery mechanism other than a Dow Jones teleprinter.

The Commission reasoned that since the transaction in this case encompassed both a transfer of tangible personal property to a purchaser in conjunction with the rendition of services by the seller, it should look at the essence of the transaction to determine if it is fundamentally a sale of property or one of services. The Commission relied on *Janesville Data Center v. Dept. of Revenue*, 84 Wis. 2d 341, 346, 267 N.W. 2d 656, 658 (1978), which held that it is the essence of a transaction, and not the nature of any one constituent part of a transaction, which determines the taxability of it.

The department claims that the transfer of a teleprinter should be taxed as a separate transaction because news service subscribers have an option whether or not to use the teleprinters, and can receive the news service without accepting the teleprinters. The department also argues that because Dow Jones made a separate "equipment charge" on its monthly invoices for maintenance of the teleprinter, sec. Tax 11.67(1), Wis. Adm. Code, should not apply, and the transaction should be taxed as a lease or rental under sec. 77.52(1), Wis. Stats.

The Court concluded that the Commission's conclusion was reasonable, did not conflict with agency rules, policies, or practices, and it did not violate statutory or constitutional provisions. Therefore, the Court upheld it.

The department has not appealed this decision.

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Newspapers and periodicals—shoppers' guides. *Woodward Communications, Inc., f/k/a Telegraph Herald, Inc., v. Wisconsin Department of Revenue* (Court of Appeals, District IV, February 19, 1988). Woodward Communications, Inc., appeals from an order affirming a decision of the Wisconsin Tax Appeals Commission. The Commission affirmed the decision of the Department of Revenue to deny Woodward's petition for a redetermination of the department's assessment of sales and use taxes against Woodward for 1977 through 1979.

Woodward questions:

A. Whether the trail court unduly deferred to the Commission's construction of the statutes.

B. Whether Woodward's printing shopping guides for others is a taxable service.

C. Whether Woodward's receipts from the sale of printing services for others is exempt under sec. 77.54(2), Wis. Stats., as destined for sale.

D. Whether the materials and supplies Woodward used to print its own shoppers' guides are subject to use tax.

E. Whether Woodward is exempt from use tax for materials and supplies used to print its own shoppers' guides under sec. 77.54(2), Wis. Stats.

F. Whether Woodward is exempt from the use tax after July 1, 1978, under sec. 77.54(15), Wis. Stats., for supplies and materials used to print its own shopping guides.

G. Whether Woodward has been denied its rights under the United States and Wisconsin Constitutions.

Woodward is in the publishing business. Between 1976 and 1978 it published and printed its own shoppers' guides for communities in Wisconsin and Iowa. It sold advertising space to its customers who placed advertisements in the shoppers' guides, designed and laid out the shoppers' guides, and printed and distributed the guides. The layout, typesetting, and paste up work for its Iowa shoppers' guides was performed in Iowa, but all printing for its own shoppers' guides was done at Platteville. During the same period, the Shopping News Division also printed shoppers' guides for others who published them. The division purchased supplies and materials used to produce the guides, whether for itself or for others.

The department assessed Woodward for use tax on the purchases of supplies and materials used to print and produce its own shoppers' guides. It also assessed Woodward for sales tax on the gross receipts for charges for printing shoppers' guides for others.

The Commission concluded that between January 1, 1976, and June 30, 1978, Woodward's gross receipts from printing shoppers' guides for others was a taxable service under sec. 77.52(2)(a)11., Wis. Stats. Woodward was the consumer of the materials and supplies used in the printing and publication of its own shoppers' guides and thus was subject to tax under sec. 77.53(1), Wis. Stats. The Commission

further concluded that Woodward had not shown it qualified for any of the the exemptions it claimed. Specifically, the Commission concluded that the guides were not "destined for sale" within the sec. 77.54(2), Wis. Stats., exemption; the materials and supplies Woodward used after July 1, 1978, to print its own guides were not exempt under sec. 77.54(15), Wis. Stats.

The Court of Appeals affirmed the Commission's decision and concluded that:

A. When material facts are not in dispute and only matters of law are in issue, the Court may review the record *ab initio* and substitute its judgment for that of the Tax Appeals Commission.

