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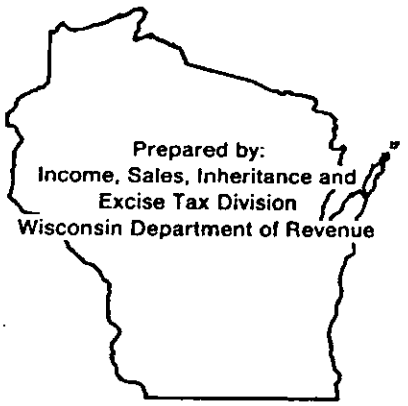

NEW TAX LAWS

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.

PRIVATE LETTER RULINGS PUBLISHED

As a result of a new law enacted in 1988, the department now issues private letter rulings. A private letter ruling is a written statement, requested in accordance with the procedures provided in Wisconsin Publication 111, issued to a taxpayer that interprets and applies the Wisconsin tax laws to the taxpayer's specific set of facts.

The department is authorized to publish letter rulings; however, not all rulings are required to be published. Rulings selected for publication will appear in the section of the *Wisconsin Tax Bulletin* titled "Private Letter Rulings." This section will be located after the "Tax Releases" section. See page 21 of this Bulletin.

IN THIS ISSUE

ESTIMATED TAX PAYMENTS UNDER THE ANNUALIZED INCOME METHOD

For Wisconsin taxpayers who are required to make estimated tax payments, there are two methods for computing the amount of such payments. Taxpayers may use (1) the regular method (generally, payments must equal 90% of the tax that will be shown on the current year's return or 100% of the tax shown on the prior year's return) or (2) the annualized income installment method.

Questions have been received as to whether taxpayers who use the annualized income installment method to compute any estimated tax installments must use that method to compute **all** installments.

The answer is "No." However, Wisconsin law (sec. 71.09(13)(d), Wis. Stats. (1987-88)) provides that when a taxpayer pays estimated tax based on the annualized income installment method, any subsequent payment based on the regular installment method must be increased by the amount saved by using the annualized income installment method rather than the regular method for earlier installments.

Example — A taxpayer determines Wisconsin estimated tax payments of $200 for each quarterly period using the regular method. The taxpayer also determines that the payment for the first quarterly period would be only $150 under the annualized income installment method. There is no benefit to using the annualized income installment method for the second, third, and fourth quarter payments. The amount of estimated tax payment required for each quarterly period is as follows:

1st Quarter	= $150	
2nd Quarter	= $250	($200 plus $50 saved by using annualized income method for 1st quarter)
3rd Quarter	= $200	
4th Quarter	= $200	

Taxpayers using the annualized income installment method may want to use the

Annualized Income Installment Worksheet which is provided in Part III of Wisconsin Schedule U (Underpayment of Estimated Tax by Individuals and Fiduciaries) or Part IV of Form 4U (Underpayment of Estimated Tax by Corporations). The worksheet should be helpful in determining the amount by which "regular" method installments must be increased to reflect savings from earlier "annualized" method installments.

The worksheet automatically selects the smaller of the annualized income installment or the regular installment (increased by the amount saved by using the annualized income installment method in figuring earlier installments) as the payment to make for each quarterly period. The worksheet can be used (1) to compute the installment payments for all periods, or (2) to compute the payment for the period for which the taxpayer first uses the annualized income installment method and payments for subsequent periods.

WAUSAU OFFICE RELOCATED

Effective immediately, the department's Wausau office is now located at One Wausau Center, 710 Third Street, Wausau 54401. The telephone number remains (715) 842-8665.

INFORMATION OR INQUIRIES?

MADISON - MAIN OFFICE
Area Code (608)

Beverage, Motor Fuel, Cigarette Tobacco Products	266-6701
Corporation Franchise or Income	266-3645
Estimated Taxes	266-9940
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

MADISON ACCOUNTANT CHARGED WITH FAILURE TO FILE RETURNS

Income Tax

A Madison accountant, James L. Nicholson, 2666 Pennwall Circle, Madison, was charged in Dane County Circuit Court with 3 counts of failing to timely file state income tax returns for each of the years 1985, 1986, and 1987 and 8 counts of failing to deposit state income taxes withheld from wages of his employes for 1986 and 1987.

A Brookfield accountant has been ordered to serve 4 years probation for criminal violations of Wisconsin state income tax laws. Martin J. Seibert, Jr., 2560 Anita Drive, Brookfield, was sentenced in Waukesha County Circuit Court, Branch 2, Waukesha, after he pled no contest to 5 counts of failing to timely file state individual and corporation tax returns. He was charged with failing to file state individual income tax returns for 1984, 1985, and 1986 and corporation franchise tax returns for 1985 and 1986.

Judge Mark S. Gempeler sentenced Seibert to 6 months in jail, stayed execution of the sentence and placed Seibert on probation for 4 years. Under the conditions of probation, Seibert must make restitution of any taxes for the years for which he filed late returns and pay court costs.

An Appleton accountant and his wife, Erwin J. and Sondra M. Oenes, 728 Fernmeadow Drive, Appleton, were charged in Outagamie County Circuit Court with 3 counts of failing to timely file state individual income tax returns for each of the years 1985, 1986, and 1987 and 22 counts of failing to deposit state income taxes withheld from wages of employes in 1986 and 1987. Erwin Oenes was also charged with failing to timely file state corporation franchise tax returns for Oenes and Associates, S.C., for the years 1986 and 1987.

Bernard A. Brennan, 539 East McKinley Street, Appleton, was charged in Outagamie County Circuit Court with 3 counts of failing to timely file state income tax returns for each of the years 1985, 1986, and 1987.

Ralph E. Paul, 2040 McGann Road, Neenah, Wisconsin was sentenced in Winnebago County Circuit Court, Branch 3, Oshkosh, after he pled no contest to one count of failing to timely file a state income tax return for 1985. Judge Thomas S. Williams sentenced Paul to 6 months in jail, stayed execution of the sentence and placed Paul on probation for 2 years. Under the conditions of probation, Paul must pay a $500 fine, file his 1984 and 1988 state income tax returns and file future returns on time during the period of probation.

Criminal charges against Paul were initiated March 27, 1989, by the Winnebago County District Attorney's office after an investigation by the Intelligence Section of the Wisconsin Department of Revenue. He was charged with failing to file state income tax returns for 1985, 1986, and 1987. The charges for 1986 and 1987 were dismissed after he pled no contest to the violation for 1985.

Alois C. Fischer, 1713 East Glendale Street, Appleton, was charged with 3 counts of failing to file state income tax returns for each of the years 1985, 1986, and 1987. Ronald J. White, 7426 Country Club Road,

Oshkosh, was also charged with 3 counts of failing to file state income tax returns for each of the years 1985, 1986, and 1987.

Larry A. Christopherson, 5211 - 84th Street, Kenosha, was charged with 23 counts of failing to deposit taxes withheld from wages of employes of Nardi Electric Company, Inc. and one count of theft of the tax monies. The complaint alleges Christopherson was president and treasurer of Nardi Electric Company and failed to make deposits totaling more than $36,000 from December 1, 1985, through June 30, 1988.

Sales Tax

Charles A. Schott, 4360 Beaufort Drive, Brookfield was charged in Waukesha County Circuit Court with one count of filing a false sales and use tax return relative to registration of a boat in June 1987.

Excise Taxes

On April 11, 1989, John R. Molitor, d/b/a "Maggies Fine Foods & Spirits," 3480 Molitor Road, Eau Claire, pleaded "no contest" to one count of wholesaling liquor and beer without a permit. Molitor was fined $250 plus costs and was given 30 days to pay.

Brennan's Country Farm Market, Inc., 5533 University Avenue, Madison, Wisconsin, was found guilty on January 23, 1989, of purchasing liquor from other than a Wisconsin wholesaler as well as wholesaling liquor without a permit. The corporation was fined a total of $893 for these 2 violations.

Skogen's IGA, 1008 North Main Street, Galesville, Wisconsin was fined $420 on February 14, 1989, for failing to maintain invoices for its liquor purchases.

Bonnie Maas, Route 2, Trempealeau, Wisconsin, was fined $420 for selling liquor and beer without a license from Larry's Landing, a bait shop which she operates.

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 June 15, 1989. Parts D and E list new rules and amendments which were adopted in 1989. Part F 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 corporations-R
3.12 Losses on account of wash sales by corporations-R&R
3.37 Depletion of mineral deposits by corporations-A
3.38 Depletion allowance to incorporated mines and mills producing or finishing ores of lead, zinc, copper, or other metals except iron-A
3.47 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 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 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

3.095 Income tax status of interest and dividends from municipal, state and federal obligations received by individuals and fiduciaries-A

C. Rules at Legislative Standing Committee

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 determination-A
3.01 Rents paid by corporations-A
3.05 Profit-sharing distributions by corporations-A
3.07 Bonuses and retroactive wage adjustments paid by corporations-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—corporations-A
3.48 Research or experimental expenditures-A
3.52 Automobile expenses—corporations-R&R
3.83 Domestic international sales corporations (DISCs)-A

D. Rules Adopted in 1989 But Not Yet Effective

1.001 Definition-A
2.14 Aggregate of personal exemptions-A
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
2.956 Historic structure and rehabilitation of nondepreciable historic property credits-NR
3.09 Exempt compensation of military personnel-A
3.098 Railroad retirement supplemental annuities-A
3.44 Organization and financing expenses—corporations-A
3.45 Bond premium, discount and expense—corporations-A
3.82 Evasion of tax through affiliated interests-A

E. Rules Adopted in 1989

11.10 Occasional sales-A (effective 5/1/89)

F. Emergency Rules

2.956 Historic structure and rehabilitation of nondepreciable historic property credits-NR (effective 12/28/88; expires 7/26/89)

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 9/28/89)

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

Sales/Use Taxes

INDIVIDUAL INCOME TAXES

Tax protestors. *Kenneth William Koch vs. Wisconsin Department of Revenue* (Circuit Court of LaCrosse County, January 17, 1989). In this case, the department had evidence that the taxpayer had received income during the years in question and that the taxpayer had incurred withholdings for tax purposes. On that basis the department concluded that the taxpayer was required to file tax returns for those years. The department requested that the taxpayer file tax returns for those years. The taxpayer's position is that federal reserve notes are tax-exempt federal obligations. The taxpayer failed to present any evidence to the Commission to support his position.

The Court found that the Commission's decision was not based on any erroneous interpretation or application of sec. 71.10 or sec. 71.11(4), Wis. Stats., that the Commission's decision was not erroneous in that wages are taxable as income under Wisconsin income tax law, and that the Commission's decision was not erroneous in that federal reserve notes are not exempt obligations of the United States and are taxable. The Court further found that the taxpayer's challenge is frivolous as a matter of law in that he knew, or should have known, that the action was without reasonable basis in law and could not be supported by a good faith argument for extension, modification, or reversal of existing law. Therefore, the decision of the Commission and order that the taxpayer pay the costs of this action and reasonable attorneys' fees incurred by the State of Wisconsin under the provisions of sec. 814.025 and sec. 814.04, Wis. Stats., was affirmed.

The taxpayer has not appealed this decision.

