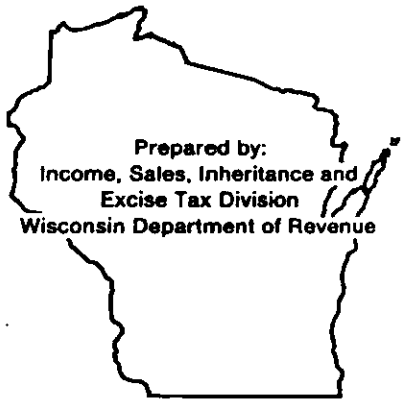
WISCONSIN TAX BULLETIN

October 1990
NUMBER 69



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ONE-TIME SCHOOL PROPERTY TAX/RENT CREDITS ARE STATE INCOME TAX REFUNDS

The Internal Revenue Service has advised the department that Wisconsin's one-time additional school property tax/rent credits for tax years 1987 and 1988 are considered a recovery of Wisconsin income taxes. This means the credits will be includible in federal gross income to the extent a federal tax benefit was received for claiming 1987 and/or 1988 Wisconsin income taxes as an itemized deduction.

The credits are includible in federal income in the year they are received. Most individuals received their one-time additional credit in April 1990.

The credits are not includible in Wisconsin income. The reason is that no tax benefit is received for Wisconsin purposes for income taxes claimed as an itemized deduction on a federal return.

The one-time additional school property tax/rent credits will be included on Forms 1099-G. Federal law requires the department to provide Forms 1099-G to persons who claim state income tax payments as an itemized deduction.

In This Issue

NEED AN EASY WAY TO RESEARCH WISCONSIN TAX QUESTIONS?

Subscribe to the Wisconsin Department of Revenue's new Topical and Court Case Index. This index will help you find a particular Wisconsin statute, administrative rule, Wisconsin Tax Bulletin article or tax release, publication, Attorney General opinion, or court decision that deals with your particular Wisconsin tax question.

The index is divided into two parts. The first part, called the "Topical Index," gives references to alphabetized subjects for the various taxes. The taxes include individual income, corporation franchise or income, sales/use, withholding, gift, estate and inheritance, cigarette, tobacco products, beer, intoxicating liquor and wine, and motor fuel. An excerpt from the individual income tax section of the topical index appears on page 40 of this Bulletin.

The second part, called the "Court Case Index," lists Wisconsin Tax Appeals Commission, Circuit Court, Court of Appeals, and Wisconsin Supreme Court decisions by alphabetized subjects for the various taxes. An excerpt from the corporation section of the court case index appears on page 41 of this Bulletin.

This index will be available in December, 1990. The annual cost is $14 per copy, plus sales tax. Subscribers will receive the full index in December, 1990 and also an ad-

dendum providing updated information in May, 1991. To order your copy of the index, complete the order blank that appears on page 57 of this Bulletin. The order blank may also be used for subscribing to the Wisconsin Tax Bulletin and for ordering the Wisconsin Administrative Code.

FORMS CHANGES FOR 1990

Following is a brief description of the major changes to the Wisconsin individual income tax and farmland preservation credit forms for 1990. No major changes have been made to the homestead credit form.

1. **Forms WI-Z, 1A, 1, and 1NPR**

   - A line is added to Form 1A for reporting IRA distributions, pensions and annuities, and taxable social security, to conform to changes in the federal Form 1040A.

   - Lines are added to Form 1A for reporting estimated tax payments and for applying an overpayment to 1991 estimated tax, to conform to changes in the federal Form 1040A.

   - A line is added to Form 1NPR for claiming a deduction for self-employment tax, to conform to a change in the federal Form 1040.

2. **Schedule FC**

   - The property tax line (line 11) is divided into two parts, to provide a space for total property taxes as well as a space for the $6,000 maximum allowable amount.

Proof copies of the 1990 Forms WI-Z, 1A, 1, and 1NPR and Schedules H and FC can be found on pages 42 to 54 of this Bulletin. The copies are subject to further revision.

SPEAKERS BUREAU

The department's Speakers Bureau provides speakers to professional organizations and community groups throughout Wisconsin. If you would like a speaker to address your group, please call the Speakers Bureau at (608) 266-8640.

Subjects that may be discussed include updates on income, corporate, and sales tax laws, audit procedures, common taxpayer errors, how tax laws apply to exempt organizations, sales tax problems of contractors or manufacturers, homestead credit, etc.

Note: There is no charge for services provided by the Speakers Bureau.

1990 PACKAGE WI-X WILL BE AVAILABLE

The department will again be offering Package WI-X which will contain actual size copies of most 1990 Wisconsin individual, fiduciary, and corporation income tax, gift tax, inheritance tax, motor fuel tax, sales tax, and withholding tax forms.

Package WI-X should be available by January 31, 1991. The cost is $7.00 per copy. It may be ordered on the bulk order blank (Form P-744). The bulk order blank was mailed in October. See the following article for more information on bulk orders.

If you do not receive an order blank and wish to purchase copies of 1990 Package WI-X, requests indicating the number of copies along with the amount due should be mailed to: Wisconsin Department of Revenue, Shipping and Mailing Section, Post Office Box 8903, Madison, WI 53708.

BULK ORDERS OF TAX FORMS

In mid-October, the department mailed the order blank (Form P-744) which tax preparers should use to request bulk orders of 1990 Wisconsin income tax forms. There is a handling charge on these orders.

In mid-October, the department also mailed order blanks (Forms P-744b and P-744L) which banks, post offices, and libraries should use to request bulk orders of 1990 Wisconsin income tax forms. No charge is made for forms used for distribution to the general public (for example, in a bank, library, or post office).

This year's mailing list for bulk order blanks contains the names of all persons and organizations who placed orders for 1989 forms. If you are not on this mailing list and do not receive a Form P-744, P-744b, or P-744L, you may request the bulk order blank by contacting any department office or by writing to the Wisconsin Department of Revenue, Shipping and Mailing Section, Post Office Box 8903, Madison, WI 53708. You may also call the Shipping and Mailing Section at (608) 267-2025.

Orders should be placed as early as possible after you receive the order blank. Orders received by November 10, 1990, will be mailed in late December and early January. Package WI-X will be mailed separately in late January.

TAX RETURN STATISTICS FOR 1989-90

There were 2,453,000 Wisconsin individual income tax returns filed during the period July 1, 1989, to June 30, 1990. This compares to 2,396,000 income tax returns filed for the prior 12 months. The 2,453,000 returns were filed by 3,524,000 individuals.

There were 253,000 homestead credit claims and 24,000 farmland preservation credit claims filed during the year. This compares to 252,000 homestead credit claims and 24,000 farmland preservation credit claims filed for the prior year.

Taxpayers were issued a total of 1,671,000 income tax refunds during the 12 months ending June 30, 1990, for an average refund of $288. The average refund for the prior year was $300.

Homestead credit refunds averaged $427 per claimant, an increase from the average refund of $400 issued last year. About 50% of the claimants were age 65 or older. Of all individuals claiming homestead credit, 48% were renters and 52% were homeowners.

An average farmland preservation credit of $1,086 was issued to each claimant. The average payment last year was $1,192. Also, an average farmland tax relief credit of $315 was issued to 61,273 farmers.

An itemized deduction credit was claimed by 21% of the taxpayers on 1989 tax returns. The average credit allowed was $307.

CHANGES IN IRS STANDARD MILEAGE RATE AND RULES ALSO APPLY FOR WISCONSIN FOR 1990

The optional standard mileage rate specified by the IRS for computing business automobile expenses for 1990 also applies for Wisconsin.

The IRS increased the rate from 25.5¢ per mile for the first 15,000 business miles driven in an automobile that is not fully depreciated, to 26¢ per mile for all business miles driven. There is no longer a 15,000 mile limitation, and the 26¢ per mile rate is allowed without regard to whether the automobile was previously considered fully depreciated. For 1989, after 15,000 miles of business use in one year and for all mileage on a fully depreciated automobile, the standard mileage rate was 11¢ per mile. The 11¢ rate is no longer in effect for standard business mileage.

If the standard mileage rate of 26¢ per mile is used, depreciation is considered to be allowed at 11¢ per mile for 1990, the same as for 1989. However, no portion of the 26¢ per mile rate is considered to be depreciation after the adjusted basis of the automobile reaches zero.

The mileage rate used to calculate automobile expenses for charitable deduction purposes, which remains at 12¢ per mile in 1990, also applies for Wisconsin.

For both federal and Wisconsin purposes, a rate of 9¢ per mile is used in 1990 to calculate automobile expenses for medical and moving expense deductions.

UPDATE OF PUBLICATION ON MARITAL PROPERTY LAW

The Internal Revenue Service and the Wisconsin Department of Revenue are updating Wisconsin Publication 113, titled *Federal and Wisconsin Income Tax Reporting Under the Marital Property Act*, for 1990.

This publication contains information about both the federal and Wisconsin treatment of separated and divorced spouses, as well as information about the collection of tax debts and the determination of the basis of property upon the death of a spouse. The Internal Revenue Service (Milwaukee District Office) is updating the portion of the publication relating to the "Federal Treatment." The Technical Services staff of the Wisconsin Department of Revenue is updating the portion relating to the "Wisconsin Treatment."

The revised publication will be available about December 1, 1990. To obtain a copy, contact any Department of Revenue office.

WISCONSIN'S ENDANGERED RESOURCE CHECKOFF: TAX PREPARERS MAKE THE DIFFERENCE

The following article was submitted by the Bureau of Endangered Resources of the Wisconsin Department of Natural Resources.

In Wisconsin and nationally, the success of the Endangered Resources Checkoff weighs heavily on tax preparers. The participation rate for donating as well as the average contributions are much higher for self-prepared returns than those prepared by tax practitioners. The fact is, many people are not being asked by their tax preparer whether they want to contribute. This is complicated by increased technology in tax preparation.

Most tax practitioners today use a computer system to process their clients' tax information. Software programs are varied. Some software programs use input sheets that do not resemble the tax form, while others use a format that closely resembles the state tax form. Some packages have blanks for the checkoff contributions and some don't. Most do not describe the endangered resources checkoff as accurately as the average tax booklet instructions that are used in self-preparation of a tax return.

According to Robert McCance, Ohio Division of Natural Areas and Preserves, there are at least two major reasons why taxpayers who use tax preparers donate less money than those who prepare returns themselves. The first involves the process of preparing a return. When the tax preparer asks whether the client wishes to contribute to the checkoff, some say yes and some say no, but many say they want to know how large a return they are due (or how much is owed) before they decide whether to contribute. The information is not available at the time. Once the data is entered, the software calculates the taxes and prints out both a federal and a state tax return complete with a zero in the checkoff box and the amount of the refund due or amount owed filled in, awaiting the client's signature. The client must amend the tax return by subtracting the donation from the refund (or adding to the amount owed) and recalculating and rewriting the final lines. Few go through the hassle, even though they may otherwise want to contribute.

So, what's the bottom line? First, taxpayers need to be asked (including the software tax input forms)—"Would you like to donate to the Endangered Resource Checkoff program that is saving our endangered animal and plant species in Wisconsin?" Second, the taxpayer needs help in facilitating the process of actually making the donation. Third, taxpayers need to be reminded that they can contribute by adding to the amount owed as well as subtracting the donation from the refund. Fourth, those of us at the Department of Natural Resources that are working on the tax checkoff need your suggestions on ways to improve the checkoff. All of you are a vital link to making a difference in the success of the program! For more information, contact Lyn Vest, DNR, Bureau of Endangered Resources, Box 7921, Madison, WI 53707 (# 608-267-0861).

VITA AND TCE PROGRAMS COMPLETE SUCCESSFUL TAX YEAR

The Wisconsin Department of Revenue expresses its appreciation to the 1,200 volunteers of the Volunteer Income Tax Assistance (VITA) and Tax Counseling for the Elderly (TCE) programs, who helped make this another successful tax year for many of Wisconsin's taxpayers. Working at sites throughout the state, volunteers completed over 30,000 state income tax returns.

The Wisconsin Department of Revenue works closely with the Internal Revenue Service in providing both training and resources to the VITA and TCE programs. This year the department conducted 40 training sessions for volunteers. The department also provides tax forms and other support items.

REMINDER: FILING DEADLINES FOR 1989 HOMESTEAD AND FARMLAND PRESERVATION CREDIT CLAIMS

December 31, 1990, is the deadline for filing a 1989 homestead credit claim. Farmland preservation credit claims for 1989 must be filed no later than 12 months after the farmland owner's 1989 taxable year ends. December 31, 1990, is the deadline for filing a 1989 farmland preservation credit claim for farmland owners who are calendar year taxpayers.

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

REMINDER: EFFECT OF 1989 LAW CHANGE WHICH FEDERALIZED WISCONSIN'S DEFINITION OF "TAXABLE YEAR"

For taxable years beginning on or after August 1, 1988, the "taxable year" for Wisconsin is the taxable period upon the basis of which the taxable income of the taxpayer is computed for federal income tax purposes. Sec. 71.01(12), Wis. Stats. (1987-88), as amended by 1989 Wisconsin Act 31.

For federal purposes, the "taxable year" is the calendar year or any fiscal year *ending* during such calendar year. Sec. 7701(a)(23), Internal Revenue Code. However, for administrative purposes, a particular year's tax return is filed for the calendar year and any fiscal year *beginning* during that calendar year.

For example, a taxpayer who files income tax returns on the basis of a September 30 year-end will report his or her income for the fiscal year beginning October 1, 1989, and ending September 30, 1990 (a *1990* taxable year), on a *1989* form.

For taxable years beginning after December 31, 1987, changes have also occurred in the Wisconsin Statutes in the annual updating of the references to the Internal Revenue Code. When the definition of "Internal Revenue Code" is updated in the Wisconsin Statutes, it applies for taxable years beginning after a particular date rather than for a particular taxable year.

For example, the Internal Revenue Code as amended to December 31, 1989, applies for taxable years that begin after December 31, 1989.

Very few differences currently exist between the Internal Revenue Code in effect for federal and Wisconsin purposes because most of the federal law changes enacted in 1987, 1988, and 1989 apply at the same time for both federal and Wisconsin purposes.

Please note that differences in the Wisconsin Statutes between the taxable year definitions and the Internal Revenue Code updates have produced some overlapping for certain short taxable years. For example, both sec. 71.01(6)(b) and sec. 71.01(6)(c) apply to a taxable year that begins August 1, 1988, and ends November 30, 1988. However, since federal law changes enacted in 1987, 1988, and 1989 apply for Wisconsin at the same time as federally, this overlapping does not cause a problem.

CRIMINAL ENFORCEMENT ACTIVITIES

Income Taxes

A Wisconsin Rapids businessman and his wife have been found guilty of failure to file state income tax returns. Ida Lee and John Siewert Sr., 1771 Riverwood Lane, were found guilty and sentenced by Dane County Judge Jack Aulik.

The Siewerts were each charged with three misdemeanor counts. He pleaded no contest to two counts of failure to file state income tax returns, was fined $1,600, and was ordered to spend 5 days in jail. A third charge against him was dismissed.

Mrs. Siewert pleaded no contest to one count and was fined $660. Two additional counts against her were dismissed. All fines were paid.

Siewert is a longtime Wood County Board of Supervisors member and a corporate shareholder in Siewert-Mogg Insurance Services and Coldwell Banker-Siewert Realtors. Mrs. Siewert is a teacher.

The criminal complaint originally filed against them by the Dane County district attorney's office stated they had a gross income of $312,194 for 1986, $341,509 for 1987, and $326,593 for 1988, but they did not file income tax returns for those years.