B. The physical form of the shoppers' guide is essential to the advertising it contains. Consequently, the sale of Woodward's shoppers' guides is the sale of the service of printing of tangible personal property under sec. 77.52(2)(a)11., Wis. Stats.

Section 77.51(4), Wis. Stats., defines "sale at retail." It does not define "resale." However, by virtue of subs. (k), the transfer by Woodward's purchasers of the shopping guides to members of the public free of charge does not prevent Woodward's sales from being retail sales.

C. Having already held that Woodward's sale of its shopping guide printing services to others is a sale under sec. 77.52(2)(a)11., Wis. Stats., to hold that sec. 77.51(4), Wis. Stats., not only makes Woodward's sale to its purchasers a retail sale but also makes the same sale exempt as "destined for sale" would render sec. 77.51(4)(k), Wis. Stats., meaningless. The same section would both cause the tax to be imposed and exempt the transaction from the tax, an absurd result.

D. Woodward's "destined for sale" contention is rejected for the same reasons stated above. That Woodward gives away its own shoppers' guides free of charge does not constitute a resale.

E. For reasons previously stated, the Court has held that the shoppers' guides Woodward prints for itself or others are not "destined for sale." The exemption Woodward relies on does not apply.

F. Section 77.54(15), Wis. Stats., as amended, exempts shoppers' guides from the sales and use tax, but not the materials and supplies used to print shoppers' guides. Because the statute is silent with respect to materials and supplies, and because the Court must strictly construe an exemption against the taxpayer, the materials and supplies Woodward used on and after July 1, 1978, were not exempt from the use tax.

G. The record is silent as to whether after July 1, 1978, Woodward distributed no less than 48 issues in a twelve-month period. Because of the strong presumption favoring constitutionality and Woodward's failure to show that the post-July 1, 1978, classification disparately treats Woodward, its challenge to the Commission's construction of sec. 77.54(15), Wis. Stats., also fails.

The taxpayer has appealed this decision to the Wisconsin Supreme Court.

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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

Corporation Franchise or Income Taxes

Sales/Use Taxes

County Sales/Use Taxes

INDIVIDUAL INCOME TAXES

1. Basis Adjustment Under Wisconsin's Marital Property Law

Statutes: Section 71.05(10)(e), Wis. Stats. (1987-88)

Note: This Tax Release applies with respect to deaths occurring on or after January 1, 1986.

Background: Generally, Internal Revenue Code sec. 1014 provides that the basis of real or personal property acquired from a decedent is its fair market value on the date of the decedent's death (or on the alternate valuation date, if chosen). In community property states, a husband and wife usually are considered as each owning half of the community property. If either spouse dies, the surviving spouse's half of the community property, as well as the decedent spouse's half, is entitled to a basis adjustment to the date-of-death value (IRC sec. 1014(b)(6)). For this double-basis adjustment to apply, at least half of the community property must be includable in the decedent's gross estate for federal estate tax purposes.

Internal Revenue Code sec. 1014(e) provides that where a decedent receives a gift of appreciated property within one year of death, and the property is reacquired by the donor or the donor's spouse, the decedent's adjusted basis immediately prior to the decedent's death is carried over and becomes the donor's (and donor's spouse's) basis in the property. Consequently, there is no basis adjustment on account of the death. For income tax purposes, IRC sec. 1041 defines any transfer between spouses, even those for full and adequate consideration, as having been acquired by gift. Therefore, any transfer to the decedent by the decedent's spouse may result in an IRC sec. 1014(e) basis adjustment denial.

For Wisconsin purposes, the basis of real or personal property acquired from a decedent is determined under the Internal Revenue Code. However, a modification is required, under sec. 71.05(10)(e), Wis. Stats. (1987-88), for any difference between the federal estate tax value and the Wisconsin inheritance tax value.

Note: Throughout this Tax Release, it should be understood that marital property and survivorship marital property can be created only while the classification rules of ch. 766, Wis. Stats., apply to the marriage. These rules apply "during marriage" which is defined as that period in which both spouses are domiciled in Wisconsin that begins at the determination date and ends at dissolution of the marriage or at the death of a spouse (sec. 766.01(8), Wis. Stats. (1987-88)).

Question 1: Under Wisconsin's marital property law, upon the death of one spouse, will the property of both spouses receive a double- basis adjustment under sec. 1014(b)(6), IRC, to the date-of-death value?