❑

Domicile. *Edwin F. and Nancy L. Prizer vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, January 26, 1989). The only issues in dispute are Mr. Prizer's domicile for the years 1985 and 1986 and the underpayment penalty for estimated taxes for those years. It is the department's position that the taxpayer was domiciled in Wisconsin for the years 1985 and 1986 and that all his income is properly taxable by Wisconsin for those years. It is the taxpayer's position that he was jointly domiciled in Illinois and Wisconsin in 1985 and 1986, and that one-half of his income is properly taxable by Wisconsin, and the other one-half of his income is properly taxable by Illinois.

The taxpayer and his wife purchased their Grafton, Wisconsin, home on September 30, 1983, and moved into the house in June 1984. The taxpayer leased a furnished apartment in Illinois from September 1984 through December 15, 1986. In December 1986, the taxpayer rented an unfurnished condominium in Des Plaines, Illinois. Other than the Grafton, Wisconsin, home, the taxpayer owned no real estate during the years under review, 1985 and 1986. During the years 1985 and 1986, the taxpayer estimates that he spent approximately 148 days each year in Wisconsin, 173 days each year in Illinois, and 44 days each year in states other than Wisconsin and Illinois.

From June 6, 1984, through 1986, the taxpayer was employed by Convenient Food Mart, Inc. of Rosemont, Illinois. The taxpayer had been employed in Wisconsin and rendered services in Wisconsin from November 1981 through March 1984. The taxpayer was living in St. Louis, Missouri, when he accepted employment in Milwaukee, Wisconsin, in November 1981. The taxpayer generally spent the weekdays in Milwaukee, but commuted to St. Louis most weekends. During this time, the taxpayer generally stayed at the Park East Hotel in Milwaukee during the weekdays. After the taxpayer acquired the Grafton, Wisconsin, property in September of 1983, he lived at the Grafton, Wisconsin, residence during the week, but still commuted to St. Louis most weekends.

In March 1984, the taxpayer resigned his employment in Milwaukee and returned to St. Louis. In June 1984, the taxpayer accepted employment in Rosemont, Illinois. Also in June 1984, the taxpayer sold his home in St. Louis and he and his wife moved to their home in Grafton, Wisconsin. From June 1984 until September 1984, the taxpayer commuted daily from Grafton, Wisconsin, to Rosemont, Illinois. On or about September 1984, the taxpayer acquired an apartment in Rosemont, Illinois, and commuted to Grafton, Wisconsin, most weekends and holidays.

During the years under review, the taxpayer had two checking accounts. One account had a Grafton, Wisconsin, address and one account had an Illinois address. The Wisconsin checking account was used to pay Wisconsin expenses and some Illinois expenses. The account was opened prior to 1985 and remained open for the period under review. The taxpayer also had an Illinois checking account during the same period. The Illinois checking account was used to pay some Illinois expenses and as a depository. The account was opened prior to 1985 and remained open for the period under review.

The taxpayer used his Grafton, Wisconsin, address for purposes of his various insurance policies. The taxpayer gave his employer both his Grafton, Wisconsin, address and his Illinois address. The taxpayer filed his federal income tax returns with the Grafton, Wisconsin, address, filed his Wisconsin income tax returns with the Grafton, Wisconsin, address, and filed Illinois income tax returns with his Grafton, Wisconsin, address. During the years under review, the taxpayer did not belong to any Wisconsin or Illinois clubs, churches, social or professional organizations, used his Illinois address for his investment accounts and stocks, and had no invest-

ment advisors or brokers. The taxpayer's will listed his address as Illinois.

During the years 1985 and 1986, the telephone and utility bills in the taxpayer's Grafton, Wisconsin, home were in his name, and telephone and utility bills were in his name at his Illinois residences. The taxpayer was not registered to vote in any state, held a Wisconsin driver's license in 1985 and part of 1986, and obtained an Illinois driver's license on October 22, 1986. The taxpayer's child never attended any Wisconsin schools. The taxpayer's wife spent most of her time in Grafton, Wisconsin, approximately 321 days a year. She spent approximately 30 days a year each year in Illinois and approximately 14 days a year elsewhere each year. The taxpayer was not estranged or otherwise separated from his wife during the years under review.

The Commission concluded that during the years 1985 and 1986, the taxpayer was domiciled in the state of Wisconsin. The taxpayer could have only one domicile at a given time and could not acquire a new domicile in Illinois until he had actually abandoned his old domicile in Wisconsin. The taxpayer did not abandon his Wisconsin domicile nor establish a new domicile in Illinois during the period under review.

The taxpayer has not appealed this decision.

❑

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). It was reported in WTB 60, page 7, that the taxpayer had appealed the Commission's decision in part. This is an error. The taxpayer has appealed the entire decision.

❑

Interest income—imputed. *J. C. Penney Company, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, April 25, 1989). The taxpayer is a Delaware corporation operating a national merchandising business by way of retail chain stores as well as a mail-order sales business. The taxpayer does business in Wisconsin and is subject to the Wisconsin corporate franchise tax.

J. C. Penney Properties, Inc. ("Properties") is, likewise, a Delaware corporation and one of the taxpayer's wholly owned subsidiaries. Properties' business is the acquisition of real estate including the construction, purchase, and improvement of buildings used by the taxpayer as department stores or warehouses. It operates throughout the United States and, like the taxpayer, does business in Wisconsin, and is subject to the Wisconsin corporate franchise tax.

The taxpayer also leases buildings for department store use from unrelated parties. Properties is the sole provider of the taxpayer's leased warehouses.

Since 1962, the taxpayer has advanced funds to Properties for use in the acquisition and/or construction of real estate to be leased to the taxpayer as stores or warehouses. The taxpayer included these advances on its balance sheets and in Wisconsin franchise tax returns, reported them as "investments." Properties included these amounts in its balance sheets and in its Wisconsin franchise tax returns as "loans from stockholder."

After field audit, the department issued a notice of amount due dated October 29, 1984, containing an assessment of additional franchise tax to the taxpayer for fiscal years ending "FYE" January 26, 1980, through January 30, 1982, in the total amount, including interest, of $390,522.12. The majority of the additional assessment was based on the department's determination that these advances and similar advances to other of the taxpayer's subsidiaries were interest-free loans. Uncharged interest income was imputed by the department on these advances from the taxpayer to Properties under sec. 71.11(7m), Wis. Stats. The department allocated additional income for each of the three fiscal years covered by audit derived from interest imputed to the loans. The department applied the average prime rate of interest for each of the three fiscal years to the average net receivables balance for the year to arrive at the amount of imputed interest. Rates used were 12% for FYE January 26, 1980, 13% for FYE January 31, 1981, and 18% for FYE January 30, 1982, to the outstanding balance of advances at each year's end, thus deriving additional income in amounts which the department then allocated to the taxpayer.

At the Commission hearing and in its brief, the taxpayer clarified that it has withdrawn its objections to the assessment, except as respects FYE January 30, 1982. For that year, the taxpayer continues to object to the rate of the interest imputed by the department and the department's failure to allow offset for rentals made by Properties to the taxpayer at a bargain rate. The taxpayer argues that the difference between actual rent charged and "market" rent should be used to offset under sec. 71.11(7m), Wis. Stats., the imputed interest, regardless of which rate is finally determined to be proper.

The taxpayer did not directly charge interest on funds advanced to Properties. Rather, the advances were repaid by an arrangement whereby a periodic "rent" was charged the taxpayer by Properties for the long-term lease of the stores and warehouses in question, but never actually collected by Properties or paid by the taxpayer. Instead, the rent was applied to systematically reduce the debt owed the taxpayer by Properties. The rent for each property was set at an amount which would amortize the debt attributable to that property (i.e. the cost of the property paid for by Properties with funds received from the taxpayer) over a period of about 30 years for retail stores or 50 years for warehouses together with interest at a rate equal to the taxpayer's quoted borrowing rate on its senior debentures for the calendar quarter preceding the lease of the store or warehouse.

These rental rates were stated as a formula in a lease entered into for each property by

the taxpayer and Properties. The rents were never paid, but bookkeeping entries were used to amortize the debt owed to the taxpayer by Properties over the term of the lease. Thus, as each monthly rent payment became due on a store or warehouse, the taxpayer would debit rent expense and credit a clearing account on its books which records the amount of debt owed the taxpayer by Properties. At the same time, Properties would debit the clearing account in its books recording the company's debt to the taxpayer and credit rent income. If a property were sold by Properties, the proceeds would be used to further reduce the clearing account. As of January 30, 1982, the net debt owed by Properties to the taxpayer under this arrangement totalled $437,795,780. This amount was used by the department to impute interest income to the taxpayer on its non-interest bearing advances to Properties.

Had Properties charged market rents on its store leases to the taxpayer, the total 1981 rents would have been 30% higher, or $64,430,440 rather than $49,561,877. The rents charged the taxpayer by Properties for warehouses were also below fair market rents. Actual rents charged for the warehouses for FYE January 30, 1982, totalled $10,991,168. Fair market rents for the warehouse properties would have been $14,972,463 and, thus, $3,981,295 or 36.2% more than the actual rents charged by Properties for such warehouses.

There were no written instruments governing the taxpayer's advances to Properties, nor were there written notes or mortgages related to them. There were no written documents establishing an obligation of Properties to repay the advances.

The Commission concluded that the department's allocation of additional income to the taxpayer for its FYE January 30, 1982, under sec. 71.11(7m), Wis. Stats., upon interest free loans made by the taxpayer to Properties, was necessary clearly to reflect the taxpayer's income. However, the amount of income determined was excessive in these respects:

A. The department used only 1981 interest rates, when it should have used the various interest rates obtained when the loans in question were made by the taxpayer to Properties.

B. The department used a prime rate of interest, when it should have used the federal safe haven interest rates promulgated under sec. 482, IRC.

C. The department failed to allow a setoff for a non-arm's length rents charged the taxpayer by Properties under a rental arrangement designed to reimburse the taxpayer for its advances of funds to Properties.

The taxpayer and the department have not appealed this decision.

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Statute of limitations—waivers. *Sta-Rite Industries, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 23, 1989). The issue for the Commission to determine is whether the tax assessment statute of limitations begins running on the date of taxpayer's mailing of the tax return or the date of department's receipt of the return.

On June 15, 1979, the taxpayer mailed to the department, certified mail, return receipt requested, its 1978 franchise tax return. The department received the return on June 18, 1979. On June 17, 1983, the parties entered into an agreement extending the department's assessment period for 1978.

At issue is the validity of the assessment extension agreement. The taxpayer claims the agreement was invalid, because it wasn't executed before the 4-year statute of limitations had expired. In support, the taxpayer argues the 4-year period began running on June 15, 1979, the date it mailed the return, and ran out on June 15, 1983, 4 years later and 2 days before the extension agreement was executed. The department counter-argues the statute didn't begin to run until June 18, 1983, when the department received the return. Therefore, the department says the statute hadn't expired on June 17, 1983, the date on which the extension agreement was executed.

The question here, thus, turns on whether the date of taxpayer's mailing of a return is the legal equivalent of the date of filing for the purposes of computing the limitation period.

The Commission concluded that there is no question that the return was properly addressed, had proper postage and postmark, and was received within 5 days. The precise statutory question boils down to whether mailing is the legal equivalent of filing. The Commission held that the terms mailing and filing are not legally synonymous, at least for the purpose of computing when the assessment period begins to run. Therefore, the department's denial of the taxpayer's petition for redetermination was affirmed.