A jail sentence and fine have been ordered for a Dodgeville attorney, for violation of the Wisconsin state income tax law. James R. Pope, 314 Tower Court, Dodgeville, was sentenced in Dane County Circuit Court, Branch 14, Madison, on one count of fail-

ing to timely file a 1988 state income tax return.

Circuit Judge George Northrup ordered Pope to serve 5 days in jail and pay a fine of $500 plus $160 costs after he pleaded no contest to the charge. Pope was charged with failing to timely file a 1988 state income tax return when he had gross income in excess of $94,000.

Portage County businessman Richard D. Boldt, 555 West Clark Street, Stevens Point, has been ordered to serve jail time and pay fines and court costs totaling $10,000 for criminal violation of the Wisconsin state income tax law. Boldt was sentenced in Dane County Circuit Court, Branch 6, Madison, after he pleaded guilty to one count of filing a false and fraudulent state income tax return for the year 1987.

Judge Richard Callaway withheld sentence and ordered Boldt to serve 3 years probation. Under the conditions of probation, Boldt must serve 30 days in jail and make restitution of state income taxes, penalties, and interest due for the years 1984, 1985, 1986, and 1987 as determined by the Wisconsin Department of Revenue. Boldt paid $10,000 as a fine and court costs when he was sentenced.

Boldt was charged with failing to report more than $11,000 in taxable income on his 1987 state income tax return. He owns and operates Bill's Pizza Shop in Stevens Point.

Sales and Use Taxes

Eight Waukesha County residents have been charged with criminal violations of the Wisconsin sales and use tax laws. Paul H. Dickson, 619 Main Street, Eagle; Lisa and Mark Groose, W383 N9049 Mill Street, Oconomowoc; Troy M. Heil, 3542 South 158th Street, New Berlin; Peter K. Kim, 14850 Westover Road, Elm Grove; Thomas N. Landgraf, 14105 West Fieldpoint Drive, New Berlin; Harvey Metzger, W224 N7740 Wooded Hills Drive, Sussex; and Richard M. Schaefer, 14405 Ridgemoor Drive, Elm Grove were each charged in Waukesha County Circuit Court, Waukesha, with filing false reports and evading sales or use taxes due when registering motor vehicles.

Each of the defendants is charged with understating the purchase price of the vehicles they purchased from private parties to evade the correct tax due.

Filing a false sales or use tax report (Form MV-1) is a crime punishable by a $500 fine or 30 days in jail or both. In addition to the criminal penalty, Wisconsin law provides for substantial civil penalties on the civil tax liability.

Fuel Taxes

A former Waterford businessman has been ordered to serve jail time and probation for criminal violations of the Wisconsin state fuel tax laws. Charles R. Guschl, 3386 Highway 45 South, Conover, who formerly operated Dick's Towing in Waterford, was sentenced in Dane County Circuit Court, Branch 11, Madison, after he pleaded guilty to fraudulently withholding and appropriating special fuel taxes belonging to the state in excess of $14,000 from May 20, 1984, until January 19, 1987.

Judge Daniel R. Moeser sentenced Guschl to 3 years imprisonment, stayed execution of the sentence, and ordered him to serve 3 years probation. Under the conditions of probation, Guschl must serve 60 days in jail and make restitution of $14,057.18 in state special fuel tax.

Theft of state motor fuel or special fuel tax money is a felony punishable by a fine not to exceed $10,000 or imprisonment not to exceed ten years or both when the amount of the misappropriation exceeds $2,500.

A Wood County businessman has been charged with criminal violations of the Wisconsin state fuel tax laws. Delbert H. Weiler, owner and operator of Weiler Oil Company, 11601 Stadt Road, Marshfield, was charged in Dane County Circuit Court, Madison, with intentionally withholding and appropriating special fuel taxes belonging to the state in excess of $100,000 from July 20, 1984 until November 20, 1987.

Theft of state motor fuel or special fuel tax money is a felony punishable by a fine not to exceed $10,000 or imprisonment not to exceed ten years or both when the amount of the misappropriation exceeds $2,500.

INFORMATION OR INQUIRIES?

Madison - Main Office
Area Code (608)

Beverage, Motor Fuel, Cigarette, Tobacco Products	266-6701
Corporation Franchise/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

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 September 15, 1990. Part D lists new rules and amendments which were adopted in the period from June 26, through Sep-

tember 15, 1990. Part E lists rules adopted in 1990 but not yet effective. ("A" means amendment, "NR" means new rule, "R" means repealed, and "R&R" means repealed and recreated.)

A. Rules at Legislative Council Rules Clearinghouse

2.165 Change in taxable year-A
2.39 Apportionment method-R&R
2.40 Nonapportionable income-R
2.48 Apportionment of net business incomes of interstate pipeline companies-A
2.94 Tax sheltered annuities-A
3.095 Income tax status of interest and dividends from municipal, state and federal obligations received by individuals and fiduciaries-A
11.04 Constructing buildings for exempt entities-A
11.05 Governmental units-A
11.12 Farming, agriculture, horticulture and floriculture-A
11.16 Common or contract carriers-A
11.26 Other taxes in taxable gross receipts and sales price-A
11.32 "Gross receipts" and "sales price"-A
11.50 Auctions-A
11.86 Utility transmission and distribution lines-R&R
11.92 Records and record keeping-A
11.96 Interest rates-A

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

1.11 Requirements for examination of returns-R&R
2.02 Reciprocity-R&R
2.41 Separate accounting method-A
2.46 Apportionment of business income of interstate air carriers-R&R
2.49 Apportionment of net business incomes of interstate finance companies-R&R
2.95 Reporting of instalment sales by natural persons and fiduciaries-A
4.54 Security requirements-NR
4.55 Ownership and name changes-NR
9.67 Cigarette tax credit-R&R
9.68 Ownership and name changes-NR
11.002 Permits, application, department determination-A
11.01 Sales and use tax return forms-R&R
11.03 Elementary and secondary schools and related organizations-A
11.08 Medical appliances, prosthetic devices and aids-A
11.09 Medicines-A
11.11 Waste treatment facilities-A
11.14 Exemption certificates (including resale certificates)-A
11.15 Containers and other packaging and shipping materials-A
11.17 Hospitals, clinics and medical professions-A
11.19 Printed material exemption-A
11.28 Gifts, advertising specialties, coupons, premiums and trading stamps-A
11.29 Leases and rentals of tangible personal property-A
11.40 Exemption of machines and processing equipment-A
11.41 Exemption of property consumed or destroyed in manufacturing-A
11.45 Sales by pharmacies and drug stores-A
11.46 Summer camps-A
11.47 Commercial photographers and photographic services-A
11.48 Landlords, hotels and motels-A
11.49 Service stations and fuel oil dealers-A
11.53 Temporary events-A
11.54 Temporary amusement, entertainment, or recreational events or places-A
11.57 Public utilities-A
11.62 Barbers and beauty shop operators-R&R
11.65 Admissions-A
11.66 Telecommunication and CATV services-A
11.68 Construction contractors-A
11.72 Laundries, drycleaners, and linen and clothing suppliers-A
11.78 Stamps, coins and bullion-A
11.79 Leases of highway vehicles and equipment-A
11.83 Motor vehicles-A
11.84 Aircraft-A
11.85 Boats, vessels and barges-A
11.88 Mobile homes-A
11.925 Sales and use tax security deposits-A
11.94 Wisconsin sales and taxable transportation charges-A
11.95 Retailer's discount-A
11.97 "Engaged in business" in Wisconsin-A
11.98 Reduction of delinquent interest rate under s. 77.62(1), Stats.-A
14.01 Administrative provisions-A
14.04 Property taxes accrued-A
14.05 Gross rent and rent constituting property taxes accrued-A

C. Rules at Legislative Standing Committee

17.01 Administrative provisions-A
17.02 Eligibility-A
17.03 Application and review-A

D. Rules Adopted in Period from June 26, 1990, to September 15, 1990 (effective date is given in parentheses)

1.06 Application of federal income tax regulations-A (7/1/90)
1.10 Depository bank requirements for estimated tax vouchers, sales and use tax returns, and withholding, motor fuel, general aviation fuel and special fuel tax deposit reports-A (7/1/90)
2.03 Corporation returns-A (7/1/90)
2.04 Information returns and wage statements-R&R (7/1/90)
2.06 Information returns required of partnerships and persons other than corporations-R (7/1/90)
2.08 Returns of persons other than corporations-A (7/1/90)
2.10 Copies of federal returns, statements, schedules, documents, etc., to be filed with Wisconsin returns-A (7/1/90)
2.30 Property located outside Wisconsin - depreciation and sale-A (7/1/90)
2.69 Income from Wisconsin business-R (7/1/90)
2.89 Penalty for underpayment of estimated tax-R (7/1/90)
2.955 Credit for income taxes paid to other states-A (7/1/90)
3.03 Dividends received, deductibility of-R&R (7/1/90)
3.08 Retirement and profit-sharing payments by corporations-A (7/1/90)
3.085 Retirement plan distributions-A (7/1/90)

3.096 Interest paid on money borrowed to purchase exempt government securities-A (7/1/90)
3.10 Salesmen's and officers' commissions, travel and entertainment expense of corporations-R (7/1/90)
3.12 Losses on account of wash sales by corporations-R&R (7/1/90)
3.37 Depletion of timber by corporations-A (7/1/90)
3.38 Depletion allowance to incorporated mines and mills producing or finishing ores of lead, zinc, copper, or other metals except iron-A (7/1/90)
3.47 Legal expenses and fines - corporations-R (7/1/90)
3.54 Miscellaneous expenses - corporations-R&R (7/1/90)
3.81 Offset of occupational taxes paid against normal franchise or income taxes-A (7/1/90)
3.91 Petition for redetermination-A (7/1/90)
3.92 Informal conference-A (7/1/90)
3.93 Closing stipulations-A (7/1/90)
3.94 Claims for refund-A (7/1/90)
8.01 Tax liability-NR (8/1/90)
8.02 Revenue stamps - occupational tax-R&R (8/1/90)
8.03 Affixing stamps-R (8/1/90)
8.04 Refunds-R&R (8/1/90)
8.05 Special tax on intoxicating liquor-R (8/1/90)
8.06 Mixture of specially taxed and regularly taxed intoxicating liquors-R (8/1/90)
8.11 Reports-A (8/1/90)
8.12 Samples-NR (8/1/90)
8.21 Purchases by the retailer-A (8/1/90)
8.22 Purchases made outside of state-A (8/1/90)
8.23 Sales to non-licensees-NR (8/1/90)
8.31 Sales out of Wisconsin-A (8/1/90)
8.51 Labels-R (8/1/90)
8.61 Advertising-A (8/1/90)
8.66 Merchandise on collateral-A (8/1/90)
8.71 Bitters-R (8/1/90)
8.76 Salesperson-R&R (8/1/90)
8.81 Transfer of retail liquor stocks-A (8/1/90)
8.87 Intoxicating liquor tied-house prohibitions-A (8/1/90)
11.05 Governmental units-A (7/1/90)
11.09 Medicines-A (7/1/90)
11.12 Farming, agriculture, horticulture and floriculture-A (7/1/90)
11.19 Printed material exemption-A (7/1/90)
11.40 Exemption of machines and processing equipment-A (7/1/90)
11.51 Grocers' guidelist-A (7/1/90)
11.535 Operators of a swap meet, flea market, craft fair or similar event-NR (7/1/90)
11.57 Public utilities-A (7/1/90)
11.61 Veterinarians and their suppliers-A (7/1/90)
14.03 Household income and income-A (9/1/90)
14.06 Marriage, separation, or divorce during a claim year-A (9/1/90)

E. Rules Adopted in 1990 But Not Yet Effective

7.01 Purchases and invoices-A
7.23 Activities of brewers, bottlers and wholesalers-A

REPORT ON LITIGATION

This portion of the WTB summarizes recent significant Tax Appeals Commission and Wisconsin court decisions. The last paragraph of each decision indicates whether the case has been appealed to a higher court.

The last paragraph of each WTAC decision in which the department's determination has been reversed will indicate one of the following: (1) "the department appealed", (2) "the department has not appealed but has filed a notice of nonacquiescence" or (3) "the department has not appealed" (in this case the department has acquiesced to the Commission's decision).

The following decisions are included:

Individual Income Taxes

Keith Breyer (p. 7)
Corporate Liquidations — sec. 333

Franklin F. Koehler (p. 8)
Partnerships — partner's share of income (loss)

Klaus Wacker (p. 8)
Foreign taxes paid

Thomas Wall (p. 8)
Losses — allocation

Corporation Franchise or Income Taxes

Appleton Papers, Inc. (p. 9)
Business loss carryforward — merger

Consolidated Freightways Corporation of Delaware (p. 9)
Apportionment — motor carriers

The Hearst Corporation (p. 10)
Apportionment—property factor, rented property; sales factor

Presto Products, Incorporated (p. 12)
Interest expense - loans between related parties

Sta-Rite Industries, Inc. (p. 13)
Waivers — statute of limitations

U.S. Oil Co., Inc. (p. 13)
Leases-1986 and prior — safe harbor rules

Inheritance Taxes

Estate of Emily Pierron, et al (p. 14)
Residuary bequests

Sales/Use Taxes

Alton Cable Corporation (p. 14)
Cable TV — installations

GTE Sprint Communications Corporation, now known as U.S. Sprint Communications Company (p. 15)
Telecommunication services — access charges

INDIVIDUAL INCOME TAXES

Corporate liquidations — sec. 333. *Keith Breyer vs. Wisconsin Department of Revenue* (Circuit Court of Outagamie County,

date stamped April 26, 1990). The only issue in this case is whether the Wisconsin Tax Appeals Commission correctly decided that the taxpayer could not benefit from the favorable tax treatment of sec. 71.333, Wis. Stats. (1983-84), without following the procedure set forth in that statute, thus giving the department authority to adjust his income tax return accordingly.

Section 71.333, Wis. Stats., is identical to sec. 333 of the Internal Revenue Code (IRC). All requirements of the IRC were met, including the filing of Form 964 with the Internal Revenue Service to elect to have the gains on liquidation taxed under sec. 333, IRC. The taxpayer did not file a copy of Form 964 with the Wisconsin Department of Revenue within 30 days of adoption of the plan, notifying the department of liquidation and the election to dissolve under sec. 71.333, Wis. Stats. The taxpayer's 1984 federal tax return was filed in accordance with the federal tax laws and rules and in accordance with the benefits of sec. 333, IRC.

When the 1984 Wisconsin income tax return was filed, there was no adjustment made to the federal income tax return for failure to file the Form 964 with Wisconsin. Upon audit, the department disallowed the sec. 71.333, Wis. Stats., treatment, adjusting the federal income tax for Wisconsin's purposes accordingly.

The Circuit Court held that the controlling question in this case is whether sec. 71.05(1) and (4), Wis. Stats., provides for any modification for not following sec. 71.333, Wis. Stats. Since the taxpayer timely elected under section 333, IRC, he was entitled to the benefits thereunder for federal purposes. The Court concluded that in accordance with sec. 71.02(2)(e), Wis. Stats., only those modifications contained in sec. 71.05(1) and (4), Wis. Stats., apply. Thus, since the department cannot rely on a specific modification to adjust the federal gross income in sec. 71.05(1) or (4), Wis. Stats., it cannot deviate from the taxpayer's federal adjusted gross income and impose a tax for not filing the state notice under sec. 71.333, Wis. Stats. The Circuit Court also concluded that since all actions by the taxpayer and the liquidating corporation complied with sec. 333, IRC and sec. 71.333, Wis. Stats., with the exception of the sec. 71.333, Wis. Stats., notice to the Department of Revenue, the total actions of the taxpayer and the liquidating corporation amount to be a substantial compliance including the timely filing of the notice under sec. 333, IRC, with the IRS, and substantial compliance has been accomplished regarding sec. 71.333, Wis. Stats.