Answer 1: The Internal Revenue Service has determined that Wisconsin's marital property system is a type of community property (Rev. Rul. 87-13, 1987-1 C.B. 20). Therefore, for federal and Wisconsin tax purposes, certain property of spouses will receive a double-basis adjustment under sec. 1014(b)(6), IRC. However, the Internal Revenue Service has indicated that certain assets cannot be classified as marital property or as containing marital property and, therefore, will not receive a double-basis adjustment upon the death of one spouse.

The following property **will** receive a double-basis adjustment for both federal and Wisconsin purposes:

a. Property acquired after the spouses' determination date which is titled as marital property.

b. Property acquired after the spouses' determination date which is titled as survivorship marital property.

c. Property acquired after the spouses' determination date which is classified as marital property or survivorship marital property by operation of law (sec. 766.60(4)(b)1. and 2., Wis. Stats. (1987-88)). For example, if a document of title expresses an intent to establish a tenancy in common exclusively between spouses after their determination date, the property is marital property. If a document of title expresses an intent to establish a joint tenancy exclusively between spouses after their determination date, the property is survivorship marital property.

d. Property acquired before the spouses' determination date which is reclassified as marital property by a marital property agreement or court order. If a marital property agreement or court order reclassifies the whole of joint tenancy or tenancy in common property as marital property, the property will be treated as marital property for basis adjustment purposes (Rev. Rul. 87-98, 1987-2 C.B. 206).

e. Property acquired before the spouses' determination date and titled solely in one spouse's name if, as a result of mixing, it is not possible to trace the nonmarital property component. Mixing can occur in two ways and can result in either the whole of the property, or only a portion, being classified as marital property.

   First, marital property (either cash or assets) can be mixed with nonmarital property. For example, if one spouse purchased a home prior to the marriage and marital property wages are used to make mortgage loan payments or substantial home improvements, the home is mixed property. If the nonmarital property component cannot be traced, the mixing rule will reclassify the whole of the home as marital property. If the nonmarital property component can be traced, only the remaining component would be classified as marital property.

   Second, a marital property component is created when there is substantial appreciation of nonmarital property resulting from the substantial efforts of either spouse, for which reasonable compensation was not received.

f. Untitled property acquired before the spouses' determination date where the presumption that the property is marital property isn't rebutted.

g. Untitled property acquired after the spouses' determination date which the marital property law classifies as marital property.

The following property of spouses **will not** receive a double-basis adjustment for either federal or Wisconsin purposes:

a. Property acquired before the spouses' determination date in joint tenancy solely between the spouses. It is the department's understanding that the Internal Revenue Service's position is that marital property and joint tenancy are incompatible ownership forms; therefore, property held in a joint tenancy form that was acquired in whole or in part with marital property will not receive a double-basis adjustment, even if it were otherwise classified by the mixing rule as marital property. (However, see the exception in previous part c.) The portion of the joint tenancy in the decedent's estate for death tax purposes will receive a basis adjustment to the date-of-death value for both federal and Wisconsin purposes.

b. Property acquired before the spouses' determination date in tenancy in common exclusively between the spouses. It is the department's understanding that the Internal Revenue Service's position on tenancies in common is the same as for joint tenancies. Therefore, for both federal and Wisconsin purposes, only the property included in the decedent's estate for death tax purposes will receive a basis adjustment to the date-of-death value.

c. Property owned by one or both spouses with another person either as joint tenants or tenants in common. The Internal Revenue Service has indicated that there can be no marital property in an asset held with a nonspouse. It appears that a marital property agreement cannot classify such an asset as marital property. A basis adjustment to the date-of-death value will occur only upon the death of the titled spouse; the death of the nontitled spouse will not result in a basis adjustment.

d. Property owned by a decedent that would have been marital property if acquired under the marital property law, called "deferred marital property," and "augmented marital property estate" property. Despite the Internal Revenue Service's previous statement to the contrary, the Internal Revenue Service now agrees with the department that such property will not receive a double- basis adjustment. However, the property included in the decedent's estate for death tax purposes will still receive a basis adjustment to the date-of-death value.