The taxpayer has appealed this decision to the Circuit Court.

❐

Business loss carryforward—mergers. *Wisconsin Department of Revenue v. The United States Shoe Corporation* (Circuit Court of Dane County, February 28, 1989). The issues are:

A. Whether the Commission erred in denying U.S. Shoe's motion for summary judgment based on a closing agreement as to tax years 1976 and 1977.

B. If it did not, did the Commission err in its interpretation of sec. 71.06(1), Wis. Stats. (1975-76), to permit U.S. Shoe to deduct against its income for 1976 and 1977 the net business losses of a corporation merged with it on the last day of its fiscal year 1975.

C. If it did not, did the Commission err by limiting this deduction to an offset against only the income earned by the "same trade or business" that generated the losses.

U.S. Shoe is an Ohio corporation which has been subject to the Wisconsin franchise tax since fiscal year 1975 and is engaged in the manufacture and sale of shoes in Wisconsin and elsewhere. The Freeman-Toor Corporation (Freeman-

Ohio) was an Ohio corporation engaged in the manufacture and sale of shoes in Wisconsin and elsewhere during the fiscal year ending July 31, 1975. Freeman-Ohio was a wholly-owned subsidiary of U.S. Shoe and on July 31, 1975, was merged under the laws of Ohio into U.S. Shoe. The Freeman-Toor Corporation (Freeman-Delaware) was a Delaware corporation engaged in the manufacture of shoes in Wisconsin and elsewhere prior to August 1, 1974. On July 31, 1974, Freeman-Delaware was a wholly-owned subsidiary of U.S. Shoe and, on that date, Freeman-Delaware and all of its wholly-owned subsidiaries were merged under the laws of Ohio into Freeman-Ohio.

On its Wisconsin franchise tax return for the fiscal year ending July 31, 1976, U.S. Shoe claimed a net business loss offset of $899,594 based on the loss amount reported on Freeman-Ohio's 1975 Wisconsin return. Not all of the loss offset was used in fiscal 1976 so that on its return for the fiscal year ending July 31, 1977, U.S. Shoe carried forward and applied the excess as a fiscal 1977 offset of $139,926.

The department's March 7, 1980, assessment disallowed the claimed offset on the grounds that Wisconsin law does not permit a corporation, formed through merger, to offset against its income the losses of its predecessor corporations. The Commission reversed the department, concluding that U.S. Shoe was entitled to carry forward the losses of Freeman-Delaware or Freeman-Ohio during 1975 through 1975 as offsets against U.S. Shoe's 1976 and 1977 Wisconsin income for corporate franchise tax purposes under sec. 71.06(1), Wis. Stats. (1975-76). The March 7, 1980, assessment was also addressed to fiscal year 1978.

The Commission concluded that the changes in the statute were substantive, substantial, and material. On this basis, it concluded that *Fall River Canning* "is no longer operative." In doing so, the Commission found the new statutory language to be unambiguous and concluded that U.S. Shoe could deduct prior year losses of corporations with which it had merged as loss carryforwards under sec. 71.06(1), Wis. Stats.

On June 19, 1984, the department issued an assessment directed to fiscal years 1978 through 1983. U.S. Shoe and the department entered into a closing agreement on December 21, 1984. U.S. Shoe argued that this agreement foreclosed all efforts of the department to assess any further franchise taxes against it for any period before January 31, 1983. The Commission agreed insofar as fiscal year 1978, but not as to 1976 and 1977.

U.S. Shoe argues that the language of the final paragraph of the closing agreement is a separate undertaking between the parties and that, by its express terms, that paragraph unambiguously settles in final fashion its franchise tax liability for all years prior to January 31, 1983. In the alternative, it argues that the agreement is ambiguous and any ambiguity must be resolved against its drafter, here the department, to reach the same result.

The Court concluded that:

A. Taken in isolation, the final paragraph of the closing agreement would appear to lead to the conclusion urged by U.S. Shoe. The title of the agreement unequivocally specifies the period covered as "June 1, 1977, through January 31, 1983, inclusive." The first paragraph recites "that for purposes of settlement, the correct adjusted incomes . . . for the years July 31, 1978, to January 31, 1983, both inclusive, are . . . ." The attached schedules show calculations for six consecutive tax periods beginning with the fiscal year commencing on June 1, 1977, and ending on July 31, 1978, through the fiscal year ending on January 31, 1983. Further, the title to the agreement references the assessment of June 19, 1984, which indisputably was a field audit assessment. The language of the final paragraph, "a final disposition of the taxpayer's franchise tax liability," when read in reference to these other parts and features of the agreement can only be construed to mean the franchise tax liabilities that are addressed by the agreement, i.e., those for the periods June 1, 1977, through January 31, 1983.

B. The resolution of the second issue rests upon the proper interpretation of sec. 71.06(1), Wis. Stats. (1977-78). Section 71.06, Wis. Stats., had been construed in 1958 by the Supreme Court in *Fall River Canning*. The legislature had amended the statute in 1965 and again in 1975. On both occasions, the purpose of the changes made were clearly stated. On neither occasion, was there any mention made of the Court's construction in *Fall River Canning*, much less any expression of intent to change it. It must be presumed that the legislature, acting with full knowledge of a judicial construction and at least twice thereafter specifically addressing the statute construed, would have either used explicit language in its changes or included as its stated purpose in some part of the drafting record the desire to allow deductibility in the post merger situation, if that was its intent. It did neither, and thus the court must presume there was no intent to change the *Fall River Canning* construction. Thus, the Court found no basis for construing sec. 71.06(1), Wis. Stats. (1977-78), as effecting the viability of *Fall River Canning's* application of the statutory deduction of business loss carryforwards to the post merger setting.

C. Since the prior business losses of Freeman-Ohio and Freeman-Delaware cannot be claimed as a deduction by U.S. Shoe, there is no need to address the third issue.

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

❐

Closing agreements. *W. R. Grace & Co. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 23, 1989). The issues for the Commission to determine are:

A. Whether the assessment dated October 12, 1981, (hereinafter referred to as the 1975 RAR assessment) issued to the taxpayer is barred by the closing agreement dated October 17, 1985.

B. Whether the department, by its actions in the course of settling two related matters regarding the taxpayer, agreed to absolve the taxpayer for all its franchise tax liability for 1975.

C. Whether the department is equitably estopped from seeking to assert the validity of the 1975 RAR assessment.

On August 4, 1977, the department issued an assessment against Grace for additional franchise taxes and interest for the years 1973 through 1975. The matter was appealed to the department and then to the Tax Appeals Commission, where only the part of the assessment for the year 1975 was at issue. Subsequently, the Commission held that Grace's domestic operations constituted a unitary business, but that its foreign and domestic subsidiaries were not part of such unitary business and, therefore, dividends and gains from such subsidiaries were not includable in Grace's apportionable income. Both the department and Grace appealed this decision to the Dane County Circuit Court. Such matters shall be referred to herein as "the court cases."

On October 12, 1981, the department issued another assessment against Grace for the years 1974 through 1975 for additional franchise tax and interest. The assessment was based on federal audit adjustments to Grace's income for those years. Such adjustments are referred to as "RAR" adjustments, which stands for "Revenue Agent's Report" adjustments. Grace paid the amount due for 1974, but appealed the inclusion of dividends and gains in apportionable income in 1975. Grace and the department agreed to hold this appeal in abeyance pending the disposition of the first Grace appeal which was then pending before the Commission. This second appeal shall be referred to herein as "the 1975 RAR assessment."

On June 14, 1982, the department issued still another assessment against Grace, this one for additional franchise tax and interest for the years 1976 through 1980. The matter was also held in abeyance pending the Commission's decision on the first appeal. The principal issues in this appeal were the unitary business issue and taxation of dividends and gains issues common to the "court cases" and the 1975 RAR assessment. This appeal shall be referred to herein as "the 1976-1980 assessment."

On June 26, 1985, while the "court cases" were pending in court and the 1975 RAR assessment and the 1976-1980 assessment were both pending before the department's Appellate Bureau, the parties held a meeting. At the meeting, the parties reached a basis of settlement reflecting the Commission's decision to the extent that Grace's domestic operations were treated as a unitary business and dividends and gains were excluded from Grace's income. After the meeting, the department sent Grace two revised audit reports, one for the "court cases," which showed an amount due for tax with interest computed to September 30, 1985, of $111,722.44; the other for the 1976-1980 assessment, which showed an amount due for tax with interest computed to October 15, 1985, of $565,462.12.

On October 14, 1985, the parties executed a stipulation of settlement in the "court cases," which provided as follows:

> It is hereby stipulated by and between the parties hereto, by their respective counsel, that the respondent/petitioner, W. R. Grace & Company, has an existing Wisconsin franchise tax deficiency, for the year 1975, in the amount of $60,106.22, along with interest thereon, computed to October 15, 1985, in the amount of $51,838.97 for a total of $111,945.19; and, it is hereby further stipulated by and between the parties hereto, by their respective counsel, that the respondent/petitioner, W. R. Grace & Company, shall pay such deficiency and interest, in the amount of $111,945.19 plus additional interest of $14.85 for each day after October 15, 1985, such deficiency remains outstanding, **and that such payment shall be in full settlement of the above-entitled actions**; and, it is hereby further stipulated by and between the parties hereto, by their respective counsel, that the parties file a stipulation of dismissal in the above-entitled actions. (Emphasis added)

On October 17, 1985, the parties executed a closing agreement relative to the 1976-1980 assessment, which provided as follows:

> IN THE MATTER OF THE ADDITIONAL FRANCHISE TAX ASSESSMENT AGAINST W. R. GRACE & CO. DATED JUNE 14, 1982 FOR THE YEARS 1976 THROUGH 1980.
>
> IT IS HEREBY STIPULATED AND AGREED that for purposes of settlement, **the correct adjusted incomes of the above-named, W. R. Grace & Co., for the years 1976 to 1980, both inclusive, are in the amounts set forth in the attached schedule(s) and that upon the basis of such adjusted incomes there are taxes and interest to October 15, 1985, totaling $565,462.12.**
>
> IT IS FURTHER STIPULATED that this agreement and the payment of the above additional taxes shall serve as a final disposition of the taxpayer's franchise tax liability up through and including the year 1980. (Emphasis added)

On March 6, 1986, the department sent Grace a closing agreement relative to the 1975 RAR assessment which made the same adjustments to income that were made in the "court case's" revised audit report, except that it imposed tax on the federal audit adjustments. Grace declined to sign the agreement claiming the stipulation of settlement in the "court cases" precluded the 1975 RAR assessment. The department issued its notice of action denying Grace's petition for redetermination and Grace appealed to the Commission. Grace's appeal claimed that the 1975 RAR assessment was barred by the closing agreement for the 1976-1980 assessment.

The Commission concluded that:

A. The assessment dated October 12, 1981, issued to the taxpayer is not barred by the closing agreement dated October 17, 1985.

B. The department, by its actions in the course of settling two related matters regarding the taxpayer, did not agree to absolve the taxpayer of all its franchise tax liability for 1975.

C. The department is not estopped from seeking to assert the validity of the 1975 RAR assessment.

The taxpayer has appealed this decision to the Circuit Court.