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

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Partnerships — partner's share of income (loss). *Franklin F. Koehler vs. Wisconsin Department of Revenue*, (Wisconsin Tax Appeals Commission, June 26, 1990). The issue in this case is whether the taxpayer, a limited partner, who received no distribution from the partnership in 1982, and who eventually lost all of his investment in the partnership, is nonetheless liable for taxes on 1982 income reported by the partnership.

As of the beginning of 1982, the taxpayer and his wife were each limited partners, each holding a 7.4% interest in an enterprise called Irving Investment Company, a limited partnership dealing in real estate, and an enterprise that was subject or became subject to the jurisdiction of the federal bankruptcy court in that year. For 1982, the enterprise filed a federal partnership return signed by the trustee in bankruptcy, showing that the shares of the taxpayer and his wife in the partnership's income for 1982 were each $2,800 of ordinary loss and $17,233.85 of net long-term capital gain. None of the gain recognized, however, ever made its way into the hands of either the taxpayer or his wife, who eventually lost everything they had invested in the partnership. There is no evidence to contradict the accuracy of the figures the trustee reported in the 1982 return.

The Commission concluded that the taxpayer is subject to taxation on income the partnership earned, even though the income remained in the partnership and was never distributed to the taxpayer. It also concluded that because the taxpayer did not show that the figures reported by the bankruptcy trustee in the return were wrong, the assessment is correct.

The taxpayer has not appealed this decision.

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Foreign taxes paid. *Klaus Wacker vs. Wisconsin Department of Revenue* (Court of Appeals, District I, May 1, 1990). This is an appeal from an order of the Circuit Court of Milwaukee County, which reversed a decision of the Wisconsin Tax Appeals Commission. The Commission had upheld the department's disallowance of a "subtraction modification" for German trade taxes on the taxpayer's 1981 Wisconsin tax return. The issue presented by the appeal is whether the department properly disallowed the taxpayer's "subtraction modification". See *Wisconsin Tax Bulletin* 63, page 8 and *Wisconsin Tax Bulletin* 47, page 12, for prior summaries of the case.

The Court of Appeals held that where an administrative agency has particular expertise, it will not substitute its judgment for the agency's application of a particular statute to the found facts if there is a rational basis in law for the agency's interpretation and the interpretation does not conflict with the statute's legislative history, prior decisions of the Wisconsin appellate courts, or constitutional prohibitions. The Court concluded that the department and the Commission have particular expertise to decide the propriety of the taxpayer's "subtraction modification", that there is a rational basis for the department's disallowance of the modification claimed by the taxpayer, and that the department properly disallowed the claimed subtraction modification.

The taxpayer has not appealed this decision.

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Losses — allocation. *Thomas Wall vs. Wisconsin Department of Revenue* (Court of Appeals, District II, May 23, 1990). The department appeals from a judgment of the

Circuit Court of Ozaukee County, reversing a decision of the Wisconsin Tax Appeals Commission, which had affirmed the department's earlier determination that the taxpayer underpaid his income taxes for the years 1982-84. The three issues in this case are:

A. Whether improper service deprived the Circuit Court of subject matter jurisdiction;

B. Whether for tax purposes record title constitutes legal title; and

C. Whether 100% allocation of losses to the taxpayer lacked "substantial economic effect."

In 1986, the department issued against the taxpayer a notice of income tax deficiency for the years 1982-84. A portion of the alleged underpayment stemmed from the 1981 purchase of some investment property in Columbus, Ohio. The taxpayer and his wife, Barbara, intended to purchase the property jointly but, through the seller's mistake, the deed named Barbara as sole owner of the property. Though aware that Thomas's name was not on the deed, the Walls made no effort to change it, believing that as joint obligors on the mortgage note they were also joint owners. In fact, other than the deed, all pertinent documents relating to the sale listed both Thomas and Barbara as joint purchasers. In each of the years at issue, losses of approximately $10,000 were attributable to the Ohio property; Thomas and Barbara each claimed one-half. The department disallowed Thomas's portion of the claimed losses on the ground that, for tax purposes, record title was determinative of ownership.

The other portion of the alleged underpayment arose from the Wall's ownership of a Waukesha county horse farm ("Harmony Farm") purchased in 1983. After purchase, the Walls entered into a partnership agreement with their son Steven. The agreement provided that each partner was to contribute $500 as initial capital, and that the partners:

> shall contribute any additional capital deemed necessary for carrying on the business and to the extent such capital contributions are unequal, the capital account records shall reflect any such capital contributions.

In addition, the agreement allocated gains and losses as follows:

> The partners shall be entitled to the net profits or shall share losses of the partnership in equal shares or as agreed .... Unless otherwise agreed, all profits shall be allocated to Steven and all losses to Thomas and all losses shall be charged against the partners [sic] capital account.

In each of the relevant years, Thomas, a physician, earned an average of $155,000, while Barbara earned less than $25,000. In 1983, Harmony Farm showed losses of nearly $51,000; in 1984, nearly $68,000. All were claimed by Thomas. The department ruled that Thomas was entitled to claim only one-half of those losses, a proportion equal to his ownership interest in the partnership.

The department also argued that the Circuit Court lacked subject matter jurisdiction because the taxpayer improperly served his petition for review upon the department and the Commission by regular mail rather than by certified mail or in person. Noting the timely service and lack of any resultant prejudice, the Court held that there was substantial compliance with the statute and denied the department's motion to dismiss. The department submitted to the Circuit Court's jurisdiction by filing a "Notice of Appearance." The department did not allege in it any jurisdictional objections, but first raised the issue four months later in a motion to dismiss.

The Court of Appeals waived the first issue due to the department's failure to timely raise it. As to the second, the Court of Appeals concluded that record title does not conclusively establish legal title and so reversed that portion of the Commission judgment. The Court affirmed the third issue because the partnership's records do not support the taxpayer's position.

The department and the taxpayer have not appealed this decision.

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CORPORATION FRANCHISE OR INCOME TAXES

Business loss carryforward — merger. *Wisconsin Department of Revenue vs. Appleton Papers, Inc.* (Circuit Court of Dane County, June 27, 1990). The issue in this case is whether the manufacturer's sales and use tax credit acquired by one organization, Appleton Papers Inc. (old API) can be utilized by the taxpayer, a corporation which is made up of that "old" corporation merged with others, Appleton Papers Inc. (new API). See *Wisconsin Tax Bulletin* 63, page 10, for a prior review of this case.

After reviewing briefs and arguments from both the department and the taxpayer, the Circuit Court affirmed the decision of the Commission and denied the department's appeal.

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

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Apportionment — motor carriers. *Consolidated Freightways Corporation of Delaware vs. Wisconsin Department of Revenue* (Court of Appeals, District IV, June 14, 1990). Consolidated Freightways Corporation of Delaware (Consolidated) appeals from an order affirming a decision of the Wisconsin Tax Appeals Commission. The Department of Revenue assessed additional franchise taxes against Consolidated for years 1974-77. The Commission affirmed the department's decision denying Consolidated's petition for a redetermination of the assessment, and the Circuit Court affirmed.

Consolidated challenges the formula used by the department to determine the portion of its income subject to Wisconsin tax in the years in question. Consolidated's claim is that the formula — as applied to its business activities during the tax years in question — violates (1) sec. 71.07(2), Wis. Stats., which limits the state's taxing power to income "derived from business transacted ... within the state," and (2) the Commerce Clause of the United States Constitution.

Consolidated is a "general commodity" common carrier, and its trucking business is nationwide. It is a Delaware corporation and its main offices are in California. As a general commodity carrier, Consolidated serves small and large shippers around the country, transporting manufactured and consumer goods.

Because Consolidated is primarily a hauler of small shipments — usually of less-than-truckload size — it normally consolidates several small shipments for over-the-road movement, utilizing a network of established routes and terminals across the country. Consolidated picks up freight from a shipper's dock, moves it to a satellite terminal, where it is combined with other freight from other shippers. It then moves the combined load to a large regional terminal, called a "consolidation center," where the load is consolidated with freight from other satellite terminals bound in the same direction.

Consolidated maintains 410 terminals nationwide and a fleet of 14,000 trailers and 2,400 tractors. It has 12 satellite terminals and a regional consolidation center in Wisconsin.

In 1966, the department adopted sec. Tax 2.47, Wis. Adm. Code, which contains a formula for apportioning the taxable Wisconsin income of a national unitary business. It is a two-factor formula which adds (a) the ratio of gross receipts from carriage of goods first acquired in Wisconsin — the "originating" or "outbound" revenues — to gross receipts from carriage of property everywhere, and (b) the ratio of ton miles of carriage to, from, and in Wisconsin to ton miles of carriage everywhere, and then (c) divides the total by two to average the results. The final figure is the percentage of the company's income subject to the Wisconsin franchise tax.

During the years in question, Consolidated continued to apportion its income, as it had in the past, using a different formula. After a field audit in which the department applied the sec. Tax 2.47, Wis. Adm. Code, formula to Consolidated's income, it issued an assessment of additional franchise tax and interest totaling $115,002.98 for the 4-year period. The department denied Consolidated's request for a redetermination and the Tax Appeals Commission affirmed the assessment, concluding that the formula 'was not contrary to law and did not result in the taxation of extraterritorial values ... [or] distort that portion of [Consolidated's] income properly taxable to Wisconsin."

Consolidated has no argument with the portion of the formula implementing a ratio of Wisconsin ton miles to national ton miles. Consolidated's argument is this:

> Originating revenues do not measure Wisconsin activity. The [outbound revenue] factor measures activity in other states. Because the income for a shipment is earned not merely by activities in Wisconsin but by activities in other states this formula factor attributes to Wisconsin [Consolidated's] activity in other states. The whole journey is attributed to Wisconsin. In fact, under this factor, the longer the journey, the greater the apportionment to Wisconsin — even while the Wisconsin activity is becoming a smaller and smaller part of the whole.

The department counters with a reference to *W.R. Arthur & Co. vs. Department of Taxation*, 18 Wis 2d 225, 118 N.W 2d 168(1962), the primary authority for the Commission's decision, and a case the department claims upheld its use of outbound revenues in apportioning the income of multistate trucking companies.

In this case, Wisconsin is but one of 50 states in which Consolidated does business. Unlike the carrier in *Arthur*, the originating revenue factor lumped together in one location (Wisconsin) the company's sales, management, terminal, over-the-road and pick up and delivery activity. But, all of its sales were in Wisconsin, as were its management and offices. There was no inbound freight; thus the company's only activity in other states was over-the-road mileage and delivery — and the extraterritoriality of these factors was reflected by the mileage and payroll components of the formula used by the department in that case — both of which attributed part of these activities to the other states in which its trucks moved.

The Court concluded that given these distinguishing factors, the *Arthur* decision is not controlling here. The burden is on the taxpayer to show that an apportionment formula imposes an unreasonable or inequitable tax and such a showing was made in this case. Use of the outbound revenue factor exaggerates Consolidated's Wisconsin income, for it assumes that outbound and inbound revenues are equal indicators of activity within the state. Consolidated established that long haul carriers are more heavily laden going out of Wisconsin than coming in, and that freight revenues are higher outbound; and the commission so found. There was evidence that Consolidated's outbound revenues in Wisconsin in the years in question were substantially in excess of its inbound revenues. In addition, because the originating revenue factor attributes the entire journey to Wisconsin, it measures Wisconsin income by activity in other states. Section 71.07(2), Wis. Stats., mandates that foreign companies can be taxed only on income from business transacted within Wisconsin. Therefore, the apportionment formula, as applied to Consolidated's activities in the years at issue, violates the mandate of sec. 71.07(2), Wis. Stats. Because of its decision, the Court held it need not consider the constitutional arguments.

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

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Apportionment — property factor, rented property; sales factor. *The Hearst Corporation vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, May 15, 1990). The primary issues involved in this case relate to allocation and apportionment of income for Wisconsin tax purposes and are as follows:

A. Whether amounts that were paid by the taxpayer pursuant to certain agreements for the right to exhibit motion picture films on its WISN-TV station are rental payments made for the use of tangible personal property so as to require their inclusion in the property factor of the Wisconsin apportionment formula at 8 times their values pursuant to sec. 71.07(2)(a)3, Wis. Stats.

B. Whether the network revenue received by WISN-TV under its affiliation agreements first with CBS and then with ABC and its revenue which it received from the sale of national advertising time is properly includable in the numerator of the sales factor of the taxpayer's Wisconsin apportionment formula.

C. The inclusion of dividend income in the taxpayer's apportionable income for Wisconsin tax purposes for the years 1975 through 1977.

During the period under review, 1974 through 1977, The Hearst Corporation, was a Delaware corporation with its principal offices in New York. Its activities during that period in Wisconsin consisted of the ownership and operation of WISN-TV, a television station located in Milwaukee, Wisconsin, and radio stations WISN-AM and FM, which are radio stations located in Milwaukee, Wisconsin.

Film License Fee: During each of the years 1974 through 1977 inclusive, the taxpayer's Wisconsin television station, WISN-TV ("WISN"), broadcast 4 basic types of programming, including: (1) feature-length films which had either been exhibits in theaters or previously shown on a television network; (2) "off-network" programs, that is, comedy or drama programs which had previously aired on a television network; (3) "first-run" programs, that is, programs which had not previously been broadcast on any television network; and (4) network programs that were carried by WISN as an affiliate of a television network.

WISN acquired the right to broadcast films and programs in the first 3 categories of programming by entering into license agreements which granted WISN a limited license of the copyright of that film or program. The taxpayer on behalf of WISN, entered into a number of contracts permitting WISN to broadcast various copyrighted films or television programs over WISN's Channel 12 facility in Milwaukee. The taxpayer entered into at least 5 such license agreements in 1974; at least 16 such license agreements in 1975; at least 15 such license agreements in 1976; and at least 26 such license agreements in 1977. (All such license agreements in effect during any part of the years 1974 through 1977, including contracts which were executed during those four years as well as contracts which had been executed in prior years, will be collectively referred to hereinafter as "License Agreements.")

Each License Agreement contained an Exclusivity Clause which gave WISN the exclusive right to broadcast a given program or film in the Milwaukee television market. The License Agreements did not grant WISN an unlimited right to broadcast the copyrighted films or programs during the contract term. Rather, the License Agreement limited the number of times which WISN could broadcast the film or program over the contract term, and further limited WISN's right to broadcast the program by specifying the time period in which WISN could broadcast the program.

To the extent WISN received prints or tapes pursuant to the License Agreements to facilitate broadcast of the licensed films or programs, WISN acquired ownership rights in those prints or tapes. WISN could not sell or subcontract the prints or tapes, and could not copy the prints or tapes for any purposes other than exhibiting them over the Channel 12 facilities pursuant to the License Agreements.

During the years 1974 through 1977, films or programs which the taxpayer had purchased under the License Agreement were delivered to WISN either through an electronic feed of the image of the program over cable lines, or through the physical delivery of a film or tape to WISN's studio.

The licensee fee set forth in each of the License Agreements represented payment solely for a limited license of the copyright to broadcast the program in the Milwaukee television market. In addition to that license fee, WISN would generally pay a separate cost for the prints over and above the licensee fee. This print cost was very small in comparison to what WISN paid as a licensee fee for the right to air a given program. In some instances, no separate print fee was charged, and the licensor was willing to provide an entire set of library prints at no additional cost beyond the license fee.