Example: A husband and wife were married and domiciled in Wisconsin on January 1, 1986. They did not have a marital property agreement. On September 1, 1988, the wife died. The husband is the sole beneficiary of the wife's estate. At the date of death, the husband and wife owned the following property:

a. Home acquired in 1960 in joint tenancy for $35,000. Substantial improvements costing $25,000, which were paid for out of marital property funds, were made in 1987. The home's fair market value on September 1, 1988, was $150,000.

b. Rental property acquired in 1975 in tenancy in common for $100,000. Mortgage payments made in 1986, 1987, and 1988 were from marital property. Depreciation of $59,250 was claimed. The property's fair market value was $350,000 on September 1, 1988.

c. Stock A acquired in 1970 by the wife by inheritance. Its fair market value in 1960 was $1,000 and on September 1, 1988, was $100,000.

d. Stock B acquired in 1986, titled as marital property, for $10,000. Its fair market value on September 1, 1988, was $11,000.

e. Stock C acquired in 1980 by the wife for $15,000 using her wages, and titled in her name alone. Its fair market value on September 1, 1988, was $20,000.

The husband's new basis in the property is computed as follows:

a. Home	
Amount subject to death tax (1/2 x $150,000), plus	$ 75,000
Amount of original basis not adjusted above (1/2 x $60,000)	30,000
Total basis of home	$105,000
b. Rental property	
Amount subject to death tax (1/2 x $350,000)	$175,000
Amount of original basis not adjusted above (1/2 x ($100,000 - $59,250))	20,375
Total basis of rental property	$195,375
c. Stock A	
Amount subject to death tax (100% x $100,000)	$100,000
Amount of original basis not adjusted above (full basis adjusted above)	-0-
Total basis of stock A	$100,000
d. Stock B	
Amount subject to death tax (1/2 x $11,000)	$ 5,500
Amount of marital property not adjusted above (1/2 x $11,000)	5,500
Total basis of stock B	$ 11,000
e. Stock C	
Amount subject to death tax (100% x $20,000)	$ 20,000
Amount of original basis not adjusted above (full basis adjusted above)	-0-
Total basis of stock C	$ 20,000

Question 2: If spouses use a marital property agreement to reclassify their property as marital property, to pass to the survivor of the two at death, and one spouse dies within one year of making the agreement, will either the decedent's one-half or the surviving spouse's one-half of the newly-reclassified marital property receive a basis adjustment?

Answer 2: Under IRC sec. 1014(e), the transfer to the decedent by the decedent's spouse would result in the denial of a basis adjustment to the decedent's one-half of such property that passes back to the spouse. However, it is unclear whether the surviving spouse's one-half of such property will receive a basis adjustment. It is the department's position, contingent upon a contrary ruling by the Internal Revenue Service, that if a sec. 1014(e), IRC denial exists for the decedent's one-half, a basis adjustment is also denied for the surviving spouse's one-half of the property.

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CORPORATION FRANCHISE OR INCOME TAXES

1. Carryovers in Certain Corporate Acquisitions

Statutes: Section 71.26(3)(n), 1987-88 Wis. Stats., and section 3203(47)(y), 1987 Wisconsin Act 27

Background: Prior to the enactment of 1987 Wisconsin Act 27, which generally federalized the determination of net income for Wisconsin franchise and income tax purposes, the Wisconsin Statutes did not provide for the carryover of tax attributes (net operating losses, credits, etc.) from a merged corporation to the surviving corporation (*Fall River Canning Co. vs. Department of Taxation*, 3 Wis. (2d) 632). However, a Wisconsin net operating loss incurred by a corporation was allowed to be carried forward and offset against the net income of the same corporation for up to 15 years. The stock ownership of such a corporation did not affect the amount of net operating loss available for offset.

With the enactment of 1987 Wisconsin Act 27, which is generally effective for the 1987 taxable year and thereafter (taxable years ending on or after July 31, 1987), Wisconsin follows secs. 381, 382, and 383 of the Internal Revenue Code (IRC) as amended to December 31, 1986, except that secs. 381, 382, and 383, IRC are modified so that they apply to Wisconsin net operating losses and Wisconsin credits rather than federal net operating losses and federal credits.