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SALES/USE TAXES

Telecommunication services. *GTE Sprint Communications Corporation, now known as U.S. Sprint Communications Company vs. Wisconsin Bell, Inc.* (Circuit Court of Milwaukee County, November 9, 1988). The issue in this case is whether the sales tax which is imposed by the State of Wisconsin on transfers of services to an inter-exchange carrier which permit the origination or termination of telephone messages between a customer in this state and one or more points in another telephone exchange (LATA) is invalid as repugnant to the Commerce Clause of the United States Constitution and the Equal Protection Clauses of the United States and Wisconsin Constitutions.

The Modification of Final Judgment (MFJ) in *United States v. American Telephone and Telegraph Company*, 552 F. Supp. 131, 227 (D.C. 1982), *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001 (1983), ordered AT&T to divest itself of its Bell Operating Company subsidiaries, including the company now known as Wisconsin Bell, and that these subsidiaries become separately owned and operated by January 1, 1984.

Beginning on January 1, 1984, the MFJ limited the former Bell Operating Companies, including Wisconsin Bell, to the furnishing of intra-exchange telecommunications services, and exchange access services for inter-exchange telecommunications services. This limitation remains today. Thus, U.S. Sprint provides toll telecommunications services and private line communications between exchanges (LATAs), while Wisconsin Bell provides those same services within exchanges (LATAs).

Wisconsin Bell provides two types of services. They provide services for the origination and termination of telephone calls within their services areas. These origination and termination services are called "access services." They are local in nature. While it may not be completely accurate in terms of the electronic pathway, it is useful to think of this service as the telephone which sits on a desk or hangs on a wall. It does, however, include electronic pathways up to a general switching area which allows access to both intra-exchange and inter-exchange pathways. Wisconsin Bell secondly provides end-to-end transmissions within exchanges (LATAs). Wisconsin Bell uses its own equipment for the entire transaction. Wisconsin Bell is prohibited from providing end-to-end transmission when the transmission crosses exchange lines (LATAs).

U.S. Sprint provides only one service, the transmission of communications across exchange lines (LATAs). This includes communications across state lines but also includes communications entirely within Wisconsin. U.S. Sprint is prohibited from providing origination and termination services.

U.S. Sprint purchases the origination and termination services from local companies such as Wisconsin Bell and pays for them pursuant to tariffs. The tariffs at issue in this case are on file with the Public Service Commission of Wisconsin or the Federal Communications Commission.

Wisconsin Bell's sale of these origination and termination services, the access services, is the taxable event which U.S. Sprint contends is unconstitutional. U.S. Sprint contends that sec. 77.52(2)(a)4, Wis. Stats., violates the Commerce Clause and the Equal Protection Clause of the United States Constitution. The tax is imposed when a telephone call goes from one LATA to another but does not get imposed when the case originates and terminates in the same LATA.

The Court concluded that where a call goes from one LATA to another and creates a transaction, that becomes taxable, there is a rational basis for the imposition of a tax.

U.S. Sprint has appealed this decision to the Court of Appeals.

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Farming—machines. *L. T. Hampel Corporation vs. Wisconsin Department of Revenue* (Circuit Court of Dane County, March 30, 1989). This case comes before the Court for judicial review of a Wisconsin Tax Appeals Commission decision and order, dated September 2, 1988, which determined that sales of the taxpayer's "Calf-tel" calf hutches are not exempt from Wisconsin sales tax under the provisions of sec. 77.54(3), Wis. Stats.

The taxpayer has been selling its calf hutches to farmers and farm equipment dealers throughout Wisconsin. From 1981 through 1984, the taxpayer sold its calf hutches without collecting Wisconsin sales tax. In a decision dated September 2, 1988, the Commission affirmed the department's determination that the sale of calf hutches was subject to the Wisconsin sales tax and that the hutches were not exempt as machines under sec. 77.54(3), Wis. Stats.

The Commission found that hutches helped reduce stress, disease, and death loss among young calves raised in hutches during the first six to eight weeks of life. The Calf-tel hutch has been very effective at achieving these goals, and in creating an environment conducive to raising healthy calves. The Calf-tel has movable parts, but none that are in constant or automatic motion. It has no electronic parts, nor does it utilize or contain any sources of mechanical energy such as gas, electricity, steam, etc. The movable parts are movable either by the calf or by humans.

The major Wisconsin case construing the exemption under sec. 77.54(3), is *Wisconsin Department of Revenue v. Greiling*, 112 Wis. 2d 602 (1983). In that case, the Court found that: "'Machine' may be a nontechnical commonplace word; however, it is not the word 'machine' by itself that is to be analyzed, but the word in conjunction with its use in floriculture that must be considered. The *Greiling* Court applied the use and function test as set out

in *Ladish Malting Co. v. Wisconsin Department of Revenue*, 98 Wis. 2d 496 (Ct. App. 1980).

The Court found that the Calf-tel calf hutch meets the above test. The Commission's findings of fact indicate that the Calf-tel calf hutches are a significant contributive factor in the production of healthy calves. Thus, the "use or function" test, articulated in *Ladish* and followed in *Greiling* would indicate that the Calf-tel hutches are "machines" under sec. 77.54(3), Wis. Stats.

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

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Leases and rentals. *Charles L. Peterson vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, January 30, 1989). The issues for the Commission to determine are:

A. Whether or not the gross receipts from the lease of taxicabs by the taxpayer during the period under review are subject to sales and use tax under Subchapter III of Chapter 77 of the Wisconsin Statutes.

B. Whether under the circumstances and facts of this case, the Wisconsin Department of Revenue is equitably estopped from collecting a tax assessed for any period prior to and including the last quarter of 1984.

During the period under review, 1979 through 1984, Charles L. Peterson was in the business of owning and operating a taxicab franchise in the city of Milwaukee. Charles L. Peterson owned and operated this taxicab franchise since 1967. The City of Milwaukee issued the taxpayer three permits, one for each of his three taxicabs, in 1967, 1979, and 1980, respectively. The taxpayer has operated this franchise by driving one cab himself and by leasing his other two cabs to independent drivers. When the taxpayer did drive, he always drove the same cab and the other cabs were exclusively leased.

The taxpayer had no control over the drivers who leased his motor vehicles. For the payment of the leasing fee, the drivers obtained the right to use a licensed taxicab with a meter, a radio, and a top light all in operable condition. The drivers were obligated to furnish gasoline.

The taxpayer did not collect or report sales and use tax on the lease of his taxicabs to the independent drivers. The taxpayer claimed that the taxicab rentals were not subject to Wisconsin sales tax because the lease arrangements are not "a transfer of personal property for use or consumption but not for resale as tangible personal property or services" within the meaning of sec. 77.51(14), Wis. Stats. The taxpayer also contends that if the tax is properly imposed on these rentals, assessment should be barred by reason of the doctrine of equitable estoppel, which he asserts to be applicable against the department. As support for his contention, he alleges that the department failed to disseminate to the taxicab industry information stating that cab rentals were taxable and that the department failed to routinely and systematically collect sales tax on such collections. This, he asserts, constitutes action or inaction by the department upon which he reasonably relied to his detriment in failing to collect sales tax from his lessees.

In 1971, two years after enactment of the statute taxing gross receipts from tangible personal property, the department assessed tax on cab rentals from the two largest of the few taxi businesses in Milwaukee. The assessments were challenged on appeal but settled on the basis of allocating a portion of the gross receipts to provision of dispatch services. The record does not reflect whether other similar assessments were subsequently made or whether other taxi businesses which rented cabs to drivers paid sales tax thereon.

The department has published administrative rules interpreting and implementing the statutes making gross receipts from rental of tangible personal property taxable. These rules were in effect during the period in question and clearly identify leases of automobiles as taxable. The department does routinely audit taxicab companies. However, due to the diverse manner in which cabs are operated, i.e., by owner/drivers, lessee/drivers, or employes, it is possible that in the case of a number of businesses, for example, those particularly in smaller towns where no leased or rented vehicles are involved, the issue simply would not have arisen.

Although the taxpayer and his witnesses lacked knowledge during the period prior to 1984 that the receipts were taxable, the record suggests that there were periodic efforts by the Wisconsin Taxicab Association to obtain an exemption for rentals. This, in turn, suggests that not everyone in the industry was unaware of the department's position that these receipts were taxable.

The Commission concluded that the leases by the taxpayer of automobiles to lessee/taxicab drivers were retail sales by the taxpayer of tangible personal property for use or consumption of the lessees, but not for resale, within the meaning of sec. 77.51(14)(j), Wis. Stats. As lessor of tangible personal property to lessees for use as taxicabs located in Wisconsin, the taxpayer was a "retailer" as defined in sec. 77.51(13)(k), Wis. Stats. The gross receipts from the leases in question were "from the sale, lease, or rental of tangible personal property . . . at retail in this state," and, thus, taxable under sec. 77.52(1), Wis. Stats. The taxpayer has failed to establish elements which would warrant the application of estoppel in this case.

The taxpayer has not appealed this decision.

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When and where sale takes place. *Republic Airlines, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, May 4, 1989). The sole issue in this case is whether during the period 1981 through 1984, Republic Airlines, Inc.'s (Republic's) sales of liquor and use of liquor, pop, and peanuts on flights which fly over Wisconsin that don't land or take off in Wisconsin, and fly over Wisconsin's

portion of Lake Michigan, are "in this state" within the meaning specified in the Wisconsin Statutes.

Republic sold liquor to passengers, while its aircraft were in flight, both while flying over Wisconsin and while not flying over Wisconsin. In addition, it furnished to passengers while its' aircraft were were in flight, both while flying over Wisconsin and while not flying over Wisconsin, liquor, pop, and peanuts, without charge.

Republic's air transportation business includes: (a) flights which arrive at or depart from Wisconsin airports; (b) flights which fly over Wisconsin but which do not land or take off in Wisconsin; and (c) flights which neither arrive at nor depart from Wisconsin airports or fly over Wisconsin.

Republic does not maintain any record of what states it was flying over when it sold liquor or furnished liquor, pop, and peanuts. The taxpayer computed its Wisconsin sales of liquor by calculating a ratio of revenue passenger miles (RPMs) flown in Wisconsin to RPMs flown everywhere and applied the ratio to its gross receipts from its system-wide sales of liquor. The numerator of the ratio included the RPMs of flights which arrived at or departed from a Wisconsin airport but did not include RPMs of flights flying over Wisconsin, which did not land or take off in Wisconsin. In addition, the eastern boundary line of Wisconsin used for purposes of computing Wisconsin RPMs did not extend to the middle of Lake Michigan. The same RPM ratio was applied by Republic to its purchases of complimentary liquor, pop, and peanuts to determine the amount of such items used in Wisconsin.

The department issued an assessment notice which, among other adjustments not at issue, adjusted Republic's Wisconsin RPM ratio or fraction by including in the numerator RPMs for flights which flew over Wisconsin, but did not land in or take off from Wisconsin, and in addition, miles flown past the Wisconsin border to the middle of Lake Michigan. The assessment notice also imposed use tax on the complimentary liquor, pop, and peanuts.

The Commission concluded that Republic's in-flight sales of liquor "over" Wisconsin occurred in Wisconsin, that Wisconsin had jurisdiction to tax the sales, and that the sales tax was not an undue burden on interstate commerce nor a violation of Due Process. The Commission also concluded, however, that the consumption of complimentary food was exempt from the use tax and remanded the case to the department with directions to recalculate the use tax owing after excluding the complimentary items.