Because of advances in technology since 1977, WISN now receives 95% of its programming via satellite feed. In such cases, no print or tape is physically delivered to WISN's broadcasting studios. Rather, WISN intercepts a signal which has been transmitted to it over a broadcasting satellite and records that intercepted image onto WISN's own videotape stock. Notwithstanding this fundamental change in the way in which WISN receives licensed programs, license agreements which WISN enters into for programs which are transmitted to it via satellite are basically identical to the License Agreements in effect during the years 1974 through 1977. License agreements which WISN enters into under the current technology are at least as restrictive as the License Agreements in effect between 1974 and 1977 and are occasionally more restrictive. The procedures under which WISN currently stores, edits, and broadcasts the videotape stock on which it records programs from a satellite image are identical to the procedures under which WISN stored, edited, and broadcast videotapes which were delivered to WISN under License Agreements in effect during the years 1974 through 1977.

Network Revenue: In November, 1966, WISN entered into a Television Affiliation Agreement with the CBS Television Network ("CBS"). Under that agreement, WISN served as the Milwaukee affiliate of CBS until 1976. On December 20, 1976, petitioner entered into a Television Affiliation Agreement with the American Broadcasting Company ("ABC") under which WISN became the Milwaukee affiliate of ABC.

The only revenue which a network affiliate station receives for broadcasting network programming is the compensation fee calculated according to the formula set forth in the Affiliation agreement. The station receives no direct portion of the revenue earned by the network for selling network commercials, and the only revenue which a network affiliate might earn during a network program other than the network compensation fee consists of local commercials which it can sell during station breaks within the network programs.

In exchange for giving up the revenue which it could earn if it were able to sell commercial time on network programs itself, WISN receives the network programming. Accordingly, at the time WISN entered into the Affiliation Agreements covering the time period at issue in this case, WISN considered the difference between the network compensation it actually received and the revenue it could have earned had it been able to sell all commercial time in the network programs itself to constitute the net cost of WISN of acquiring the network programs.

National Advertising Revenue: In addition to network revenue received under network affiliation agreements during the years 1974 through 1977, WISN generated its own advertising revenue in two ways: (1) local advertising and (2) national advertising. Local advertising consisted of local accounts within WISN's coverage area. Such advertising was directly solicited by a sales staff of WISN employes located in Milwaukee. National advertising was placed by national sales representatives, i.e., brokers located outside Wisconsin who generated business from national advertisers and advertising agencies located primarily in New York, Chicago, and Los Angeles.

Commercials sold by national sales representatives as national advertising were all produced independently of WISN and were transmitted to WISN either by satellite feed or by courier. No national advertising broadcast by WISN was produced by WISN or through the use of WISN's studio facilities.

Between 1974 and 1977, WISN incurred the following costs outside Wisconsin in generating national advertising revenues: (1) national sales commissions paid to WISN's national sales representatives, all of which were paid to entities outside of Wisconsin (the amounts of which are set forth in the previous paragraph); (2) film license fees paid by WISN under the License Agreements, all of which were paid to entities outside of Wisconsin; and (3) the cost to WISN of acquiring network programming in the form of foregone advertising revenue, all of which were paid to entities outside of Wisconsin.

Dividends Received from Corporations Apportioning Less Than 50% of Their Income to Wisconsin: During the years 1975, 1976, and 1977, the taxpayer received dividend income from corporations who apportioned less than 50% of their income to Wisconsin.

The Commission concluded that:

A. All license fees paid by the taxpayer under the License Agreements in effect during the years 1974 through 1977 were paid to acquire limited copyright licenses which permitted the taxpayer's television station, WISN, to broadcast certain copyrighted films and television programs over Channel 12 in Milwaukee, and were not paid for the rental of tangible personal property within the meaning of sec. 71.07(2)(a), Wis. Stats. No portion of the fees paid by the taxpayer under the License Agreements is includable in the property factor of the taxpayer's Wisconsin apportionment formula for any of the years 1974 through 1977.

B. The network income is a result of the income-producing activity of broadcasting the network programming in Wisconsin, and, thus, is includable in full in the numerator of the sales factor. The direct cost of performing the network programming function is the cost of broadcasting in Wisconsin and is fully allocable to Wisconsin. The national advertising income is a result of the income producing activity of broadcasting in Wisconsin, and, thus, the income is includable in full in the sales factor numerator. The direct cost of performing the national advertising function is the cost of broadcasting that programming with those ads in Wisconsin and is allocable in full to Wisconsin.

C. The dividends received from corporations apportioning less than 50% of their income to Wisconsin during the period under review are includable in the taxpayer's Wisconsin apportionable income within the intent and meaning of secs. 71.04(4) and 71.07(1m), Wis. Stats. (1975-77). The statutes do not unlawfully discriminate in favor of local business at the expense of business conducted in interstate commerce in violation of the Interstate Commerce Clause and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

D. The income tax statutes of the State of Wisconsin are deemed to be constitutional until they are declared otherwise by a court of competent jurisdiction. The Wisconsin Tax Appeals Commission does not have the jurisdiction to determine the constitutionality of the income tax statutes of the State of Wisconsin.

The taxpayer and the department have not appealed this decision.

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Interest expense—loans between related parties. *Presto Products, Incorporated vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, July 18, 1990). The taxpayer and the department each filed motions for summary judgment in this matter.

During the period in question, 1981 through 1985, the taxpayer was a wholly-owned subsidiary of The Coca-Cola Company. The taxpayer was indebted to the parent and paid interest on such debt at commercially reasonable rates to the parent. The interest deducted by the taxpayer in 1981 through 1985 was incurred in the maintenance and operation of its business; it was not incurred on notes or securities issued to acquire the taxpayer's own capital stock.

The taxpayer would have sought financing from third parties had the parent not loaned it the funds in question. The existence of third party debt would not have prevented the taxpayer from paying dividends to the parent.

The Commission concluded as follows:

1. This case presents no genuine issue of fact.

2. The interest paid to the taxpayer's parent has been shown to be ordinary and necessary in conducting its business and therefore comes within sec. 71.04 (2)(a)3, Wis. Stats., and is deductible by the taxpayer.

3. The mere fact that the taxpayer borrowed money from its parent at commercially reasonable rates and also paid dividends to its parent in the same year does not in and of itself prove a distortion of income sufficient to permit the nullification of bona fide loans between related parties.

The Commission therefore granted the taxpayer's motion for summary judgment and denied the department's motion for summary judgment.

The department has not appealed this decision.

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Waivers — statute of limitations. *Sta-Rite Industries, Inc. vs. Wisconsin Department of Revenue* (Circuit Court of Milwaukee County, March 14, 1990). This is a review of a decision of the Wisconsin Tax Appeals Commission, wherein it was determined that an assessment against the taxpayer for 1978 franchise taxes was not barred by the 4-year statute of limitations for assessments. On June 17, 1983, Sta-Rite executed an agreement extending the department's assessment period for 1978. The issue in this case is the validity of the assessment extension agreement.

On June 15, 1979, the taxpayer mailed its franchise tax return for 1978 to the department. The return was received by the department on June 18, 1979. The taxpayer claimed the assessment extension agreement of June 17, 1983, was invalid, because the 4-year statute of limitations period began running on June 15, 1979, the date it mailed the return, and expired on June 15, 1983, two days before the extension agreement was executed. The department took the position that the statute did not begin to run until June 18, 1979, when the department received the return, and that therefore, the statute hadn't expired on June 17, 1983, the date on which the extension agreement was executed. The Commission determined that there was no indication in sec. 71.10(13), Wis. Stats. (1983-84), that mailing a return constituted the date on which the 4-year assessment statute of limitations began "ticking" and that "to say that something is, by mailing, 'considered ... filed ...on time' is not a declaration that it is thereby *actually* filed."

The Circuit Court concluded that the Wisconsin statute does not equate mailing with filing for all purposes, but instead indicates that timely mailing constitutes timely filing. Qualifying words "on time" show that the Wisconsin statute treats mailing as filing only for purposes of determining the mailed item's timeliness. It, therefore, upheld the decision of the Commission denying the taxpayer's petition for redetermination.

The taxpayer has not appealed this decision.

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Leases-1986 and prior — safe harbor rules. *U.S. Oil Co., Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, July 18, 1990). The issues in this case are:

1. Whether the taxpayer, a purchaser-lessor in two 1981 sale and leaseback transactions with two separate seller-lessees, was entitled to deduct in fiscal year (FY) 1982 and FY 1983 the depreciation it took on the equipment it purchased and the interest expense it paid to seller-lessees on the deferred sales prices.

2. If not, whether upon the taxpayer's sale of the equipment back to the seller-lessees in FY 1984, it was entitled to a deduction for the loss it incurred on the sale, and if so, when and in what amount the loss should have been reported.

On November 13, 1981, the taxpayer entered into two sale-leaseback transactions with two banks. In both cases, the taxpayer putatively purchased office equipment from the banks and simultaneously entered into putative leases whereby the taxpayer leased the equipment back to the banks. In each case the taxpayer made a down-payment and signed a note for the balance, to be paid in monthly installments; the lease portion of each transaction provided that the bank was to pay the taxpayer rent in exactly the same amount as the monthly installment payment from the taxpayer to the bank.

The motivations for both transactions were the parties' desires to take advantage of the so-called Safe Harbor provisions of the Internal Revenue Code (sec. 168(f)(8), IRC), which at the time allowed one taxpayer to in effect sell certain tax benefits it couldn't utilize fully to another taxpayer who could. By selling the equipment to the taxpayer, the banks were able to realize some immediate cash in lieu of the unusable depreciation deductions; and by virtue of its becoming the putative owner of the equipment, the taxpayer deducted on its federal returns the depreciation expenses and interest expenses (on the notes to the bank) and reported rental income (from the lease payments of the banks to it).

On August 1, 1983, the taxpayer became an S-corporation, and the parties terminated the leases. At termination, the taxpayer "sold" the equipment to the banks, in each case for the then unpaid balances the taxpayer owed on the notes. Apparently, no cash changed hands at termination — the "sales" prices were paid by the purchasing banks cancelling the notes representing the taxpayer's debts to the banks.

At the time the transactions were first consummated in November 1981, the favorable tax consequences of these sorts of transactions were recognized at both the federal and state levels. However, by legislation which went into effect May 1, 1982, but which retroactively applied to 1981, Wisconsin excluded federal safe harbor leasing provisions from the Wisconsin definition of "internal revenue code" — seemingly ending the state's tax recognition of favorable federal safe harbor treatment. It was this legislation that resulted in the department's assessment against the taxpayer, disallowing the taxpayer's depreciation deductions for 1982 and 1983, disallowing the taxpayer's interest expense deductions, disregarding the taxpayer's rental income receipts from the banks, and in effect apparently imputing the down-payments as income to the banks, yet not recognizing any corresponding adjustment allowing the taxpayer to deduct the down-payments as the cost of buying the tax benefits.

The taxpayer argued that irrespective of the legislative change, the department erred in not recognizing the transactions as actual, bona-fide purchases, sales, and leaseback of equipment, and in treating the transactions as a purchase and sale of tax benefits. Alternatively, the taxpayer argued that even if the treatment of the initial sales was correct and did involve the taxpayer's purchase of tax benefits, the treatment was incomplete, because it failed to recognize, and give the taxpayer an adjustment for, the expense the taxpayer incurred in acquiring the tax benefits. There are two sub-issues involved in its alternative argument; (1) in what year should this adjustment be made, and (2) what is the amount of the adjustment?

As to the taxpayer's primary argument, the department countered that the treatment given in the assessment was exactly what the statutory change called for; on the taxpayer's alternative argument, the department took the position that the losses resulting from the loss of the rights to tax benefits are not deductible, because the losses were not recognized on the taxpayer's books.

The Commission concluded as follows:

1. The department's treatment is supported by the terms of the transaction documents, which reveal that the transactions cannot be characterized as true leases, and that the transactions were the purchase and sale of tax benefits.

2. The taxpayer did suffer losses in the sense that its rights to the federal tax benefits became worthless or were abandoned before the cost of obtaining those rights was recovered. The proper way to treat the transactions is to view them as capital transactions, each involving the FY 1982 purchase of a non-income-producing, intangible asset, the beneficial use of the asset for FYs 1982 and 1983, and the subsequent abandonment of the asset, culminating in a FY 1984 loss to the extent the asset was unutilized. Thus the taxpayer's loss would all be realized in FY 1984 when the loss occurred, and the loss would equal the original cost of the benefits minus the sum of the net investment tax credits and net depreciation deductions used in FYs 1982 and 1983.

The case was remanded to the department to calculate the 1984 loss in accordance with the principles expressed in this opinion; the assessments for 1982 and 1983 were affirmed.

The taxpayer and the department have not appealed this decision.

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INHERITANCE TAXES

Residuary bequests. *Estate of Emily Pierron, et al vs. Wisconsin Department of Revenue*, (Court of Appeals, District I, June 26, 1990). Holy Family Convent of Manitowoc, Wisconsin, St. Camillus Health Care Center, Inc., Sacred Heart Roman Catholic Church, and St. John's De Nepomuc Roman Catholic Church (collectively, the charities) appeal from an order of the Circuit Court of Milwaukee County, which determined that their residuary bequests under the will of Emily Pierron are subject to inheritance tax. The Circuit Court determined that only $1,000 of each bequest is exempt from taxation under sec. 72.17(4)(c), Wis. Stats. The charities claim that the full amount of the residuary bequests is exempt from inheritance tax pursuant to sec. 72.15(1)(a)2, Wis. Stats.

The issue in this case is whether Emily Pierron intended that bequests to the charities as provided in her will be for the performance of a religious purpose or services for her, her deceased parents and husband, or whether she intended the bequests to be unfettered by any conditions or requirements.

The Court of Appeals concluded that the wording in Emily Pierron's will demonstrated her "request" that masses be said, and that having already bequeathed $200 for masses, it would be unreasonable to conclude the she intended the expenditure of $186,288.56 for the same services. The decedent's will unambiguously provided for masses and then for an unconditional gift of the residuary. Her expression of a request or wish for additional masses does not mandate performance, which would bring the residuary within the embrace of inheritance taxation. Thus, the bequests to the charities under the will of Emily Pierron are exempt from inheritance taxes under sec. 72.15(1)(a)2, Wis. Stats.

The department has not appealed this decision.

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SALES/USE TAXES

Cable TV — installations. *Alton Cable Corporation vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, May 9, 1990). In October 1987, the department issued to the taxpayer an assessment of additional sales and use taxes, with interest and penalties thereon for the years 1981-85. The additional tax due was primarily the result of sales tax on installations. Delinquent interest and the 25% penalty under sec. 77.60(3), Wis. Stats., as well as late filing fees under sec. 77.60(2), Wis. Stats., were imposed.

The taxpayer, a Wisconsin corporation, was organized in 1980. From 1981 to 1985, it engaged in the installation of cable TV "drops" for operators of cable television transmission systems. The taxpayer had not reported or remitted the tax on installation, based on its belief that the cable transmission companies were liable for the taxes.

Almost all of the services involved above ground line installations of various types including aerial drops, FM installations, subpole, universal drops, and midspans. There may have been a few underground installations, but they would have been de minimus. No breakdown of underground work was provided to the department. Services provided by the taxpayer were those of a contractor billed to the cable transmission companies and comprised the basis for the department's determination of the gross receipts base for sales tax purposes. The taxpayer did not provide the department with any exemption certificates taken from the cable transmission companies.