Section 381, IRC provides that in certain situations a corporation may take carryovers of another corporation's tax benefits, privileges, elective rights, and obligations. This is available to a parent corporation after complete liquidation of a subsidiary, and to the transferee in a nontaxable corporate acquisition of property in certain types of reorganization. The items that may be taken into account include net operating loss carryovers, unused charitable contribution deduction carryovers, unused credits, and accounting, inventory, and depreciation methods.

Sections 382 and 383, IRC limit the amount of income that a corporation can offset using net operating loss carryovers and the amount of excess credit that can be carried over after certain changes in ownership.

Generally, under sec. 382, IRC, if the ownership of more than 50% in value of the stock of a "loss corporation" changes, the corporation becomes a "new loss corporation", and the amount of taxable income of any "post-change year" that may be offset using "pre-change losses" is limited. The amount of limitation is determined by multiplying the value of the stock of the corporation just prior to the ownership change by the federal long-term tax-exempt rate in effect on the date of the change. Two kinds of ownership changes that can trigger the income limitation on corporation net operating loss carryforwards are an ownership shift involving a "five % shareholder" and any "equity structure shift". If a corporation fails to meet certain business continuity requirements, the corporation's net operating loss carryforwards are eliminated entirely.

Question 1: When are secs. 381, 382, and 383, IRC, as modified by the Wisconsin Statutes, effective for Wisconsin franchise and income tax purposes?

Answer 1: Sections 381, 382, and 383, IRC, as modified, apply for Wisconsin for the 1987 taxable year and thereafter. Therefore, these sections apply to mergers, acquisitions, ownership changes, etc. which occur during the 1987 taxable year and thereafter (i.e. taxable years ending on or after July 31, 1987).

Question 2: What Wisconsin net operating losses and credits of a predecessor corporation are available to a successor corporation? Are the carryovers limited to those from taxable year 1987 and thereafter?

Answer 2: Any Wisconsin net operating loss or credit carryover that would be available to a predecessor corporation becomes available to the successor corporation. For example, beginning with net operating losses incurred in the taxable year 1980, a 15 year carryforward period is provided. Therefore, Wisconsin net operating losses from the taxable year 1980 and thereafter are available to the successor corporation. The carryovers are **not** limited to those losses incurred or credits computed in taxable year 1987 and thereafter.

Question 3: Do the limitations provided in secs. 382 and 383, IRC, apply even though Wisconsin doesn't allow a corporation to file consolidated returns?

Answer 3: Yes. While secs. 1501 to 1505, 1551, 1552, 1563, and 1564, IRC, which relate to consolidated returns, are excluded from Wisconsin's definition of the Internal Revenue Code, secs. 382 and 383, IRC, have only been modified so that they apply to Wisconsin net operating losses and Wisconsin credits rather than federal losses and federal credits. Therefore, limitations provided in secs. 382 and 383, IRC, apply even though consolidated filing is not permitted.

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2. Manufacturing for Purposes of the Manufacturer's Sales Tax Credit

Statutes: Section 71.28(3), Wis. Stats. (1987-88)

Wis. Adm. Code: Section Tax 2.11, September 1983 Register

Background: Company ABC processes whole fresh beef carcasses to produce "boxed beef." "Boxed beef" is beef carcasses cut into smaller, more manageable pieces for sale to butcher shops which will do the final cutting and packaging for retail sale to the customer.

Refrigerated beef carcasses (38-40°F) are unloaded from trucks into the production area (Area C) of Company ABC where they are cut, trimmed, vacuum sealed, and boxed in a process taking less than one hour. The temperature of Area C is maintained at 35°-38°F. The product is then sent to Area B where the temperature of the meat is lowered to 28°F, slightly above the temperature at which meat freezes. This process takes 2 to 3 days.

The majority of Company ABC's customers are retailers. Therefore, it is necessary that the product be cooled to 28°F so that it remains fresh and looks fresh.

Question: May the electricity used to keep Areas B and C at the correct temperature be used to compute the manufacturer's sale tax credit?

Answer: Section 71.28(3), Wis. Stats. (1987-88), provides that sales and use tax paid for electricity used in the manufacture of tangible personal property may be used to compute the manufacturer's sales tax credit. Manufacturing is defined as the production by machinery of a new article with a different form, use, and name from existing materials by a process properly regarded as manufacturing.