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

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Appeals—award of costs. *Susie Q Fish Co., Inc. v. Wisconsin Department of Revenue* (Court of Appeals, District IV, January 26, 1989). Susie Q Fish Co., Inc. appeals from a Circuit Court order affirming a decision of the Tax Appeals Commission denying its motion for costs under Wisconsin's Equal Access to Justice Act, sec. 227.485, Wis. Stats. The taxpayer prevailed in a contested tax exemption case with the Department of Revenue involving its two commercial fishing vessels — the Susie Q and the Avis-J. See Wisconsin Tax Bulletin 53, page 10, for a review of that case.

Under sec. 227.485(3), Wis. Stats., as a small business, the taxpayer was entitled to costs, unless the Tax Appeals Commission determined that the Department of Revenue's position was substantially justified or that special circumstances existed that would make an award of costs unjust.

The Court of Appeals concluded that the Tax Appeals Commission correctly determined that the Department of Revenue was substantially justified in relying on the original certificates of documentation which showed that the Susie Q and the Avis-J did not meet the tonnage requirements of sec. 77.54(13), Wis. Stats., and sec. Tax 11.16(3)(b)1, Wis. Adm. Code. The Tax Appeals Commission correctly found that the Department of Revenue did not have a duty under sec. Tax 11.16(3)(b), Wis. Adm. Code, to measure the vessels to determine, independently of the certificates, whether the vessels qualified for the exemption.

The taxpayer appealed this decision to the Wisconsin Supreme Court; however, its petition was denied.

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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

Homestead Credit

Corporation Franchise or Income Taxes

Sales/Use Taxes

INDIVIDUAL INCOME TAXES

1. Distributions From IRAs Which Invest in U.S. Government Securities

Statutes: Section 71.05(6)(b)1, Wis. Stats. (1987-88)

Facts and Question 1: A Wisconsin resident establishes an individual retirement account (IRA). The amounts contributed to the IRA are invested in securities issued by the United States Government (e.g., U.S. Treasury bonds). When amounts are withdrawn from this IRA, will a portion of the amount withdrawn constitute interest from a United States Government security which is exempt from Wisconsin income tax?

Answer 1: Yes. The portion of the amount withdrawn from an IRA which is attributable to interest from U.S. Government securities may be excluded from Wisconsin taxable income. Federal law (31 USCS § 3124) prohibits states from taxing interest on United States Government obligations. An individual who receives distributions from an IRA which invests in U.S. Government securities is considered to have received exempt interest from a U.S. Government obligation. Section 71.05(6)(b)1, Wis. Stats. (1987-88), provides a subtraction from federal adjusted gross income for U.S. Government interest when computing Wisconsin taxable income.

Question 2: When U.S. Government interest is accumulated in an IRA, what portion of a distribution from the IRA is considered U.S. Government interest?

Answer 2: The portion of an IRA distribution which is considered U.S. Government interest is based on the following formula:

$$\text{Amounts distributed from all IRAs during the year} \times \frac{\text{Total U.S. Government interest received by the IRAs for all years minus the amounts of U.S. Government interest withdrawn in prior years}}{\text{Total value of all IRAs at the end of the year plus amounts distributed during the year}}$$

The following worksheet can be used to determine the portion of an IRA distribution which is considered U.S. Government interest. If the taxpayer has more than one IRA, they must be considered together, as if they were a single IRA, when completing the worksheet.

1. Amounts distributed from all IRAs during the year ..... $_____
2. Total U.S. Government interest received by the IRAs for all years minus the amounts of U.S. Government interest withdrawn in prior years ..... $_____
3. Total value of all IRAs at end of year plus amount on line 1 ..... $_____
4. Divide line 2 by line 3. (Enter decimal figure.) ..... _____
5. Multiply line 1 by line 4. This is the amount of the IRA distribution which is considered U.S. Government interest ..... $_____

Example 1: A taxpayer has an IRA which has a fair market value of $40,000 on December 31, 1988. Over the years, the taxpayer contributed $25,000 of deductible contributions to the IRA and the IRA was credited with $10,000 of interest from U.S. Government securities and $11,000 of other interest. During 1988, the taxpayer received a distribution of $6,000 from the IRA. The

taxpayer did not receive any distributions in prior years. The Wisconsin subtraction for U.S. Government interest for 1988 is $1,304.40, computed as follows:

1. Amounts distributed from all IRAs during the year		$6,000.00
2. Total U.S. Government interest received by the IRAs for all years minus the amounts of U.S. Government interest withdrawn in prior years	$10,000.00	
3. Total value of all IRAs at end of year plus amount on line 1 ($40,000.00 + $6,000.00)	$46,000.00	
4. Divide line 2 by line 3	.2174	
5. Multiply line 1 by line 4. This is the amount of the IRA distribution which is considered U.S. Government interest.		$1,304.40

Example 2: During 1989, the taxpayer in Example 1 receives an additional distribution of $8,000 from the IRA. No additional contributions are made to the IRA during 1989. Interest income credited to the IRA during 1989 is $4,000 of which $1,800 is interest from U.S. Government securities and $2,200 is other interest. The fair market value of the IRA on December 31, 1989, is $36,000. The Wisconsin subtraction for U.S. Government interest is $1,908, computed as follows:

1. Amounts distributed from all IRAs during the year		$8,000.00
2. Total U.S. Government interest received by the IRAs for all years minus the amounts of U.S. Government interest withdrawn in prior years ($10,000.00 + $1,800.00 – $1,304.40)	$10,495.60	
3. Total value of all IRAs at the end of the year plus amount on line 1 ($36,000.00 + $8,000.00)	$44,000.00	
4. Divide line 2 by line 3	.2385	
5. Multiply line 1 by line 4. This is the amount of the IRA distribution which is considered U.S. Government interest.		$1,908.00

Question 3: How is the portion of an IRA distribution which is considered U.S. Government interest determined where both deductible and nondeductible contributions are made to the IRA?

Answer 3: The above worksheet may also be used when nondeductible contributions are made to an IRA which invests in U.S. Government securities. The total nondeductible contributions should be included with the U.S. Government interest on line 2. This results in the amount of the distribution which is not taxable to Wisconsin. The portion which is attributable to U.S. Government interest is the difference between the amount taxable for federal purposes and the amount taxable for Wisconsin purposes.

Example: A taxpayer has an IRA which has a fair market value of $60,000 on December 31, 1988. Over the years, the taxpayer contributed $40,000 of deductible contributions and $2,000 of nondeductible contributions to the IRA, and the IRA was credited with $20,000.00 of interest from U.S. Government securities and $8,000 of other interest. During 1988, the taxpayer received a distribution of $10,000.00 from the IRA. Of this amount, $9,700 is included in federal adjusted gross income. The taxpayer did not receive any distribution in prior years. The Wisconsin subtraction for U.S. Government interest for 1988 is $2,843, computed as follows:

1. Amounts distributed from all IRAs during the year		$10,000.00
2. Total nondeductible contributions and U.S. Government interest received by the IRAs for all years minus any tax-free withdrawals in prior years	$22,000.00	
3. Total value of all IRAs at end of year plus amount on line 1 ($60,000.00 + $10,000.00)	70,000.00	
4. Divide line 2 by line 3	.3143	
5. Multiply line 1 by line 4. This is the total amount not taxable for Wisconsin.		3,143.00
6. Subtract line 5 from line 1. This is the amount of the IRA distribution that must be included in Wisconsin income.		$ 6,857.00
Amount of IRA distribution included in federal adjusted gross income		$ 9,700.00
Less amount to be included in Wisconsin income		6,857.00
Allowable subtraction for U.S. Government interest		$ 2,843.00

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2. Employe Benefit Plans: Unrelated Business Taxable Income

Statutes: Section 71.01(6), Wis. Stats. (1987-88)

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

Background: Under sec. 501(a) and (c)(9) of the Internal Revenue Code (IRC), voluntary employes' beneficiary associations providing for the payment of life, sick, accident, or other benefits to

the members of such association or their dependents or designated beneficiaries are exempt from federal income tax if no part of the associations' earnings inures to the benefit of any private shareholder or individual. However, such associations are taxed on their unrelated business taxable income for federal tax purposes under sec. 511, IRC.

Question: Are voluntary employes' beneficiary associations subject to Wisconsin franchise or income tax on their unrelated business taxable income?

Answer: No. Although sec. 71.01(6), Wis. Stats. (1987-88), would require voluntary employes' beneficiary associations to report their unrelated business taxable income for Wisconsin tax purposes, 29 U.S.C. § 1144(a), preempts such taxation by Wisconsin.

Title 29 U.S.C. § 1144(a) was created by the Employe Retirement Income Security Act of 1974 (ERISA) and provides that ERISA supersedes any and all state laws insofar as they relate to any employe benefit plan.

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3. Itemized Deduction Credit and School Property Tax Credit: Business Use of the Home

Statutes: Sections 71.07(5) and (9), Wis. Stats. (1987-88)

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

Background: For federal tax purposes, an employe may claim an itemized deduction for unreimbursed office-in-the-home expenses on Schedule A. Beginning with the 1987 tax year, unreimbursed home office expenses, other than taxes, interest, and casualty losses, are subject to the 2% of federal adjusted gross income limitation and are claimed as a miscellaneous itemized deduction on federal Schedule A. Taxes, interest, and casualty losses are not subject to the 2% limitation and are deducted on the appropriate lines (i.e., interest with home mortgage interest, taxes with other real estate taxes, and casualty losses with other casualty losses) on Schedule A.

For Wisconsin tax purposes, certain amounts claimed as itemized deductions on federal Schedule A are used to compute the Wisconsin itemized deduction credit. Interest amounts from federal Schedule A which are used in computing the Wisconsin itemized deduction credit include (1) interest paid on a principal residence, (2) interest paid on a second home located in Wisconsin, (3) interest paid on a land contract, and (4) other interest, but not exceeding $1,200 ($600 if married filing a separate return). Real estate taxes paid are not used to compute the Wisconsin itemized deduction credit. However, real estate taxes paid on a principal residence are used to determine the school property tax credit.

Question 1: When an employe claims a federal itemized deduction for unreimbursed home office expenses, is the entire amount of home mortgage interest on federal Schedule A considered interest on a principal residence for purposes of the Wisconsin itemized deduction credit?

Answer 1: No. The portion of the home mortgage interest related to business use retains its character as a business expense. Only the personal portion of the mortgage interest expense on the residence is fully used when computing the Wisconsin itemized deduction credit. The portion of the mortgage interest expense related to business use of the home is combined with "other interest" and is subject to the $1,200 limitation ($600 if married filing a separate return).

Note: If the amount of interest expense for a principal residence was paid on a land contract rather than on a mortgage, all of the amount of interest paid is used to compute the Wisconsin itemized deduction credit. Section 71.07(5)(a)7, Wis. Stats. (1987-88), provides that land contract interest is not subject to the $1,200 limitation.