The taxpayer failed to appear at the Commission's hearing either by corporate officer or by representative.

The Commission held that the department's assessments are presumed to be correct in the absence of any evidence as to their incorrectness and concluded that the taxpayer's installations of various above ground cables were taxable services described in sec. 77.52(2)(a)10, Wis. Stats.

The taxpayer has not appealed this decision.

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Telecommunication services — access charges. *GTE Sprint Communications Corporation, now known as U.S. Sprint Communications Company, vs. Wisconsin Bell, Inc. and State of Wisconsin* (Wisconsin Supreme Court, May 15, 1990). GTE Sprint Communications Corporation, now U.S. Sprint Communications Company, appeals a judgment of the Circuit Court of Milwaukee County which denied U.S. Sprint's motion for summary judgment seeking to have declared unconstitutional the retail sales tax imposed upon the transfer of origination and termination services ("access services"), pursuant to secs. 77.51(14)(m) and 77.52(2)(a)4, Wis. Stats. (1985-86). The first question is whether the tax violates the equal protection clauses of either Article I, Section I of the Wisconsin Constitution or the Fourteenth Amendment, Section I of the United States Constitution. If not, the second question is whether the tax violates the commerce clause of Article I, Section 8 of the United States Constitution.

U.S. Sprint contends that secs. 77.51(14)(m) and 77.52(2)(a)4, Wis. Stats., violate equal protection because the tax only applies to purchases of access services by inter-LATA carriers. (Note from Editor: In a decision dated January 11, 1988, the Circuit Court of Milwaukee County held in the case of *Wisconsin Bell, Inc. v. Schneider Communications, Inc. v. Department of Revenue*, that the term interexchange carrier as used in sec. 77.51(13)(p) and (14)(m), Wis. Stats., referred to facilities based carriers only and did not include resellers. Thus, charges for access services to resellers are not subject to sales and use tax.)

U.S. Sprint argues there is no rational basis for the legislature's classifying inter-LATA carriers separately from local exchange carriers and resellers for the purpose of taxing the transfer of access services.

U.S. Sprint and the State agree that the legislature enacted sec. 77.51(14)(m), Wis. Stats., to offset the expected loss of revenue caused by a ruling which concluded that neither inter-LATA carriers nor resellers were liable to pay the tax for the purchase of access services. The legislature responded by amending the definition of a "sale" to include the purchase of access services by an inter-LATA carrier.

The Court concluded that to tax the transfer of access services to inter-LATA carriers but not the same transfer to local exchange carriers and resellers denies inter-LATA carriers the constitutional guarantee of equal protection of the laws. The Court, therefore, declared unconstitutional the tax imposed upon the transfer of access services to an inter-LATA carrier pursuant to secs. 77.51(4)(m) and 77.52(2)(a)4, Wis. Stats.

Wisconsin Bell, Inc. and the State of Wisconsin have not appealed this decision.

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TAX RELEASES

("Tax Releases" are designed to provide answers to the specific tax questions covered, based on the facts indicated. In situations where the facts vary from those given herein, the answers may not apply. 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

Farmland Preservation/Tax Relief Credits

Corporation Franchise or Income Taxes

Individual and Corporation Franchise or Income Taxes

Sales/Use Taxes

All Taxes

INDIVIDUAL INCOME TAXES

1. Loss on Personal Residence Reimbursed While a Nonresident

Statutes: Section 71.04(1), Wis. Stats. (1987-88).

Background: Federal law provides that if your employer reimburses you for a loss on the sale of your home when you transfer to a new location, the payment must be included in federal taxable income as compensation for services.

Under sec. 71.04(1)(a), Wis. Stats. (1987-88), income from personal services of nonresident individuals follows the situs of the services.

Facts and Question: A Wisconsin resident is notified by his or her employer that he or she is being transferred to New York. The taxpayer abandons his or her domicile in Wisconsin and becomes a resident of New York. The taxpayer sells his or her personal residence in Wisconsin at a loss. The loss is reimbursed by the taxpayer's employer at a time when the taxpayer is a resident of New York.

Is the reimbursement received by the New York resident taxable income to Wisconsin?

Answer: No. The reimbursement is connected to services the taxpayer will perform in New York. Therefore, it is not taxable under sec. 71.04(1), Wis. Stats. (1987-88).

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2. Retirement Benefits Paid to a Former Spouse Under a Qualified Domestic Relations Order

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

Background: Taxpayers' payments from certain Milwaukee city and county retirement systems and from the Wisconsin Retirement System that are attributable to the former Milwaukee Public School Teachers' Annuity and Retirement Fund and the Wisconsin State Teachers' Retirement System qualify for exemption from Wisconsin income tax if the amount is paid on the account of a person who was a member of, or who was retired from, any of such qualifying retirement systems as of December 31, 1963. Sec. 71.05(1)(a), Wis. Stats. (1987-88).

The taxpayer participating in a qualifying retirement system may have his or her rights or payments subject to division under a qualified domestic relations order. 1989 Wisconsin Act 218, effective April 28, 1990. A qualified domestic relations order is a judgment, decree, or order which meets certain requirements that a court issues under the domestic relations law. Such judgment, decree, or order basically divides the taxpayer's rights or payments in the qualifying retirement system between the taxpayer and his or her spouse.

Facts and Question: A person was a member of the Wisconsin State Teachers' Retirement System as of December 31, 1963. All his or her payments received from the Wisconsin Retirement System become exempt from Wisconsin income tax. In 1990, the person falls under a qualified domestic relations order that equally divides his or her payments with a former spouse.

Do the former spouse's payments from the qualifying retirement system under the qualified domestic relations order qualify for the income tax exemption for 1990 and thereafter?

Answer: Yes. The former spouse's payments from the qualifying retirement system under such order are exempt from Wisconsin income tax when the payments would have been exempt if the participant had received them. The reason is that the former spouse is receiving payments on the account of a person who was a member of the Wisconsin State Teachers' Retirement System as of December 31, 1963, which makes the payments exempt from Wisconsin income tax.

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3. Statute of Limitations for Issuing an Assessment-Extension Agreement

Statutes: Sections 71.77(2), (5) and (8) and 71.80(18), Wis. Stats. (1987-88).

Background: In sec. 71.77, Wis. Stats. (1987-88), sub. (2) provides that with respect to an income tax assessment, notice must be given

within 4 years of the date the tax return was "filed." Subsection (5) provides that the limitation period may be extended if an agreement between the taxpayer and the department is entered into prior to the expiration of the limitation period. Subsection (8) further provides that a return filed before the last day prescribed by law for filing the return is deemed to be "filed" on the last day. Section 71.80(18), Wis. Stats. (1987-88), provides that a tax return is considered to be filed on time if it is mailed in a properly addressed, postage prepaid envelope that is postmarked before midnight of the last day prescribed for filing, provided it is actually received by the department within 5 days of the last prescribed date.

Facts and Question: The 1985 Wisconsin individual income tax return of a calendar year taxpayer is mailed in an envelope that is postmarked April 15, 1986, but not received by the department until April 18, 1986. On April 17, 1990, an assessment extension agreement is signed by the taxpayer and an authorized representative of the department.

May the department issue an assessment against the taxpayer within the time specified in the agreement, or is the agreement invalid because it was considered to have been executed after the expiration of the four-year statute of limitations?

Answer: An assessment may be issued within the period of time specified in the agreement. The extension agreement is valid because it is considered to have been executed prior to the expiration of the limitation period.

In *Sta-Rite Industries, Inc., vs. Wisconsin Department of Revenue* (Wisconsin Circuit Court, Milwaukee County, March 14, 1990), the Circuit Court held that the language in sec. 71.10(13), Wis. Stats. (1983-84) (renumbered sec. 71.80(18), Wis. Stats. (1987-88)), merely provides that the timeliness of a properly mailed tax return is considered only with respect to the imposition of a late filing penalty, and that section of the statutes does not control the four-year statute of limitations for assessing additional income taxes. The Circuit Court upheld the department's position that the four-year statute of limitations begins to run on the date the department receives the tax return.

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HOMESTEAD CREDIT

1. Community Spouse Income Allowance as Household Income

Statutes: Section 71.52(6), Wis. Stats. (1987-88), and sec. 49.455, Wis. Stats., as created by section 1453 of 1989 Wisconsin Act 31, effective September 30, 1989.

Note: This Tax Release applies only with respect to 1989 and subsequent years' homestead credit claims.

Background: As a part of 1989 Wisconsin Act 31, a "Spousal Impoverishment Program" (sec. 49.455, Wis. Stats.) was enacted, effective September 30, 1989. The income provision of this program is referred to as the "community spouse income allowance". The program is administered by each county's health and social services department.

Under this program, all or part of the income of an "institutionalized spouse" (a spouse in a nursing facility or a medical institution) who is on Title XIX medical assistance may be allocated to the "community spouse" (the spouse not living in the nursing facility or medical institution), if the community spouse's income is less than a predetermined amount established by law; that amount is $1,500 per month for 1989 and $1,565 per month for 1990. When part of the institutionalized spouse's income is allocated to the community spouse, less resources are available to pay for the cost of the institutionalized spouse's medical care, and consequently a proportionately larger part of the cost of medical care is paid by medical assistance.

Question: Does the income allowance which a community spouse receives from an institutionalized spouse under sec. 49.455, Wis. Stats., affect household income on a homestead credit claim filed by the community spouse?

Answer: No. The household income of a community spouse who receives an income allowance under the Spousal Impoverishment Program is computed in the same manner as the household income of any married claimant who resides separately from his or her spouse. The community spouse income allowance is not included in the list of items which must be added to Wisconsin adjusted gross income when computing household income for homestead credit purposes.

In determining a married claimant's household income when the spouses live apart, the claimant is required to include all of his or her own "nonmarital property" income but is not required to include any of the spouse's "nonmarital property" income (such as social security benefits; SSI payments; and pensions, annuities, and railroad retirement benefits attributable to employment before the determination date).

The couple's "marital property" income must be computed under Wisconsin's marital property law, unless the claimant's spouse was not domiciled in Wisconsin. Under marital property law, one-half of the marital property income generated by the spouse's services and property would be includable in the claimant's household income, if the spouse notified the claimant of the amount and nature of that marital property income. This is true regardless of whether or not any portion of the spouse's income is allocated to the claimant under the Spousal Impoverishment Program. See Wisconsin Publication 109 for more information about the marital property law.

Example: For all of 1990, Dick was an institutionalized spouse on Title XIX medical assistance. His only source of income was social security of $800 per month. Jane is his community spouse, and she intends to file a homestead credit claim for 1990. All of her income

for 1990 was nonmarital property income, consisting of gross social security of $600 per month and gross pension of $400 per month. Under the Spousal Impoverishment Program, $565 of Dick's income was allocated to Jane each month, to meet her monthly maintenance needs allowance of $1,565.

Jane's household income for 1990 is computed to be $12,000 (monthly payments of $600 of social security and $400 of pension equals $1,000 per month, times 12 months equals $12,000). This is the same household income that would have been computed if she had not received a community spouse income allowance. The income allowance of $565 per month from Dick is not considered in the computation of her household income.

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2. Dependent Deduction in Computing Household Income

Statutes: Section 71.52(5), Wis. Stats. (1987-88), as amended by section 2070m of 1989 Wisconsin Act 31 and section 8 of 1989 Wisconsin Act 100, effective with 1989 claims filed in 1990.

Note: This Tax Release applies only with respect to 1989 and subsequent years' homestead credit claims.

Background: Section 71.52(5), Wis. Stats. (1987-88) was amended by 1989 Wisconsin Acts 31 and 100, to provide a deduction from income of $250 for each qualifying dependent to determine household income on a homestead credit claim. The dependent must qualify as the claimant's dependent for federal tax purposes under section 152 of the Internal Revenue Code, and the dependent must have had the same principal abode as the claimant for more than six months during the year to which the claim relates.

Question 1: What does the statutory language "have the same principal abode as the claimant" mean?

Answer 1: Except as provided in answer 2 below, to have the same principal abode as the claimant means to live with the claimant or occupy the claimant's homestead.

Question 2: Is the $250 dependent deduction allowed for a son or daughter who qualifies as a dependent but is temporarily absent from the claimant's homestead (for example, away at college) for more than six months during the year?

Answer 2: Yes. A dependent who is temporarily absent for reasons such as school, illness, vacations, business commitments, and military service is considered to occupy the claimant's homestead during the temporary absence. A dependent's "principal abode" during temporary absences from a claimant's homestead continues to be the claimant's homestead.

Question 3: Is the $250 dependent deduction allowed for a dependent who dies during the first half of the year or who is born during the second half of the year, even though the dependent did not actually live with the claimant for more than six months during the year?

Answer 3: Yes, provided the dependent lives with the claimant during the entire time he or she is alive during the year (see question 2 regarding temporary absences due to illness, etc.). The birth or death of a dependent during the year constitutes an exception to the six months occupancy requirement.

Question 4: How does the six months occupancy requirement apply with respect to a dependent who is adopted or becomes a claimant's stepchild during the second half of a claim year?

Answer 4: The same as in answer 3. A dependent who is adopted by the claimant, is placed with the claimant for adoption, or becomes the stepchild of the claimant during the second half of a claim year is considered to have lived with the claimant for more than six months, provided he or she lives with the claimant for the balance of the year after the adoption, the placement for adoption, or becoming a stepchild.

Question 5: Does a claimant who qualifies for the Wisconsin earned income credit for income tax purposes automatically qualify for a $250 dependent deduction for homestead credit?

Answer 5: No, as illustrated in the following example:

Example: A divorced homestead credit claimant has custody of a child all year and provides over half the support of the child. The claimant qualifies for earned income credit for federal income tax purposes but may not claim the child as a dependent on the federal return, because a pre-1985 divorce decree allows the claimant's former spouse to claim the deduction for the dependent.

The claimant qualifies for the Wisconsin earned income credit based on that child, just as he or she qualifies for the federal earned income credit. However, since the child may not be claimed as a dependent on the federal tax return, the $250 dependent deduction may not be claimed on the homestead credit claim.

Question 6: May a claimant automatically deduct $250 for each dependent claimed on his or her federal income tax return?

Answer 6: No. In order for the claimant to be able to claim the $250 dependent deduction for homestead credit, the dependent must qualify as a dependent for federal tax purposes *and* must live with the claimant for more than six months during the year. The following are examples of situations where a person claimed as a dependent for federal income tax purposes does not meet the six months occupancy requirement which applies for homestead credit purposes.

(1) A divorced couple's child can be claimed as a dependent by the claimant under a pre-1985 divorce decree, but the child lives with the claimant's former spouse, as in the example in answer 5.

(2) A child qualifies as a dependent but moves away from the claimant's homestead before July 1 of a claim year, such as a student who graduates and moves permanently to an apartment in June.

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FARMLAND PRESERVATION/TAX RELIEF CREDITS

1. Farmland Credits' 95% Limitation

Statutes: Sections 71.07(3m)(c)1, 71.28(2m)(c)1 and 71.47(2m)(c)1, Wis. Stats., as created by 1989 Wisconsin Act 31, effective for claims based on property taxes accrued in 1989 and thereafter.

Note: This Tax Release applies only with respect to farmland preservation credit claims and farmland tax relief credit claims based on property taxes accrued during 1989 and thereafter.