The electricity consumed in Area B for reducing the temperature of the product from 35-38°F down to 28°F is considered used in manufacturing because it makes the product ready for sale. Therefore, the sales and use tax paid on such electricity may be used in the computation of the manufacturer's sales tax credit.

The sales and use tax paid on electricity consumed in Area C does not qualify for credit. The product is not in the area long enough, nor is the temperature differential great enough to cause a change in temperature of the product and, therefore, the process cannot be considered manufacturing.

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3. Unrelated Business Income - Exemption for State and Other Units of Government

Statutes: Sections 71.24(1m) and 71.26(1)(a) and (b), Wis. Stats. (1987-88)

Note: This Tax Release applies only to taxable years 1988 and thereafter.

Background: Section 71.26(1)(a), Wis. Stats. (1987-88), provides that certain corporations are exempt from Wisconsin income or franchise taxation, except that they will be taxed on unrelated business taxable income as defined in section 512 of the Internal Revenue Code. Section 71.26(1)(b), Wis. Stats. (1987-88), provides that income received by the United States, the State of Wisconsin, and all counties, cities, villages, school districts, or other political units of the State of Wisconsin shall be exempt from Wisconsin income or franchise taxation.

Section 71.24(1m), Wis. Stats. (1987-88), provides that every corporation subject to a tax on unrelated business taxable income under sec. 71.26(1)(a), Wis. Stats. (1987-88), shall file a return with the department if a federal return is also required to be filed.

Question 1: Is the State of Wisconsin, or any county, city, village, school district or other political unit of the State of Wisconsin:

a. Subject to the Wisconsin tax on unrelated business income?

b. Required to file Form 4T, which is the Wisconsin return for computing the tax on unrelated business income?

Answer:

a. No. These entities are exempt from **all** Wisconsin income and franchise taxes, including the tax on unrelated business income (sec. 71.26(1)(b), 1987-88 Wis. Stats.).

b. No. A Form 4T is not required to be filed by any of these entities because their unrelated business income is exempt from Wisconsin income and franchise taxation.

Question 2: Is a university which is part of University of Wisconsin system, required to pay a Wisconsin income or franchise tax on its unrelated business taxable income? (Assume it is subject to a federal tax on its unrelated business income.)

Answer 2: No. Under case law, a university that is part of the University of Wisconsin system should be considered a part of the state. Although sec. 71.26(1)(a), Wis. Stats. (1987-88), would impose a Wisconsin tax on the university's unrelated business income; sec. 71.26(1)(b), Wis. Stats. (1987-88) specifically exempts from taxation all income of "the state." Therefore, such a Wisconsin state university is exempt from Wisconsin income or franchise taxation on its unrelated business income, even though for federal purposes, such income may be taxable. Accordingly, a Form 4T does not have to be filed with the Department of Revenue.

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SALES/USE TAXES

1. Cooling Towers - Real or Personal Property/Manufacturing

Statutes: Sections 77.51(20), 77.52(2)(a)10 and 77.54(6)(a), (6m) and (9a), Wis. Stats. (1987-88)

Wis. Adm. Code: Sections Tax 11.04, January 1979 Register, Tax 11.39(1), July 1987 Register, and Tax 11.40(1)(b) and (2)(c), November 1981 Register

Background: A power plant provides electricity, heat, and chilled water to various buildings in a complex. The current 5 cell cooling tower which serves the chiller is being expanded.

The cooling tower consists of a wooden framework providing support for both exterior surfaces and interior cells consisting of fill, drift eliminators, and the water distribution system. The cooling tower is set on and securely bolted to a concrete foundation (collection base). A powerful fan is mounted on the roof of the structure to draw air through the structure.

Hot water (101°F) is sprayed onto the fill made of PVC sheet in a honeycomb pattern maximizing surface area and air turbulence. The tower cools the water by evaporation. Once the water is cooled to 85°F, it drains to the collection basin and is pumped to chiller units. Fresh water is added constantly to replace the evaporated water.

The chiller units provide chilled water (42°F) through a closed loop underground piping system to cool the various buildings of the complex. The chilled water piped into the buildings comes off the building at 56°F and returns to the chiller units where it is again cooled to 42°F. The chillers, although driven by steam, do not themselves use or make steam.