Example: A single taxpayer is an employe who works in his or her home for the convenience of the employer. Twenty percent of the home is used regularly and exclusively for this business purpose. The taxpayer reports 20% of the cost of maintenance, insurance, and utilities and depreciation as a miscellaneous itemized deduction on federal Schedule A (subject to the 2% of federal adjusted gross income limitation). The taxpayer paid $3,000 for interest on the home mortgage and $1,200 for real estate taxes on the home during the year . These amounts are reported as deductible home mortgage interest and real estate taxes on federal Schedule A. The taxpayer may use $2,400 ($3,000 x 80%) as interest paid on a principal residence when computing the Wisconsin itemized deduction credit. The business portion of the home mortgage interest is combined with "other interest" and up to $1,200 of the total is used to compute the Wisconsin itemized deduction credit.

Question 2: When an employe claims an itemized deduction on federal Schedule A for home office expenses, is the entire amount of real estate taxes paid during the year used when determining the home owner's school property tax credit?

Answer 2: No. Section 71.07(9)(a)3, Wis. Stats. (1987-88), defines property taxes for purposes of the school property tax credit as the property taxes paid on a claimant's principal dwelling "less any property taxes paid which are properly includable as a trade or business expense under section 162 of the internal revenue code." Thus, the property taxes paid must be reduced by the amount allocated as taxes paid for business use of the residence before determining the home owner's school property tax credit. In the above example, $960 ($1,200 x 80%) is used as real estate taxes paid on a principal residence to determine the school property tax credit.

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4. Taxation of Lottery Winnings

Statutes: Sections 71.01(6)(c), 71.04(1)(a), 71.07(7), and 71.67(4), Wis. Stats. (1987-88)

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

Background: Federal law provides that winnings from lotteries are gambling winnings and must be included in taxable income. If winnings from a state lottery are payable in installments, the annual payments must be included in taxable income. These same provisions apply for Wisconsin residents under sec. 71.01(6)(a) to (c), Wis. Stats. (1987-88).

Nonresidents are taxed on winnings from the Wisconsin lottery under sec. 71.04(1)(a), Wis. Stats. (1987-88).

A lottery ticket can be effectively assigned to another person, in whole or in part, for tax purposes. The assignment must occur before the determination that the ticket is a winning ticket. If it is assigned after determining the ticket is a winner, the donor (original owner) of the ticket remains liable for the income tax on the total winnings.

Section 71.67(4), Wis. Stats. (1987-88), provides that the executive director of the lottery must withhold Wisconsin income tax on winnings from the Wisconsin lottery if such winnings are $2,000 or more. The amount withheld is computed by multiplying the lottery winnings by the highest tax rate applicable to individuals (6.93% for the 1988 taxable year).

Question 1: If a Wisconsin resident wins a lottery run by another state, is that income subject to Wisconsin income tax?

Answer 1: Yes. Lottery winnings won by a Wisconsin resident from any state's lottery are subject to Wisconsin income tax under sec. 71.04(1)(a), Wis. Stats. (1987-88).

Question 2: If lottery winnings are taxable to a Wisconsin resident by both Wisconsin and another state, is there any relief from paying tax on the income twice?

Answer 2: Yes. Section 71.07(7), Wis. Stats. (1987-88), provides that if a Wisconsin resident pays net income tax to another state, that resident may claim a credit against Wisconsin net tax for the amount of the net tax paid to the other state. The credit is not allowed unless the lottery winnings are taxed by both states.

Example: Taxpayer A, a resident of Wisconsin, wins $10,000 in the Illinois lottery. Taxpayer A pays $500 of Illinois income tax on the $10,000 of lottery winnings. Taxpayer A may claim a credit on his or her Wisconsin income tax return of $500 for the tax paid to Illinois.

Question 3: Taxpayer A buys a Wisconsin lottery ticket that wins $500. After A determines the ticket is a winner, A gives the ticket to Taxpayer B. Must Taxpayer B include the $500 in his or her Wisconsin taxable income?

Answer 3: No. Because Taxpayer A knew that the ticket was a winner before giving it to Taxpayer B, Taxpayer A must include the $500 in his or her Wisconsin taxable income.

Question 4: Can two or more persons share in the winnings from a Wisconsin lottery ticket and, therefore, each report a portion of the lottery winnings as taxable income?

Answer 4: Yes. Two or more persons may share the lottery winnings from a single lottery ticket. If several persons agree to share in possible winnings from a Wisconsin lottery ticket, the amount of the winnings is reportable as taxable income by the person or persons who "own" the ticket at the time the drawing or other event that determines the winner takes place. An agreement to share in the lottery winnings made after the winnings have been determined will not allow the persons to share in the taxability of such winnings.

Example 1: Taxpayer A and Taxpayer B buy a Wisconsin lottery ticket, each paying 50¢ for the ticket. The ticket is a $5,000 winner. Taxpayer A and Taxpayer B would each report $2,500 as taxable income.

Example 2: Taxpayer A buys a Wisconsin lottery ticket, scratches the ticket, and determines it is a $5,000 winner. Taxpayer A then agrees to share the winnings equally with Taxpayer B. Taxpayer A must report $5,000 as taxable income because the agreement to share the winnings was made after the winnings had been determined.

Question 5: Taxpayer A, Taxpayer B, and Taxpayer C buy a Wisconsin lottery ticket together and agree to share equally in any winnings. They determine that the ticket is a $5,000 winner. Will Wisconsin income tax be withheld from the winnings?

Answer 5: Yes. Section 71.67(4), Wis. Stats. (1987-88), provides that Wisconsin income tax must be withheld on any lottery prize of $2,000 or more. The term "lottery prize" refers to the total prize paid on a particular lottery ticket and not the amount of winnings each person will receive.

Note: The Lottery Board will issue only one check per winning ticket even though several people may be sharing in the lottery winnings. The amount paid, if over $2,000, will be reduced by any income tax withheld.

Question 6: Will a taxpayer receive an information return regarding lottery winnings?

Answer 6: Yes. Under federal law, the Lottery Board is required to issue Form W-2G, "Certain Gambling Winnings" to any person to whom it pays winnings of $600 or more if such winnings are at least 300 times the amount of the single wager. Any Wisconsin income tax withheld will be shown on the Form W-2G.

Question 7: Will the Lottery Board issue more than one Form W-2G if several persons share in the lottery winnings?

Answer 7: Yes, provided the person who received the lottery winnings files federal Form 5754, "Statement by Person(s) Receiving Gambling Winnings," with the Lottery Board. Form 5754 is used to notify the Lottery Board, as payer of the lottery winnings, of any persons, other than the person receiving the gambling winnings, that are subject to withholding or reporting requirements because they were entitled to part of the winnings.

Form 5754 should be filed with the Lottery Board prior to the close of the calendar year in which the winnings were paid. This gives the Lottery Board sufficient time to issue any Forms W-2G prior to their due date of January 31 following the year in which the winnings are paid.

Example: In 1988, Taxpayers A, B, and C agree to share equally in the winnings of a Wisconsin lottery ticket. The taxpayers can prove that this agreement was reached prior to scratching off the appropriate spaces on the ticket. The ticket is a winner of $5,000. Therefore, the total prize of $5,000 is subject to Wisconsin withholding at the rate of 6.93% or total withholding of $346.50.

Taxpayer A redeems the ticket with the Lottery Board and is issued a check of $4,653.50 ($5,000 – $346.50) and shares the amount with B and C. Provided Taxpayer A files Form 5754 with the appropriate information, Taxpayers A, B, and C will each receive an information return (Form W-2G) showing a taxable amount of winnings of $1,666.66 ($5,000 ÷ 3) and Wisconsin withholding of $115.50 ($346.50 ÷ 3).

Withholding is shared in the same proportion as the lottery prize.

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5. Waiver of Interest on Underpayment of Estimated Tax

Statutes: Sections 71.09(11)(c) and (d) and 71.84(1), Wis. Stats. (1987-88)

Background: For the 1988 taxable year and thereafter, no interest on underpayment of estimated tax will be assessed to individuals and fiduciaries if certain conditions apply as determined by the Secretary of Revenue. Section 71.09(11)(c) and (d), Wis. Stats. (1987-88), provides:

"(11) EXCEPTIONS TO INTEREST. No interest is required under s. 71.84(1) if any of the following conditions apply:

(c) The secretary of revenue determines that because of casualty, disaster, or other unusual circumstances it is not equitable to impose interest.

(d) The secretary of revenue determines that the taxpayer retired during the taxable year or during the preceding taxable year after having attained age 62 or becoming disabled and that the underpayment was due to reasonable cause and not due to wilful neglect."

Question 1: How does an individual or fiduciary apply for a waiver of interest on underpayment of estimated tax?

Answer 1: An individual or fiduciary may apply for a waiver of the interest on underpayment of estimated tax by completing Schedule U and writing the word "WAIVER" in the bottom margin of page 1 of the schedule. The individual or fiduciary must also attach an explanation to the schedule and show how much of the underpayment interest is to be waived. The Schedule U and explanation should be attached to the Wisconsin income tax return when it is filed.

If an individual or fiduciary is applying for a waiver of the interest on underpayment of estimated tax for the entire year, a Schedule U need not be completed. Rather, the individual or fiduciary may apply for a waiver by attaching an explanation to the Wisconsin income tax return when it is filed. The explanation should be clearly titled as an "Application for Waiver of Interest on Underpayment of Estimated Tax."

The department will review the application for waiver of the interest on underpayment of estimated tax when the return is computer processed. The individual or fiduciary will receive an adjustment notice if the application is denied or denied in part.

If an individual or fiduciary does not apply for the waiver with the tax return, interest on underpayment of estimated tax may be assessed by the department. The individual or fiduciary could then apply for a waiver by filing a written objection to the assessment within 60 days of receipt of an adjustment notice. The individual or fiduciary should explain the reasons why a waiver is requested and show how much of the underpayment interest should be waived.

The department will review a written objection to an assessment and determine how much, if any, of the underpayment interest will be waived. The individual or fiduciary may further appeal the department's decision, in which case the application for waiver and appeal will be referred to the Appellate Bureau.

Question 2: What are the department's guidelines for waiving interest on underpayment of estimated tax in cases of casualty, disaster, or other unusual circumstances?

Answer 2: Upon application by the taxpayer, the department will consider each case on its merits. The department may waive a portion of the interest on underpayment of estimated tax as explained below. The number of payments for which interest will be waived will be determined based on the circumstances in each case.

Interest may be waived on estimated tax payments due after:

1. A natural disaster occurred (e.g., tornado, flood, fire, etc.).
2. Onset of a debilitating illness or injury (e.g., stroke, heart attack, cancer, auto accident, etc.) of the taxpayer or an immediate family member.
3. The taxpayer entered a nursing home or other treatment facility.
4. The taxpayer requested his or her employer to withhold Wisconsin tax and the employer incorrectly withheld another state tax.
5. The taxpayer first began working in a reciprocal state where the employer withheld the tax of the reciprocal state rather than Wisconsin tax.
6. The taxpayer moved to Wisconsin from a reciprocal state where the employer continued to withhold the tax of the reciprocal state rather than Wisconsin tax.

Question 3: What are the department's guidelines for waiving interest in retirement cases?

Answer 3: Upon application by the taxpayer, the department will consider each case on its merits. The taxpayer must meet all of the statutory requirements before interest can be waived. Retirement alone is not enough to excuse the interest on underpayment; the taxpayer must show reasonable cause for not making the required estimated tax payments. Also, other income sources will be considered in determining how much, if any, of the interest will be waived.