Background: In the farmland tax relief credit law, under secs. 71.07(3m)(c)1, 71.28(2m)(c)1, and 71.47(2m)(c)1, Wis. Stats., as created by 1989 Wisconsin Act 31, the sum of farmland preservation and farmland tax relief credits "may not exceed 95% of the property taxes accrued on the farm." *Farmland preservation credit* is based on up to $6,000 of property taxes accrued on farmland subject to a certified zoning ordinance, a farmland preservation agreement, or a transition area agreement, plus all improvements (buildings) on that farmland. The *farmland tax relief credit* is based on up to $10,000 of property taxes accrued on all farmland that is part of a claimant's farm, regardless of whether or not it is subject to a zoning ordinance or an agreement, but it does not include the taxes on the improvements.

Question: Since the farmland tax relief credit is based on property taxes accrued on only farmland and not improvements, and since the 95% limitation is provided in the farmland tax relief credit law, are the total of farmland preservation and tax relief credits limited to 95% of just the farmland property taxes, exclusive of improvements?

Answer: No. The definition of "farmland" in the farmland tax relief credit law is "... real property, exclusive of improvements ...". Secs. 71.07(3m)(a)3, 71.28(2m)(a)3 and 71.47(2m)(a)3, as created by 1989 Wisconsin Act 31. However, the 95% limitation is based on property taxes accrued on the "farm". Because of the distinct difference between the wording "real property, exclusive of improvements" and "farm", the 95% limitation applies to the total property taxes on the farm, including the taxes on all land that is part of the farm and on all improvements on that land. This includes taxes on land that is not subject to an agreement or an ordinance as required under the farmland preservation credit law, as well as taxes which exceed the $6,000 limitation for farmland preservation credit computation or the $10,000 limitation for farmland tax relief credit computation.

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CORPORATION FRANCHISE OR INCOME TAXES

1. Dividends Received Deduction: Requirement to Own at Least 80% of Stock

Statutes: Section 71.26(3)(j), Wis. Stats. (1987-88).

Background: Corporations may deduct from income dividends received from a corporation with respect to its common stock if the corporation receiving the dividends owns, directly or indirectly, during the entire taxable year at least 80% of the total combined voting stock of the payor corporation. Sec. 71.26(3)(j), Wis. Stats. (1987-88).

Facts: Corporations X, Y, and Z all file Wisconsin franchise or income tax returns on a calendar-year basis. On January 1, 1990, Corporation X owns 68% of the common stock of Corporation Y and Corporation Z owns the remaining 32% of Corporation Y's common stock. Neither Corporation X nor Corporation Z disposes of any of the Corporation Y common stock during the taxable year. Corporation X owns 100% of Corporation Z's common stock on January 1, 1990, and does not dispose of any of this stock during the taxable year.

Corporation Y pays a $300 million dividend during 1990: $204 million to Corporation X and $96 million to Corporation Z.

Question 1: Does Corporation X have an 80% or more ownership interest in Corporation Y for purposes of the Wisconsin dividends received deduction?

Answer 1: Yes. Corporation X has a 68% direct interest in Corporation Y and a 32% indirect interest in Corporation Y through its constructive ownership of the Corporation Y shares owned by Corporation Z. Therefore, Corporation X qualifies for the Wisconsin dividends received deduction because it has an 80% or more ownership interest in Corporation Y during the entire taxable year.

Question 2: Does Corporation Z have an 80% or more ownership interest in Corporation Y for purposes of the Wisconsin dividends received deduction?

Answer 2: No. Corporation Z has only a 32% direct interest in Corporation Y. Section 318(a)(3)(C) of the Internal Revenue Code does not apply for purposes of the dividends received deduction. Therefore, Corporation Z does not qualify for the Wisconsin dividends received deduction because it does not have an 80% or more ownership interest in Corporation Y.

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2. Net Operating Loss for Purposes of Computing Wisconsin Unrelated Business Taxable Income of Exempt Organizations Taxable as Corporations

Statutes: Section 71.26(1)(a), Wis. Stats. (1987-88).

Background: Section 71.26(1)(a), Wis. Stats. (1987-88), provides that all religious, scientific, educational, benevolent or other corporations or associations of individuals not organized or conducted for pecuniary profit are subject to Wisconsin income or franchise tax on their unrelated business taxable income as determined under sec. 512 of the Internal Revenue Code (IRC). Therefore, an exempt organization taxable as a corporation will use the amount of unrelated business income computed for federal purposes when computing the Wisconsin tax on unrelated business taxable income except that adjustments will be made to federal unrelated business taxable income to account for:

(1) Federal law changes that have not been adopted by the Wisconsin Legislature (e.g., for taxable years beginning on or after 1/1/89, only federal laws enacted by 12/31/88 have been adopted by Wisconsin).

(2) Electing (in the manner prescribed by the Internal Revenue Code) to treat an item of income or expense differently for Wisconsin than the item was treated on the federal return filed with the IRS. (See Question 3 below.)

None of the modifications provided in sec. 71.26(3), Wis. Stats. (1987-88), for regular corporations apply for computing Wisconsin unrelated business income of exempt organizations taxable as corporations.

Under sec. 512, IRC, unrelated business income is income from an unrelated trade or business after deduction for net operating losses as determined under sec. 172, IRC. Section 172, IRC, provides that a net operating loss may be carried back 3 years unless an election is made to carry the net operating loss forward to each of the next 15 years.

Question 1: Can an exempt organization taxable as a corporation carry forward a net operating loss for purposes of computing Wisconsin unrelated business taxable income where that same loss is carried back for federal purposes?

Answer 1: Yes. A different election can be made for Wisconsin purposes than was made for federal purposes. Therefore, an exempt organization taxable as a corporation may adjust federal unrelated business income (the starting point in computing Wisconsin unrelated business taxable income) to account for the carryforward of the net operating loss for Wisconsin where the same net operating loss was carried back for federal purposes.

Question 2: Can an exempt organization taxable as a corporation carry back a net operating loss for Wisconsin unrelated business taxable income purposes?

Answer 2: Yes. There is no provision in Wisconsin law that prohibits the carryback of net operating losses for purposes of computing Wisconsin income or franchise tax on unrelated business taxable income.

Question 3: Can an exempt organization taxable as a corporation elect to carry back a net operating loss when computing Wisconsin unrelated business taxable income if that loss was carried forward in computing federal unrelated business taxable income?

Answer 3: Yes. A different election can be made for Wisconsin income or franchise tax purposes than was made for federal tax purposes. Therefore, an exempt organization taxable as a corporation may adjust the amount of federal unrelated business taxable income used for Wisconsin purposes to account for the carry back of net operating losses even though the net operating losses are carried forward for federal purposes.

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3. Sales Factor — Throw Back of Sales Due to Insufficient Nexus With Destination State

Statutes: Section 71.25(9)(b), Wis. Stats. (1987-88), as affected by 1989 Wisconsin Act 31.

Administrative Rules: Section Tax 2.39(5)(c)6., January 1978 Register.

Background: A multistate corporation with operations in Wisconsin must report a portion of its net income to Wisconsin using the apportionment method if its Wisconsin operations are part of a unitary business. The apportionment formula used by most multistate corporations consists of a property factor, payroll factor, and sales factor. The numerator of the sales factor is the taxpayer's total sales in Wisconsin during the taxable year and the denominator is the taxpayer's total sales everywhere.

For purposes of computing the sales factor, sales of tangible personal property are included in the numerator of the sales factor at 50 percent if the property is shipped from a location in Wisconsin to a location in another state and the taxpayer is not within the jurisdiction, for income or franchise tax purposes, of the destination state. Sec. 71.25(9)(b)3., Wis. Stats., as created by 1989 Wisconsin Act 31. Sales are "thrown back" to Wisconsin even though the taxpayer is within the jurisdiction of the destination state if the activities in that state are limited to those protected by Public Law 86-272. Sec. Tax 2.39(5)(c)6., Wis. Adm. Code. Under Public Law 86-272, a state may not impose its income tax or franchise tax based on net income on a corporation selling tangible personal property if that corporation's only activity in the state is the solicitation of orders, which orders are approved outside the state and are filled by delivery from a point outside the state.

Facts and Question: ABC Corporation, which is doing business in and outside Wisconsin, is subject to State X's franchise tax but is not subject to its income tax. ABC Corporation's only activity in State X is the solicitation of sales. State X imposes its franchise tax on a foreign corporation doing business in the state even if the corporation's only activity is the solicitation of sales. Public Law 86-272 does not apply to State X's franchise tax because the tax is based on a corporation's net worth. ABC Corporation is not subject to State X's income tax because its only activity in State X, the solicitation of sales, is a protected activity under Public Law 86-272.

Are ABC Corporation's sales that are destined for State X treated as Wisconsin sales and included in the numerator of its sales factor?

Answer: Yes. ABC Corporation's sales destined for State X are treated as Wisconsin sales and are included in the numerator of the sales factor at 50 percent. These sales are thrown back to Wisconsin because ABC Corporation's only activities in State X, the destination state, are activities protected by Public Law 86-272.

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INDIVIDUAL AND CORPORATION FRANCHISE OR INCOME TAXES

1. Recapture of Development Zone Investment Credit

Statutes: Sections 71.07(2di), 71.09, 71.28(1di), 71.29 and 71.47(1di), Wis. Stats. (1987-88).

Background: Special tax credits are available for persons doing business in areas which have been designated by the Wisconsin Department of Development as development zones. One of these credits is the investment credit as provided by secs. 71.07(2di), 71.28(1di), and 71.47(1di), Wis. Stats. (1987-88).

If a person who has been certified for tax benefits by the Department of Development purchases an asset for use in his or her business in a development zone, he or she may be able to claim the investment credit. The credit is equal to 2.5% of the qualified investment in depreciable, tangible personal property. (The percentage is 1.75% if the taxpayer elects to expense the cost of the asset under sec. 179 of the Internal Revenue Code, rather than depreciating it.)

Under certain conditions a taxpayer may have to recapture part or all of an investment credit previously claimed by adding the recapture amount to his or her tax. The recapture applies if property upon which a credit has been claimed is disposed of or is no longer used in the taxpayer's business in a development zone before the end of the recapture period for the property as provided by sec. 47(a)(5) of the Internal Revenue Code as amended to December 31, 1985.

Facts and Question 1: In July of 1990, a taxpayer disposes of development zone investment credit property before the end of its useful life. The taxpayer is required to recapture $600 of investment credit on the 1990 Wisconsin income or franchise tax return. Is the taxpayer required to make Wisconsin estimated tax payments for the amount of recapture of development zone investment credit?

Answer 1: No, a taxpayer is not required to make estimated tax payments for the amount of recapture of investment credit. The estimated tax provisions (secs. 71.09 and 71.29, Wis. Stats. (1987-88)) establish income subject to tax as the basis for the requirement to make estimated tax payments. The development zone investment credit recapture is not an income item and therefore, estimated tax payments are not required.

Question 2: The amount of recapture of development zone investment credit is an addition to the tax for the year of recapture. May the amount of recapture be offset by nonrefundable and refundable credits allowable on the tax return?

Answer 2: Yes, the amount of recapture of development zone investment credit which is added to the tax on the return may be offset by all allowable nonrefundable and refundable credits.

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SALES/USE TAXES

1. Cotton Cloth Underpads Used by Nursing Homes

Statutes: Sections 77.51(1m) and 77.54(40), Wis. Stats., as created by 1989 Wisconsin Act 335.

Background: Section 77.54(40), Wis. Stats., as created by 1989 Wisconsin Act 335, provides an exemption from sales and use tax for the gross receipts from the sale, lease, or rental of and the storage, use, or other consumption of cloth diapers. "Cloth diapers" as defined in sec. 77.51(1m), Wis. Stats., as created by Wisconsin Act 335, means a cloth diaper for sanitary purposes.

"Diaper" as defined in *Webster's New Collegiate Dictionary* means a basic garment for infants consisting of a folded cloth or other absorbent material drawn up between the legs and fastened about the waist.

Facts and Question: A nursing home that is not an exempt organization described in sec. 77.54(9a)(f), Wis. Stats. (1987-88), uses cotton cloth underpads in beds of residents for sanitary purposes. These underpads are washable and reusable. The underpads are used in beds of immobile patients or patients with diaper rash.

Are the gross receipts from the sale of these cotton underpads exempt from sales and use tax?

Answer: No. The cotton cloth underpads are not cloth diapers within the common or ordinary meaning of that term. Therefore, the gross receipts from the sale of the cotton cloth underpads are not exempt under sec. 77.54(40), Wis. Stats., as created by 1989 Wisconsin Act 335.

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2. Court Ordered Bankruptcy Sales

Statutes: Sections 77.51(9) and 77.54(1) and (7), Wis. Stats. (1987-88).

Wisconsin Administrative Code: Section Tax 11.50(4)(c), December 1987 Register.

Background: Recently, the U.S. Supreme Court in the case of *California State Board of Equalization v. Sierra Summit, Inc.* 104 L.Ed2d 910 (1989) overruled a 1951 U.S. Court of Appeals decision and held that both the sales and use tax do not discriminate against bankruptcy trustees or those with whom they deal because a purchaser at a judicial bankruptcy sale is required to pay only the same tax as if the property had been purchased from someone else. As a result of this decision, individual estates and trustees may now need to obtain seller's permits and collect and remit tax on such transactions.

The *Sierra Summit, Inc.* decision states the trustee in bankruptcy is not an arm of the federal government, but is instead a representative of the debtor's estate. The court concluded that a liquidation sale by the trustee in bankruptcy is a taxable sale for sales and use tax purposes.

Depending on the facts and circumstances involved the bankruptcy trustee's sales may qualify as exempt occasional sales under secs. 77.51(9)(a) or (am) and 77.54(7), Wis. Stats. (1987-88).

The occasional sale exemption generally excludes sales of motor vehicles, snowmobiles, mobile homes not exceeding 45 feet in length, trailers, semitrailers, all-terrain vehicles or aircraft registered or titled, or required to be registered or titled in this state, and boats registered or titled or required to be registered or titled, in this state or under the laws of the United States.

Facts and Question: The Bankruptcy Court appoints a trustee to liquidate a debtor-retailer's assets. The assets to be liquidated include the tangible personal property that the debtor-retailer used to conduct its trade or business, the remaining inventory on hand, and several delivery vehicles.

The trustee advertises the vehicles in several large city newspapers to solicit offers. These vehicles are sold to the person making the highest offer.

The trustee hires an auction company to conduct an auction sale of the property previously used by the debtor-retailer in conducting its trade or business (other than the vehicles) and the inventory.

The bankruptcy trustee does not hold and is not required to hold a seller's permit and the debtor-retailer has properly surrendered its permit. Which of these sales are subject to sales and use tax?

Answer: 1. The purchasers of the vehicles must pay the sales or use tax prior to registering or titling the vehicles in this state.

2. Items of inventory which were purchased by other retailers, to be placed into inventory, may be purchased without tax as property for resale.

3. The auction company's receipts from the liquidation sales of the insolvent debtor's tangible personal property that was used to conduct its trade or business and inventory items not sold for resale are subject to tax. The auction company collects and remits the sales tax to the state.

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3. Customer May File Claims for Refund of Sales and Use Taxes

I. Background

The Court of Appeals, District IV, in its decision in *Dairyland Harvestore Inc. vs. Wisconsin Department of Revenue; Badgerland Harvestore Systems, Inc., f.k.a. Badgerland Harvestore Products vs. Wisconsin Department of Revenue*, dated August 17, 1989, concluded "that the legislature intended by its amendment to sec. 77.59(4), Stats., that all persons who have paid an excess sales tax, whether to a retailer or to the department, may file a claim for refund. We specifically infer that the legislature intended through its amendment to permit customers who paid excess sales taxes to retailers to claim tax refunds from the department."