Question 1: Is the cooling tower (including additions thereto) real or personal property?

Answer 1: The cooling tower (including the addition to the cooling tower) constitutes real property. The tower sits on a concrete foundation and is securely bolted to that foundation in numerous places. The frame and decking are made with ordinary building materials (e.g., pressure treated lumber). The large size of the structure indicates a real property improvement. The tower, although it could be dismantled and moved, will most probably remain as located for its entire useful life and be repaired or replaced piecemeal indefinitely.

Because the cooling tower is considered a real property improvement, the contractor erecting the tower will not charge sales tax to the power plant. Instead the contractor must pay sales or use tax on its cost of materials used in constructing the tower.

Question 2: Does a cooling tower, used in conjunction with a chiller unit in cooling various buildings, qualify as machinery and equipment used directly in manufacturing?

Answer 2: No. A cooling tower does not qualify as machinery and equipment used directly in manufacturing for two reasons. First, the cooling tower is real property (see Question 1) and secondly, the power plant's cooling of various buildings in the complex does not constitute manufacturing. No item of tangible personal property is being produced. Rather, a service is being performed on the buildings.

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2. Discount Cards

Statutes: Sections 77.51(4), 77.52(1), and 77.53(1), Wis. Stats. (1987-88)

Facts: For $20, ABC Company furnishes its customers an ABC discount card. The customer may use the card for a limited time period to receive a 15% discount on the purchase of ABC merchandise. In addition, any customer purchasing the discount card receives a 5" x 8" portrait.

Question 1: Is the $20 received by ABC Company from the customer for the discount card subject to Wisconsin sales tax?

Answer 1: Yes. The $20 paid to purchase the discount card is a taxable receipt because it is considered to be a payment for merchandise.

Question 2: Is ABC Company liable for use tax on its cost of the portrait (the portrait is given to a customer who pays $20 for the discount card)?

Answer 2: No. Part of the consideration by ABC Company for the $20 payment by the customer is the transfer of a portrait to the customer.

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COUNTY SALES/USE TAX

1. County Tax: Transitional Provisions Relating to Services

Statutes: Sections 77.51(14) and 77.77(1), Wis. Stats. (1987-88)

Background: Services subject to the 5% Wisconsin sales tax are **not** subject to the 1/2% county tax if:

a. The services are furnished to the customer **before** the effective date of the county ordinance (i.e., April 1 of a particular year), regardless of the date of billing or payment, or

b The services are furnished to the customer **after** the effective date of the county ordinance, but the service is:

1) Billed to the customer **before** the effective date of the county ordinance, **and**

2) Paid **before** the effective date of the county ordinance. (Note: In this situation, both the billing **and** payment must occur **before** the effective date of the county ordinance.)

Question 1: What is the definition "paid" for purposes of "b.2)" above?

Answer 1: "Paid" means that payment for the service is delivered to the retailer in person or, if payment is made by mail, the payment check is placed in a properly addressed envelope and postmarked before the April 1 date the county ordinance became effective.

Example 1: Customer A, whose home is located in a county which adopted the county tax effective April 1, 1988, has taxable landscaping services performed at his home on April 15, 1988. However, the customer received a bill from the landscaper for this service on March 1, 1988, with the request that it be paid by March 30, 1988. The customer mailed the check and the envelope was postmarked April 1, 1988. Although the billing was made before April 1, 1988, payment was not made before April 1, 1988. Therefore, the exemption from county tax does not apply.

Note: If Customer A in Example 1 had paid the bill before April 1, 1988 (i.e., had the envelope postmarked before April 1, 1988), the services would have been exempt from the county tax because the customer would have been billed before April 1, 1988, and he or she would have paid the bill before April 1, 1988.

Example 2: Customer B, whose home is located in a county which adopted the county tax effective April 1, 1988, has taxable plumbing services performed at his home on March 30, 1988. Customer B receives a bill from the plumber on April 2, 1988, and pays the bill on April 15, 1988.

The plumbing service performed at the customer's home on March 30, 1988, is not subject to the county tax because it was furnished to the customer **before** April 1, 1988, the effective date of the county tax. Since the service was performed before April 1, 1988, the date of billing and date of payment have no effect upon whether or not this service is taxable.

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