The department may waive a portion of the interest on underpayment of estimated tax as explained below. The number of payments for which interest will be waived will be determined based on the circumstances in each case.

Interest may be waived on estimated tax payments due after:

1. Retirement if the taxpayer thought state tax was being withheld from retirement income because federal tax was being withheld.
2. Retirement if the taxpayer was provided incorrect information about the tax treatment of his or her retirement income by the employer or other payer.
3. Onset of a disabling illness or injury that leads to retirement.

Question 4: Will any other unusual circumstances be considered for purposes of waiving interest on underpayment of estimated tax?

Answer 4: The department will consider each case on its merits. The circumstances must be unusual, though, in the same way that a casualty or disaster is unusual. The department will not waive interest in cases where the taxpayer was not aware of estimated tax payment requirements.

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HOMESTEAD CREDIT

1. VEAP Payments As Household Income

Statutes: Section 71.52(6), Wis. Stats. (1987-88)

Wis. Adm. Code: Section Tax 14.03(2)(b), February 1980 Register

Background: Under sec. 71.52(6), Wis. Stats. (1987-88), compensation and other cash benefits received from the United States for past or present service in the armed forces is includable in income for homestead credit purposes.

The Voluntary Educational Assistance Program (VEAP) was a program available to persons who joined the active duty U.S. military service between January 1, 1977, and June 30, 1985, and whose contributions in the program commenced before April 1, 1987. Participation in the program was voluntary, and an individual's contributions had to be at least $25 per month but no more than $100 per month, though a "lump-sum" contribution was permissible. The total amount which could be contributed was $2,700, and the armed forces matched the individual's contributions at the rate of $2 for each $1 contributed. Also, additional contributions called "kickers" could be added by the armed forces, as an enlistment incentive or for other similar reasons.

The monthly distribution equals the total amount available (contribution plus matching amounts plus kickers) divided by the number of months the person made contributions, but the total monthly allocation cannot exceed $300. That allocation is then prorated if the person is less than a full-time student. The payments are made directly to the veteran based on this formula, not based on tuition costs, etc., and no interest accrues on any portion of VEAP payments. Each monthly payment consists partly of the individual's contribution and partly of the armed forces' contribution (for example, if there were no kickers, the monthly payment would consist of 1/3 the individual's contribution and 2/3 the armed forces' contribution).

Upon request, the U.S. government will pay back to the veteran the portion of the veteran's contribution not used for educational purposes, even 100% if the veteran so wishes, but without interest.

Question: Are VEAP payments includable in household income for homestead credit purposes?

Answer: The portion of VEAP payments constituting a claimant's contribution is not considered household income, since the program is similar to a type of savings account which can be recovered with no restrictions. However, the portion of VEAP payments constituting the United States government's contribution is household income for homestead credit purposes, as compensation or other cash benefits received from the United States for past service in the armed forces.

Note: Since the breakdown of the payments between the two sources of contributions is already done by the U.S. government before payments commence, the computation of the includable amount may readily be made using this information.

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CORPORATION FRANCHISE OR INCOME TAXES

1. Payroll Factor: Contributions to Section 401(k) Plans

Statutes: Section 71.25(8), Wis. Stats. (1987-88)

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

Note: This Tax Release supersedes the Tax Release titled "Payroll Factor - Section 401(k) Earnings" which appeared in *Wisconsin Tax Bulletin* 49, page 12.

Background: Section 71.25(8), Wis. Stats. (1987-88), provides in part that the payroll factor of the standard 3-factor Wisconsin apportionment formula includes the total compensation paid during the taxable year. Section Tax 2.39(4), Wis. Adm. Code, defines the term "compensation" to include wages, salaries, commissions, and any other form of remuneration paid to employes for personal services rendered.

A qualified cash or deferred arrangement under section 401(k) of the Internal Revenue Code (IRC) is any arrangement which is part of a profit-sharing or stock bonus plan which meets the requirements of section 401(a), IRC. Under such a plan, a covered employe may elect to have the employer make payments as contributions to a trust on behalf of the employe, or to the employe directly in cash. The payments to the trust are excluded from the taxable income of the employe until the employe actually receives distributions from the trust. A plan may also provide for an employer to make matching contributions to the trust.

Question 1: Are wages contributed to a qualified cash or deferred arrangement under section 401(k), IRC, on behalf of employes who have elected to participate in such a plan, included in the computation of the payroll factor?

Answer 1: Yes. Such wages are included in the payroll factor computation under sec. 71.25(8), Wis. Stats. (1987-88), and section Tax 2.39(4), Wis. Adm. Code, in the period in which they are earned. An employe's election to defer from taxation until a later time a portion of his or her salary does not also defer inclusion of these wages in the payroll factor computation until that later date.

Question 2: Are matching contributions to the trust by an employer under section 401(k), IRC, included in the computation of the payroll factor?

Answer 2: No. Since the employes do not have a right to receive such contributions directly in cash, the contributions do not constitute compensation for purposes of the payroll factor computation.

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SALES/USE TAXES

1. Coin-Operated Laundry Machines

Statutes: Section 77.52(2)(a)6, Wis. Stats. (1987-88)

Facts and Question: Section 77.52(2)(a)6, Wis. Stats. (1987-88), provides that Wisconsin sales tax is imposed on laundry services, except when the service is performed by the customer through the use of coin-operated, self service machines.

Is laundry service performed by a customer through the use of a washer or dryer activated by tokens or magnetic cards exempt from Wisconsin sales tax?

Answer: No. A washer or dryer activated by tokens or magnetic cards is not considered a "coin-operated" machine. Therefore, the exemption does not apply.

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2. Exemption for Heavy Logging Equipment

Statutes: Sections 77.51(4)(c)4, 77.52(2)(a)10, and 77.54(39), Wis. Stats. (1987-88)

Background: Section 77.54(39), Wis. Stats. (1987-88), provides that the gross receipts from the sale, storage, use, or other consumption of off-highway, heavy mechanical equipment used exclusively or directly in the harvesting or processing of raw timber products in the field by a person in the logging business are exempt from Wisconsin sales and use tax.

Question 1: Are accessories, attachments, fuel, parts, supplies, and/or materials related to heavy logging equipment exempt under sec. 77.54(39), Wis. Stats. (1987-88), also exempt from Wisconsin sales and use tax?

Answer 1: No. Accessories, attachments, fuel, parts, supplies, and/or materials related to such exempt heavy logging equipment are not exempt from Wisconsin sales and use tax as there is no exemption provided in the statutes for such items.

Question 2: Is there Wisconsin sales or use tax on the cost of labor used in repairing exempt heavy logging equipment.

Answer 2: No. Section 77.52(2)(a)10, Wis. Stats. (1987-88), provides that the repair, service, altering, fitting, cleaning, painting, coating, towing, inspecting, or maintaining of items exempt under Chapter 77, Subchapter III, is exempt from Wisconsin sales and use tax. Therefore, because heavy logging equipment is exempt under sec. 77.54(39), Wis. Stats. (1987-88), the charges for labor to repair, service, etc., the equipment are also exempt.

Example 1: Company A has a part replaced on a piece of its exempt heavy logging equipment. Company A pays the repair bill which consists of $40 for the part and $60 for labor. The $40 charge for the part is subject to Wisconsin sales and use tax. The $60 labor charge is not subject to Wisconsin sales and use tax.

Example 2: Company B has an attachment added to one of its items of exempt heavy logging equipment. The attachment costs $1,000, the labor to install the attachment is $500. The cost of the $1000 attachment is subject to Wisconsin sales and use tax. The labor charge of $500 is subject to Wisconsin sales and use tax pursuant to sec. 77.51(4)(c)4 because the labor relates to the installation of the taxable attachment.

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3. Governmental Unit's Use of Occasional Sale Exemption

Statutes: Section 77.54(7m) and (9a), Wis. Stats. (1987-88)

Background: Section 77.54(7m), Wis. Stats. (1987-88), provides that occasional sales of tangible personal property or services by a neighborhood association, church, civic group, garden club, social club, or "similar nonprofit organization" are exempt from Wisconsin sales or use tax if no professional entertainment is involved, if the organization is not involved in a trade or business, and if the organization is not required to have a Wisconsin seller's permit. (See *Wisconsin Tax Bulletin* 59, pp. 14-16 for a more detailed explanation of the occasional sales exemption.)

Section 77.54(9a), Wis. Stats. (1987-88), provides that sales to the following governmental units are exempt from Wisconsin sales and use tax.

a. Wisconsin and any agency thereof.

b. Any county, city, village, town, or school district in Wisconsin.

c. A county-city hospital established under sec. 66.47, Wis. Stats.

d. A sewerage commission organized under sec. 144.07(4), Wis. Stats., or a metropolitan sewerage district organized under secs. 66.20 to 66.26 or 66.88 to 66.918, Wis. Stats.

e. Any other unit of government in Wisconsin or any agency or instrumentality of one or more units of government in Wisconsin.

However, there is no similar provision exempting sales by a Wisconsin or municipal governmental unit.

Question: May a governmental unit specified in a. through e. above exempt its sales from Wisconsin sales or use tax as occasional sales under sec. 77.54(7m), Wis. Stats (1987-88)?

Answer: Yes. A governmental unit will be considered a "similar nonprofit organization" and qualify for the occasional sales exemption, provided all other requirements of sec. 77.54(7m), Wis. Stats. (1987-88), are met.

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4. Payment for Personal Use of Automobile Provided by Employer

Statutes: Section 77.51(4)(a), (13)(k) and (14)(intro.) and (j) and 77.58(6), Wis. Stats. (1987-88)

Wis. Adm. Code: Section Tax 11.79(1), September 1984 Register

Facts and Question 1: Company ABC provides each of its salespersons a company automobile which is used for business and personal purposes. If the salesperson uses the automobile for personal purposes, the salesperson must pay ABC Company 24¢ per mile (assume 24¢ per mile is fair rental value) for all personal miles traveled. Are the payments by the salesperson to Company ABC for personal use of a company automobile subject to Wisconsin sales tax?

Answer 1: Yes. The use of the automobile for personal purposes in exchange for payment is considered a lease or rental of a motor vehicle and is subject to Wisconsin sales tax pursuant to sec. 77.51(14)(j), Wis. Stats. (1987-88) and section Tax 11.79(1), Wis. Adm. Code.

Facts and Question 2: Assume the same facts as in Facts and Question 1 except that the salesperson pays only 9¢ per mile for personal miles traveled, even though the fair rental value is 24¢ per mile. Is sales tax due on 9¢ per mile or 24¢ per mile?

Answer 2: The measure of sales tax would be 9¢ per mile unless facts and circumstances indicate that the salesperson is paying some other consideration for personal use of the company automobile in addition to the 9¢ per mile. In that case the measure of sales tax would be greater than 9¢ per mile.

Facts and Question 3: Company XYZ owes Salesperson A back wages of $1,200. Salesperson A cancels the debt owed to him or

her in exchange for the use of a company automobile for personal purposes. Is there a sales tax liability in this situation.

Answer 3: Yes. Although Salesperson A does not pay a fee for the use of the automobile, Salesperson A is cancelling a debt of the employer. Use of the company automobile is subject to sales tax because sec. 77.51(4)(a), Wis. Stats. (1987-88), provides that gross receipts means the rental price of tangible personal property valued in money, whether received in money or otherwise. The cancellation of indebtedness of $1,200 is the gross receipts subject to sales tax.