The court also stated "We recognize that sec. 77.59(4), Stats., can cause administrative difficulties. Refund claims may be filed both by the customer who paid the tax to the retailer and by the retailer who paid it to the department, but presumably the legislature was aware of this problem. Section 77.59(8m) provides a partial solution. It permits retailers to file claims 'if the applicant's customers have filed valid claims for refunds with the applicant and if the refund is passed along to those customers.' The assumption is that those customers will not file claims with the department. The department should be able to develop a procedure by which the customer who files a claim with the department must show that the retailer will not also file a claim."

On November 7, 1989, the Wisconsin Supreme Court denied the Department of Revenue's petition to review the *Dairyland Harvestore, Inc.* case. The result of this Supreme Court action is

that the Court of Appeals decision dated August 17, 1989 is binding upon the Department of Revenue.

II. Policy as a Result of Court of Appeals Decision

Note: This policy applies retroactively to all years open under the statute of limitations as well as prospectively. This policy applies to both Wisconsin sales and use taxes and county sales and use taxes.

A. *Statute of Limitations for a Customer Filing a Claim for Refund of Sales and Use Taxes*

1. *Four Years*: A customer has 4 years from the unextended due date of the customer's franchise or income tax return to file a refund (or if exempt, within 4 years of the 15th day of the 4th month of the year following the close of the calendar or fiscal year). Sec. 77.59(4), Wis. Stats. (1987-88).

   Example: The customer erroneously paid $100 of sales tax to the seller in January 1989. The customer files its corporate franchise tax return on a calendar year basis.

   Since the $100 of sales tax was paid in the 1989 calendar year, the customer has 4 years from March 15, 1990 (unextended due date of 1989 return) to file a claim for refund with the department.

   If the customer paid for the transaction by his or her credit card, the sales tax is considered paid on the date the seller accepts the credit card as a method of payment from the customer; not when the customer remits payment to the credit card company for the purchase. If the sale is an installment sale between the customer and the seller, a prorata portion of the sales or use tax is considered paid with each installment.

2. *Claims Filed During Extension Period to Audit*: If the time for issuing an audit determination is extended by agreement between the taxpayer (customer) and the Department of Revenue, the customer may, during the extended time period, file a claim for refund of sales and use taxes erroneously paid to a seller.

3. *What if Seller Did Not Remit Tax to the Department of Revenue?* The customer may file a claim for refund with the Department of Revenue for tax erroneously paid to a seller registered to collect Wisconsin sales or use tax, regardless of whether the seller remitted such tax to the Department. If a customer erroneously paid tax to an unregistered seller who did not remit the tax to the Department, a claim for refund may not be filed with the department.

4. *What if a Field Audit Determination Has Been Made Prior to the Customer's Claim For Refund?* If a sales or use tax field audit determination has been issued to the customer covering the period in which the customer erroneously paid sales tax to a seller, the customer may not file a claim for refund, after the date of the audit determination, for sales tax erroneously paid to the seller.

   Sections 77.59(4)(a) and (8m), Wis. Stats. (1987-88), do *not* apply with respect to claims for refund by customers.

   Example: A customer is field audited for sales and use tax for years 1985-1988 and an audit determination for $1,000 was received by the customer on June 10, 1989. An appeal (petition for redetermination) was not filed with the department's Appellate Bureau. Customer erroneously paid sales tax of $200 to a seller in 1986, however, this overpayment was not addressed in the determination dated June 10, 1989.

   The customer may *not* file a claim for refund for the $200 with the department (1) under sec. 71.59(4), Wis. Stats. (1987-88), because a field audit determination has been made, or (2) within 2 years of June 10, 1989; under sec. 77.59(4)(a), Wis. Stats. (1987-88), because the $200 tax paid by the customer to the seller was not included in the field audit determination received on June 10, 1989.

5. *What if an Office Audit Determination Has Been Made Prior to the Customer's Claim For Refund?* If a sales or use tax office audit determination has been issued to the customer covering the period in which the customer erroneously paid sales tax to a seller, the customer may file a claim for refund for sales tax erroneously paid to the seller, provided the transaction on which sales/use tax is being claimed for refund was not adjusted in the office audit determination.

   Example: An office audit determination covering the January, 1989 monthly sales and use tax return was received by a customer on July 1, 1989 for failing to report use tax of $50 on a desk purchased from an Ohio retailer. An appeal (petition for determination) was not filed with the department's Appellate Bureau. Customer erroneously paid sales tax of $100 to a seller in January 1989 on the purchase of a manufacturing machine.

   The customer may file a claim for refund of the $100 of tax paid to the seller within 4 years of the unextended due date of the customer's Wisconsin income or franchise tax return, under sec. 77.59(4), because this item was not adjusted in the office audit determination.

B. *Rate of Interest and Date For Computing Interest*

Interest on refunds will be computed at 9% per annum, from the last day of the month following the month in which the tax was paid by the customer to the seller.

Example: If a customer paid $50 tax to the seller in January, 1990, interest at 9% per annum will be computed from February 28, 1990.

C. *Customer and Seller May Not Both Obtain Refunds of Sales Tax*

Refunds will not be allowed to both the customer and seller for the same tax.

Example: Customer erroneously paid $100 of sales tax to the seller when purchasing a machine, which qualifies for the manufacturing exemption. Customer files a timely claim for refund on July 1, 1990 for the $100 of tax. Seller files a claim for refund on August 1, 1990 for this same $100 of tax on the sale of this manufacturing machine to the customer.

Since the customer's claim was filed before the seller's claim, *only* the customer's claim will be allowed.

D. *Effect of Retailer's Discount on Customer's Claim for Refund*

A "retailer's discount" allowed to a seller under sec. 77.61(4)(c), Wis. Stats. (1987-88), does not affect the amount of refund a customer is entitled to receive from the Department of Revenue for tax erroneously paid to a seller.

E. *Offsetting Customer's Refund Against Any Other Taxes Owing the Department*

The Department of Revenue has authority to apply any sales or use tax that was incorrectly paid by a customer to a seller, against a customer's other taxes that the customer owes the department. Sec. 77.59(5), Wis. Stats. (1987-88).

F. *Customer Overpayments Discovered in Audits*

If a Department of Revenue audit of a customer determines that the customer erroneously overpaid tax to a seller, the auditor will include this overpayment in the audit determination.

Example: Assume $1,000 of sales tax was incorrectly paid in 1987 by Customer A to a seller on tax-exempt custom software. A field audit of Customer A is being conducted for 1985-1988. The adjustments result in additional tax of $2,500 for each of the 4 years (exclusive of $1,000 overpayment to seller).

The $1,000 tax incorrectly paid to the seller in 1987 will reduce the additional tax due from Customer A for 1987 from $2,500 to $1,500 ($2500 - $1000).

G. *Recoupment Principle*

In its June 28, 1974 decision in *American Motors Corporation vs. Department of Revenue* the Wisconsin Supreme Court ruled that either the state or the taxpayer may counter a timely claim for refund or assessment with a "stale" claim, meaning one barred by the statute of limitations, so long as the same year or period is involved. This is called the recoupment principle. The recoupment principle does apply to customer claims for refund.

Example: A sales tax field audit involves the years 1982 through 1988. All of the years are open to assessment because the taxpayer has not filed sales tax returns due. The years 1982 through 1985 are closed to claims for refund under sec. 77.59(4)(intro.), Wis. Stats. (1987-88). The audit determines that taxes were underpaid and overpaid as set forth below. The overpayments are due to sales tax incorrectly paid to sellers on items which qualified for exemptions.

	Underpaid	Overpaid	Offset Allowed	Net Tax Due or (Refund)
1982	$1,000	$(4,000)	$(1,000)	$ -0-
1983	1,000	(3,000)	(1,000)	-0-
1984	1,000	-0-	(1,000)	-0-
1985	1,000	-0-	(1,000)	-0-
1986	2,000	(8,000)	(8,000)	(6,000)
1987	3,000	-0-	-0-	3,000
1988	4,000	-0-	-0-	4,000

In this situation, for the closed years of 1982 through 1985, the overpayments are allowed only as offsets against any underpayments. Thus, the additional assessment of $4,000 for 1982 through 1985 would be offset by the $7,000 of overpayments, resulting in no tax due for those years closed to refund under sec. 77.59(4)(intro.), Wis. Stats. (1987-88). The net cumulative overpayment of $3,000 ($7,000 less $4,000) for 1982 through 1985 would not be refunded.

For 1986 through 1988, the actual net underpayment or overpayment would be computed on a year-by-year basis. Interest would be computed on each year's net over/underpayment.

(*Note:* For the years 1982 through 1985, if the total underpayment exceeded the total overpayment, interest would be computed for each year on the net underpayment.)

III. Form to Use

The "Claim for Refund of Wisconsin State and County Sales Taxes" form (Form S-220) should be used by a customer to claim a refund. The customer must attach to this form a Schedule of Purchases form for each seller to whom tax was incorrectly paid and is being claimed for refund. The seller must sign this schedule unless the seller is no longer in business.

A copy of the claim form is on pages 55 and 56 of this Bulletin.

IV. Any Questions

You may call or visit any department office or write to:

Wisconsin Department of Revenue
P.O. Box 8902
Madison, WI 53708

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4. Effect of Discounts, Coupons, and Rebates on Gross Receipts

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

Background: Section 77.52(1), Wis. Stats. (1987-88), imposes a sales tax upon all retailers at the rate of 5% of the gross receipts from the sale, lease, or rental of tangible personal property sold, leased, or rented at retail in this state.

Section 77.51(4)(a), Wis. Stats. (1987-88), defines gross receipts as the total amount of the sale, lease, or rental price from sales at retail of tangible personal property valued in money, whether received in money or otherwise. Section 77.51(4)(b), Wis. Stats. (1987-88), provides that gross receipts does not include cash or term discounts allowed and taken on sales.

Question 1: Does a discount given by a retailer on the purchase of tangible personal property reduce the retailer's gross receipts for purposes of computing Wisconsin sales tax?

Answer 1: Yes. A discount is a reduction in the price of tangible personal property from the full or standard amount and reduces the retailer's gross receipts for purposes of computing Wisconsin sales tax.

Example 1: A store liquidates inventory and offers a 20% discount on all merchandise sold. Customer A purchases an item with an original price of $100. Wisconsin sales tax and amount due from Customer A are computed as follows:

Original price of item	$100
Less: 20% discount	(20)
Gross receipts received by retailer	80
Sales tax (5% x $80)	4
Total due from Customer A	$ 84

Example 2: Customer B purchases a vehicle with a sticker price of $10,000. Customer B and the dealer negotiate a lower price of $9,700. Wisconsin sales tax and the total due from Customer B are computed as follows:

Original price of vehicle	$10,000
Less: Dealer discount	(300)
Gross receipts received by retailer	9,700
Sales tax (5% x $9,700)	485
Total due from Customer B	$10,185

Question 2: Does a coupon, such as a certificate, ticket, voucher, or other document presented to a retailer by a customer at the time of sale to reduce the purchase price of a particular item, reduce the retailer's gross receipts for purposes of computing Wisconsin sales tax?

Answer 2: A coupon amount may or may not reduce a retailer's gross receipts subject to Wisconsin sales tax, depending on the type of coupon that is being redeemed. The question is whether the coupon represents a cash discount offer by the seller or an offer by the manufacturer of the item to share in a portion, or all, of the purchase price.

A "store coupon" distributed by a retailer, which may or may not have value at another store, is considered to be a reduction of the retailer's gross receipts used in computing Wisconsin sales tax. The retailer is not reimbursed for the reduction in price because of the coupon.

A "manufacturer's coupon" distributed by the manufacturer of the item through newspapers and circulars, etc., which may be used at any retail store that accepts coupons, is not considered to be a reduction of the retailer's gross receipts used in computing Wisconsin sales tax. A manufacturer's coupon is, in effect, a sharing of the purchase price with the purchaser. Therefore, the retailer's gross receipts from the sale are not reduced by the coupon amount because the retailer receives the full purchase price for the item (i.e., a portion from the purchaser and the remainder from the manufacturer).

However, when a retailer offers double value on a manufacturer's coupon, the amount of the retailer's additional discount is considered to be a reduction of the retailer's gross receipts used in computing Wisconsin sales tax. The amount representing the manufacturer's portion of the coupon remains subject to tax as discussed above.

Note: See the Tax Release titled "Retailer's Receipts for Handling Manufacturers' Coupons" for more information regarding a manufacturer's reimbursement to retailers for handling coupons (*Wisconsin Tax Bulletin 50*, page 20).

Example 3: Customer C purchases a box of laundry soap for $3.50. Customer C presents a "store coupon" redeemable for 50 cents off the purchase price of the laundry soap. The gross receipts subject to sales tax, the amount of tax, and the total amount due from Customer C are computed as follows:

Original price of laundry soap	$3.50
Less: Store coupon	(.50)
Gross receipts received by the retailer	3.00
Sales tax ($3.00 x 5%)	.15
Total due from Customer C	$3.15

Example 4: Customer D purchases a box of laundry soap for $3.50. Customer D presents a "manufacturer's coupon" redeemable for 50 cents off the purchase price. The amount of gross receipts subject

to Wisconsin sales tax, the amount of tax, and the total amount due from Customer D are computed as follows:

Original price of laundry soap	$3.50
Less: Manufacturer's coupon	(.50)
Manufacturer's rebate to retailer	.50
Gross receipts received by retailer	3.50
Sales tax ($3.50 x 5%)	.18
Less: Manufacturer's contribution	(.50)
Total due from Customer D	$3.18

Example 5: Customer E purchases a box of laundry soap for $3.50. The customer presents a "manufacturer's coupon" redeemable for 50 cents off the purchase price. The retailer is offering double the value on manufacturer's coupons. The amount of gross receipts that are subject to Wisconsin sales tax, the amount of tax, and the total amount due from Customer E are computed as follows:

Original price of laundry soap	$3.50
Less: Manufacturer's coupon	(.50)
Less: Retailer's additional discount	(.50)
Manufacturer's rebate to retailer	.50
Gross receipts received by retailer	$3.00
Sales tax ($3.00 x 5%)	.15
Less: Manufacturer's contribution	(.50)
Total due from Customer E	$2.65

Question 3: If a customer receives a rebate from a manufacturer for property purchased from a retailer, does that rebate reduce the retailer's gross receipts in computing Wisconsin sales tax?

Answer 3: No. A manufacturer's rebate does not reduce the retailer's gross receipts in computing Wisconsin sales tax. This is true whether the customer receives the rebate in cash or applies it against the amount paid to the retailer.

Example 6: Customer F purchases an automobile for $10,000 from a dealer. The manufacturer offers a $1,000 rebate on this automobile. Customer F elects to have the $1,000 rebate applied to his purchase of the automobile. Wisconsin gross receipts, sales tax, and the total due from Customer F are computed as follows:

Original price of vehicle	$10,000
Less: Manufacturer's rebate	(1,000)
Manufacturer's rebate to retailer	1,000
Gross receipts received by retailer	10,000
Sales tax ($10,000 x 5%)	500
Less: Manufacturer's contribution	(1,000)
Total due from Customer F	$ 9,500

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5. Registering for Seller's Permits by Cable Television Companies

Statutes: Section 77.52(7) and (9), Wis. Stats. (1987-88).

Background: Section 77.52(7) and (9), Wis. Stats. (1987-88), provides that persons desiring to operate as a seller in Wisconsin shall have a separate seller's permit for each place of operations.

If a person has more than one place of operation and applies for a seller's permit for each operation, the department generally will issue a single seller's permit number to each place of operation. The permit for each place of operation will contain that number plus a letter suffix unique to that place of operation.