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5. Photocopies of Medical Records

Statutes: Sections 77.51(14)(h) and (L) and 77.52(1) and (2)(a)7, Wis. Stats. (1987-88)

Wis. Adm. Code: Sections Tax 11.47(1)(e), September 1977 Register and Tax 11.67, September 1984 Register

Facts and Question: Company ABC employs people in Wisconsin hospitals to copy patient records as requested by patients themselves or third parties such as attorneys or insurance companies.

Requests for patient records are normally received by the hospitals and turned over to Company ABC. Company ABC employes open the envelopes, log the patient's name, the requestor, the date, and information requested. The log is then used by Company ABC personnel who go to the hospital's medical records area to obtain the necessary documents. The appropriate documents are photocopied using the hospital's photocopying machine and returned to the medical records area.

Company ABC mails the photocopied documents to the requestor with an invoice for the amount due. The normal charge varies from $5 to $15 which includes up to 5 copies. Additional copies are available on a per page basis. All postage is paid by Company ABC. No reimbursement is made to the hospitals for the use of the hospitals' copy machine or paper.

Are these charges by Company ABC subject to Wisconsin sales and use tax?

Answer: Yes. The charges by Company ABC are for the sale of photocopies which are subject to Wisconsin sales and use tax under sec. 77.51(14)(h) and (L) and 77.52(1) and (2)(a)7, Wis. Stats. (1987-88).

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PRIVATE LETTER RULINGS

"Private letter rulings" are written statements issued to a taxpayer by the department that interpret Wisconsin tax laws to the taxpayer's specific set of facts. Any taxpayer may rely upon the ruling to the same extent as the requestor, provided the facts are the same as those set forth in the ruling. The number assigned to each ruling is interpreted as follows: The first two digits are the year issued, the next two digits are the week issued, and the last 3 digits are the number in the series of rulings issued that year. "Issued" means when the ruling is available to be published (80 days after being mailed to the requester). The date following the 7-digit number is the date the ruling was mailed to the requester. Certain information contained in the ruling that could identify the taxpayer requesting the ruling has been deleted. Wisconsin Publication 111, "How to Get a Private Letter Ruling From the Department of Revenue," contains additional information about private letter rulings.

W 8916001, February 1, 1989

Type Tax: Sales/Use

Issue: Occasional Sales Exemption

Statutes: Sections 77.51(a) and 77.54(7) and (7m), Wis. Stats. (1987-88)

This letter responds to your request for a private letter ruling regarding whether receipts qualify for the occasional sale exemption from sales tax.

The information provided in your letter states that B was organized to conduct the 1989 event. This event is an amateur competition between teams from various countries throughout the world and is scheduled to take place in 1989. This organization has applied for and received exempt status from the Internal Revenue Service under Section 501(c)(3) of the Internal Revenue Code. B will be dissolved shortly after the consummation of the event.

All revenues will be related to the holding of the event in 1989, which will consist of an amateur competition between teams representing various countries throughout the world and will be held at Place A. No professional entertainment will be involved in this event other than disclosed below which is not a subject of this ruling request. The following receipts will be received in connection with this event:

a. Admission tickets will be sold to individuals. In addition, corporations will be solicited to purchase blocks of seats.

b. B has arranged through the Place A vendor to provide concessions at the tournament (food and beverage). B will receive a commission on these sales. The vendor will be the retailer of these sales and does hold a Wisconsin seller's permit.

c. There will also be a trade fair in which accessories, T-shirts, and other tangible personal property will be sold. This trade fair will be conducted by an outside firm and B will receive a commission on these sales. It is our understanding that the seller will apply for a temporary seller's permit.

d. Programs will be sold at the event. In addition, B will solicit advertising to be included in the program and in limited areas of the arena.

e. Commemorative pins and other souvenirs will be sold by B at the event. In addition, sales of the pins has begun primarily to the members of the organization.

f. B will receive contributions from C. C holds the television rights to the event. The amount of contributions received from C will depend in part on the monies collected by C because of these rights.

g. During the week, five special events featuring professional entertainment will be held. These events will be sponsored by three local clubs. Separate admission will be charged for these events. The local clubs will be responsible for the collection and remittance of sales tax on the receipts from these events.

h. B will purchase uniforms from an out-of-state supplier for use by its members while working at the games in an official capacity. The members will make contributions to B for the cost of the uniforms. B will make no profit on these sales.

You have stated that the entire event has been detailed and is in no way part of a larger event or transaction.

A copy of the Agreement Between B and C was attached to your letter. Also attached was a copy of the B budget showing total estimated receipts of $533,450, itemized as follows:

Budget

Receipts	
Tickets:	
Wholesale	$152,000
Committee	116,450
Transportation	30,000
Arena Events:	
Trade Fair	7,000
Beer Garden	5,000
Television Revenue	32,000
Contributions	50,000
Programs	51,000
Souvenirs	20,000
Corporate Boxes	40,000
Hospitality/Tours	25,000
Interest	5,000
Total Receipts	$533,450

You have requested a ruling that the proposed receipts as detailed in this request would not require B to hold a Wisconsin seller's permit and the receipts listed under items a, d, e, f, and h would qualify as an "occasional sale" as defined in Wisconsin Statute section 77.51(9)(a) and, therefore, be exempt from sales tax under section 77.54(7). As authority for your request you state the following:

"Wisconsin Statute Section 77.54(7) provides an exemption from the sales and use tax for 'occasional sales' to include "Isolated and sporadic sales of tangible personal property or taxable services where the infrequency, in relation to the other circumstances, including the sales price and the gross profit, support the inference that the seller is not pursuing a vocation, occupation or business or a partial vocation or occupation or part-time business as a vendor of personal property on (SIC) taxable services.

"The events described should fall under the statutory definition of 'occasional sale." Since this taxpayer is a nonprofit entity staffed exclusively by volunteers, there is no profit motive, and therefore, they cannot be construed to be pursing a trade or business. The [event] is held annually in various cities throughout the world. It is very unusual for it to be held in the United States. This is the first time the event has ever been held in Wisconsin and it is unlikely that the event would again be held in Wisconsin for many, many years. Therefore, this event should meet the isolated and sporadic requirements. The Wisconsin Tax Appeals Commission held similarly in *Wisconsin Farm Progress Days Clark County v. Wisconsin Department of Revenue*, WTAC Docket No. S-10652, January 21, 1986.

"Wisconsin Statute Section 77.54(7m) exempts from sales tax gross receipts by nonprofit organizations not engaged in operating a trade or business. The statute defines an organization to be engaged in trade or business 'if its sales of tangible personal property or services, not including sales or tickets to events, or if its events occur on more than 20 days during the year, unless its receipts do not exceed $15,000 during the year.' All of the taxpayer's events revolve around one main event which will occur within a ten day period. The only sales, other than advance ticket sales, not occurring during the ten day period are sales of commemorative pins and other souvenirs by the taxpayer relating to the event. It is unlikely that the gross receipts in 1988 from the sale of these souvenirs will exceed $10,000.

"Even if it is determined that the taxpayer does not meet the provisions of Section 77.54(7m), the event should still be considered as an occasional sale under the provisions of Section 77.54(7)."

Ruling

For calendar year 1988, if B's gross receipts from the sale of tangible personal property exceed $7,000, then from only that

time forward, all sales of admissions described under par. a are taxable; however, all sales of tangible personal property become taxable including the initial $7,000. Tangible personal property includes programs described under par. d, pins and souvenirs described under par. e, and uniforms described under par. h. If B's gross receipts from sales of tangible personal property do not exceed $7,000 during calendar year 1988, none of B's sales of tangible personal property and admission tickets occurring during the calendar year 1988 would be subject to sales taxation.

For calendar year 1989, B's gross receipts under items a. (admissions), d. (programs), e. (pins and souvenirs), and h. (uniforms) are subject to sales taxation.

Analysis

Due to 1987 Wisconsin Act 399, different criteria for determining whether a nonprofit organization is engaged in a trade or business apply during the period in question (i.e., calendar years 1988 and 1989). Consequently, the receipts for each year must be viewed separately, each under its appropriate statute and/or rule. For this purpose, the sale of admission tickets is deemed to occur at the time payment (e.g., cash, check, or credit card) is received for the tickets.

For calendar year 1988, the occasional sale exemption is found in sec. 77.54(7), Stats., and "occasional sale" is defined in sec. 77.51(9)(a) and (c), Stats. Section Tax 11.10(3), Wisconsin Administrative Code, interprets these sections. Subsection (3)(a) of this rule sets forth the occasional sale standards for admissions, while subsection (3)(c) establishes a dollar standard for sales of "other" tangible personal property and services (exclusive of meals and admissions).

Under sec. Tax 11.10(3)(c), receipts from sales of "other" tangible personal property and services are exempt as occasional sales if the seller is not otherwise required to have a seller's permit and gross receipts from such "other" sales of property and services do not exceed $7,000 during a calendar year. The exception from this rule for isolated and sporadic sales described in sec. Tax 11.10(3)(d), dealing with situations where the gross receipts exceed $7,000, does not apply, as B's sales may occur daily on every day that the event exists during calendar year 1988.

Tax 11.10(3)(e) provides that paragraphs (a), (b), and (c) of subsection (3) are treated separately. If the $7,000 standard in paragraph (c) for "other" sales is exceeded, all receipts for the calendar year from such "other" sales are taxable, and in addition the admissions received after the receipts from "other" sales first exceed $7,000 are taxable.

Effective January 1, 1989, sec. 77.51(9)(c), Stats., which establishes the occasional sale exemption standard for admissions, is repealed and replaced by sec. 77.54(7m). Section 77.54(7m), Stats., sets two thresholds for occasional sale exemption, 20 days and $15,000, and does not distinguish between types of sales and events. A nonprofit organization is deemed to be engaged in a trade or business if its sales of property other than tickets and its events occur on more than 20 days during a calendar year and its gross receipts from all taxable sales exceed $15,000 during the year.

Under the facts presented, B's sales of commemorative pins and souvenirs may occur on every day. In addition, it will sell programs and uniforms and hold the event. Thus, B will make sales of property other than tickets on more than 20 days during calendar year 1989. As indicated in its budget, B's gross receipts from taxable sales are projected to be:

Tickets	$268,450
Programs	51,000
Souvenirs	20,000
Total	$339,450

Therefore, the event will exceed both the 20 day and $15,000 thresholds in calendar year 1989, and under sec. 77.54(7m), Stats., B is deemed to be engaged in a trade or business during that year. Accordingly, its sales during calendar year 1989 will not qualify as occasional sales.

You have indicated you felt that, as a nonprofit organization, B has no profit motive, and therefore, B cannot be construed to be pursuing a trade or business. The Legislature clearly did not intend to exempt all sales by nonprofit organizations; indeed the statutes set forth very precise standards as to when a nonprofit organization is deemed to be engaged in trade or business subject to sales tax during calendar year 1989 or as to when receipts from admissions qualify as occasional sales during calendar year 1988. The *Wisconsin Farm Progress Days* decision is distinguishable as to the facts and the law and does not apply in this situation. For these reasons, B cannot qualify for the sec. 77.54(7), Stats., occasional sale exemption.

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