The gross receipts from all places of operation for that person are reported on a consolidated Wisconsin sales and use tax return.

Cable companies are generally regulated at a local level by municipal authorities. A cable television system or portion of a cable television system that operates or will operate within a separate and distinct community or municipal entity is called a "system community unit".

Facts and Question: A cable company operates 20 cable systems in Wisconsin. Is the cable company required to register for a Wisconsin seller's permit for each of the 20 cable system operations?

Answer: Yes. Each "system community unit" owned by a cable television company constitutes a "place of operation" within the meaning and intent of sec. 77.52(7) and (9), Wis. Stats. (1987-88). Therefore, the cable television company should hold a separate seller's permit for each system community unit it operates.

The cable company would receive 20 seller's permits with a common 6 or 7 digit number, but each permit would have a different letter suffix. The cable company would file a consolidated Wisconsin sales and use tax return for the 20 system community units reporting the gross receipts of all the units on the one return.

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6. Sales of Sundry Items to Hospitals and Nursing Homes

Statutes: Sections 77.52(1), 77.53(1) and 77.54(9a), (14) and (14g), Wis. Stats. (1987-88).

Wis. Adm. Code: Section Tax 11.17, August 1985 Register

Background: Hospitals, clinics and members of the medical profession do consume certain sundry items in the rendering of medical services to their patients. These sundry items, including tissue, lotion, soap and toothpaste sold to hospitals, clinics and members of the medical profession are taxable unless the hospital or clinic

qualifies as a charitable organization under sec. 77.54(9a), Wis. Stats. (1987-88).

At other times, hospitals, clinics and members of the medical profession do sell certain sundry items to their patients. Those sundry items, including tissue, lotion, soap and toothpaste sold to hospitals, clinics and members of the medical profession may be purchased without tax for resale, if a properly completed resale certificate is given to the supplier. The hospitals, clinics and members of the medical profession are then required to charge Wisconsin sales tax on its sale of these items to its patients.

Example 1: A hospital patient received soap, lotion, and Kleenex from the hospital during his hospital stay for a broken leg. These items are charged to the patient on the patient's bill for the hospital stay. The soap, lotion, and Kleenex are considered to be provided in the rendering of medical services, and the hospital would be required to pay Wisconsin sales or use tax on its purchase of these items, unless the hospital qualifies as a charitable organization. This is true regardless of whether the soap, lotion, and Kleenex are separately itemized on the patient's bill.

Example 2: A hospital patient goes to the hospital gift shop or commissary and purchases soap, lotion, and Kleenex. The hospital is required to charge Wisconsin sales tax on the sale of these items to the patient. The hospital may purchase these items without tax if it gives its supplier a properly completed resale certificate.

Question: Are sundry items sold to nursing homes and provided to nursing home patients subject to Wisconsin sales or use tax in the same manner as hospitals, clinics, and members of the medical profession?

Answer: Yes. Sundry items, such as Kleenex, lotion, soap, and toothpaste, sold to a nursing home and provided to nursing home patients in rendering medical services are subject to Wisconsin sales and use tax at the time such items are sold to the nursing home, unless the nursing home qualifies as a charitable organization under sec. 77.54(9a), Wis. Stats. (1987-88).

If such items are not provided in rendering medical services, they are sales for resale and may be sold to the nursing home without tax, if a properly completed resale certificate is given to the supplier. The nursing home is then required to charge Wisconsin sales tax on its sales of these items to patients.

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ALL TAXES

1. Wisconsin Taxation of Indians

Introduction: State taxation involving Indians is complex. The law is not set forth in state statutes or rules (except cigarette taxation). An Indian tribe possesses all the attributes of sovereignty of any political community, except as granted away by treaty, taken away by Congress, or inconsistent with domestic dependent status. Tribal sovereignty is dependent and subordinate to the federal government, not the states. State jurisdiction to tax may be preempted by the United States Constitution, federal treaty, or statute, explicitly or implicitly.

Recent court decisions have relied upon federal preemption with tribal sovereignty as a backdrop in deciding whether a state has jurisdiction to tax. If there is no federal preemption, and the state imposition of tax does not interfere with the rights of the reservation Indians to make their own laws and be ruled by them, a state tax may validly be imposed.

The Department of Revenue is issuing this Tax Release to cover most transactions. These are general guidelines. Questions regarding specific situations may be addressed by writing to Wisconsin Department of Revenue, P.O. Box 8933, Madison, WI 53708.

I. Taxation of Indians - Wisconsin Individual Income Tax

Statutes: Section 71.09(7m), Wis. Stats. (1985-86), and secs. 71.02, 71.04(1)(a), 71.05(3), 71.07(6) and 71.83(1)(a)6, Wis. Stats. (1987-88).

Background: The following definitions apply:

"Indians" means all persons of Indian descent who are enrolled members of any federally recognized tribe.

"Reservation" means all land within the boundaries of the Bad River, Forest County Potawatomi, Lac Courte Oreilles, Lac du Flambeau, Menominee, Mole Lake, Oneida, Red Cliff, St. Croix, and Stockbridge-Munsee reservations as well as any Winnebago Indian communities.

"Tribal reservation" means the reservation of the tribe of which an Indian is an enrolled member (e.g., the tribal reservation for an enrolled member of the Oneida tribe is the Oneida reservation).

Policy: Following is the department's policy in taxing Indians for Wisconsin income tax purposes:

A. Law applicable to Indians living on their tribal reservation:

1. Taxable income includes:
   a. Wages from working off their tribal reservation.
   b. Income from business or real estate located off their tribal reservation.
   c. Winnings from the Wisconsin lottery.
   d. Winnings from a multistate lottery (if the winning ticket was purchased in Wisconsin).
   e. Wager winnings from pari-mutuel race tracks in Wisconsin.
   f. Prizes or awards relating to employment off their tribal reservation.

2. Exempt income includes:
   a. Wages from working on their tribal reservation.
   b. Income from business or real estate located on their tribal reservation.
   c. Interest, dividends, and other income from intangibles regardless of where the bank accounts, etc., are located.
   d. Prizes or awards (except those identified as taxable in 1.c, d, e and f above).
   e. Retirement income.

B. Law applicable to Indians living off their tribal reservation:

All income is taxed in the same manner as for other Wisconsin residents and nonresidents even though the Indian may be working on his or her tribal reservation. However, income from active duty in the military earned by a domiciliary of a tribal reservation is exempt from Wisconsin income tax, even though the Indian resides off the tribal reservation.

Facts and Question 1: An Indian, who is single, lives on his or her tribal reservation in Wisconsin and has the following income:

Wages earned on the tribal reservation	$ 5,000
Wages earned off the tribal reservation	12,000
Long-term capital gain from the sale of real property located on the tribal reservation	2,000
Interest income from a bank off the tribal reservation	500
Dividend income from a corporation off the tribal reservation	100
Long-term capital loss from the sale of real property located off the tribal reservation	(3,000)

What is the taxable income for Wisconsin income tax purposes?

Answer 1: $11,500. Taxable income includes wages earned off the tribal reservation ($12,000) less $500 of the long-term capital loss from the sale of property located off the tribal reservation ($3,000). (The amount of capital loss that can be applied against noncapital gain income is limited to $500 per year. Unused capital losses may be carried over to later years.) Wages earned on the tribal reservation ($5,000), long-term capital gain on the sale of property located on the tribal reservation ($2,000) and other intangible income ($600) are exempt from Wisconsin income tax for an Indian living on his or her tribal reservation.

Facts and Question 2: An Indian, who is single and lives off his or her tribal reservation in Wisconsin, has the following income:

Wages earned on the tribal reservation	$10,000
Wages earned off the tribal reservation	5,000
Loss from a partnership located on the tribal reservation	(3,000)
Long-term capital gain on sale of property located on the tribal reservation ($1,000 less 60% exclusion = taxable gain of $400)	400
Total	$12,400

What is the taxable income reportable to Wisconsin?

Answer 2: $12,400. An Indian living off his or her tribal reservation, but in Wisconsin, is subject to Wisconsin income tax on all income or loss.

Facts and Question 3: An Indian is a domiciliary of South Dakota. The Indian takes temporary employment in Wisconsin and works on a reservation in Wisconsin. Is the Indian subject to Wisconsin income tax on the income earned on the Wisconsin reservation?

Answer 3: Yes. Because the Indian is not working on his or her tribal reservation and is not domiciled in Wisconsin, income earned on the Wisconsin reservation is subject to Wisconsin income tax in the same manner as for other nonresidents. Nonresidents of Wisconsin are subject to Wisconsin income tax on personal service income earned in Wisconsin.

Facts and Question 4: An Indian is a member of the U.S. Army, stationed in South Carolina. Prior to entering the Army, the Indian lived on his or her tribal reservation. The Indian has not abandoned his or her Wisconsin domicile. Is the Indian subject to Wisconsin income tax on the income earned from the Army?

Answer 4: No. Because of the Soldiers' and Sailors' Civil Relief Act of 1940, Wisconsin does not have the jurisdiction or authority to tax income which an Indian who is domiciled on his or her tribal reservation earns from active duty in the U.S. Army, while stationed outside the reservation (*Wisconsin Dept. of Revenue vs. Annette L. Turner*, Circuit Court of Dane County, January 21, 1987).

Facts and Question 5: Are prizes, awards, and gambling winnings received by an Indian living on his or her tribal reservation subject to Wisconsin taxation?

Answer 5: The following indicates the taxable status of various types of prizes, awards, and gambling winnings:

(a) Prizes and awards related to employment on the Indian's tribal reservation - Not taxable

(b) Prizes and awards related to employment off the Indian's tribal reservation - Taxable

(c) Prizes and awards not related to employment (except those listed in (d) through (f) below) - Not taxable

(d) Winnings from the Wisconsin lottery - Taxable

(e) Winnings from a multistate lottery ticket purchased in Wisconsin - Taxable

(f) Wager winnings from pari-mutuel race tracks in Wisconsin - Taxable

Facts and Question 6: May the retirement plan penalties provided by sec. 71.83(1)(a)6, Wis. Stats. (1987-88), be imposed on an Indian living and working on his or her tribal reservation?

Answer 6: No. Section 71.83(1)(a)6, Wis. Stats. (1987-88), provides for the imposition of a penalty equal to 33% of the federal penalty imposed under sections 72(q) and (t), 4973, 4974, 4975, or 4980A of the Internal Revenue Code. The penalties provided under this section are to be assessed, levied, and collected in the same manner as income taxes. Because such penalties are to be treated as income taxes, Wisconsin does not have jurisdiction to impose them on an Indian living and working on his or her tribal reservation.

Facts and Question 7: An Indian and his or her Indian spouse live on their tribal reservation. Both work on their tribal reservation and have earned income. They also have income from real estate located off the reservation, but in Wisconsin. The income from this property is subject to Wisconsin income tax. Is the couple allowed the Wisconsin married couple credit?

Answer 7: For 1987 and subsequent taxable years, the couple is not allowed the Wisconsin married couple credit. Section 71.07(6), Wis. Stats. (1987-88), provides that earned income for purposes of computing the married couple credit must be reduced by any amount of earned income which is not subject to tax. Because the wages earned by the couple are not taxable by Wisconsin, the couple's earned income for purposes of the married couple credit is zero and no credit may be claimed.

(Note: For the 1986 taxable year, Indians were allowed to claim the Wisconsin married couple credit based on earned income which was not taxable by Wisconsin.)

Facts and Question 8: A taxpayer is an Indian living on his tribal reservation with his spouse. His spouse is not an Indian. The taxpayer is self-employed on the tribal reservation and has $20,000 of income from the business. His wife works off the reservation and has wages of $15,000. Does Wisconsin's marital property law apply?

Answer 8: Yes, Wisconsin's marital property law does apply. The income of both spouses is taxable as marital property income.

The husband is considered to be earning one-half of the income he earned on the reservation ($20,000 + 2 = $10,000), which is nontaxable, and one-half of the income earned by his wife off the reservation ($15,000 + 2 = $7,500), which is taxable. The wife is considered to be earning one-half of the income earned by her husband on the reservation ($20,000 + 2 = $10,000), which is taxable to her as a non-Indian, and one-half of the income she earned off the reservation ($15,000 + 2 = $7,500), which is also taxable.

Therefore, if they file a joint Wisconsin income tax return, they will be taxed on one-half of the husband's self-employment income and all of the wife's income from working off the reservation ($10,000 + $15,000 or $25,000). If they file separate Wisconsin returns, the wife will be taxed on one-half of the income earned on the reservation by her husband and one-half of the income earned by her off the reservation ($10,000 + $7,500 or $17,500). The husband will be taxed on $7,500 (one-half of the income earned by his wife off the reservation).

This answer assumes that no marital property agreement, unilateral statement, or court order changes their marital property income to individual property. In addition, it assumes that neither spouse is an "innocent spouse" for Wisconsin income tax purposes.

Facts and Question 9: In November 1988 Congress passed the Technical and Miscellaneous Revenue Act (TAMRA), adding sec. 7873 to the Internal Revenue Code. This section provides that no tax shall be imposed on income derived by a member of an Indian tribe directly or through a qualified Indian entity, or by a qualified Indian entity from a fishing rights related activity of such tribe. This provision is effective for all taxable periods beginning before, on, or after the date this provision was enacted. Does this provision apply for Wisconsin tax purposes?

Answer 9: Yes. Section 3042 of TAMRA provides that sec. 7873, IRC is to apply for state tax purposes in the same manner as for federal tax purposes.

II. Taxation of Indians - Wisconsin Corporate Franchise or Income Tax

Statutes: Sections 71.23, 71.25 and 71.43, Wis. Stats. (1987-88).

Background: The following definitions apply:

"Indian corporation" means a corporation in which Indians own 51% or more of the voting stock. For purposes of this ownership test, count only those Indian shareholders who are enrolled members of the same tribe.

"Indians" means all persons of Indian descent who are enrolled members of any federally recognized tribe.

"Reservation" means all land within the boundaries of the Bad River, Forest County Potawatomi, Lac Courte Oreilles, Lac du Flambeau, Menominee, Mole Lake, Oneida, Red Cliff, St. Croix, and Stockbridge-Munsee reservations as well as any Winnebago Indian communities.

"Tribal reservation" means the reservation of the tribe of which an Indian is an enrolled member (e.g., the tribal reservation for an enrolled member of the Oneida tribe is the Oneida reservation).

Policy: An Indian corporation located on the tribal reservation of its shareholders is exempt from Wisconsin franchise or income tax. However, if the corporation has sufficient business activity (see sec. Tax 2.82, Wis. Adm. Code) off the reservation and in Wisconsin so that it is considered to be doing business in Wisconsin, it is subject to Wisconsin franchise or income tax in the same manner as other corporations doing business in Wisconsin. This means that

such part of the corporation's income as is earned off the reservation will be taxable to Wisconsin as determined using the appropriate apportionment method provided by sec. 71.25, Wis. Stats. (1987-88).

A non-Indian corporation having property and/or doing business on a reservation is subject to Wisconsin franchise or income tax on or measured by income earned both on and off the reservation.

Facts and Question 1: An Indian corporation is a manufacturer of furniture. The furniture is manufactured on the reservation and is stored on the reservation until it is sold. Sales are made both on and off the reservation from a central distributing center on the reservation. The only activity off the reservation is the solicitation of orders. Orders are approved at a location on the reservation. Is the corporation subject to Wisconsin franchise or income tax?

Answer 1: No. The corporation does not have sufficient business activity off the reservation to be considered doing business in Wisconsin.

Facts and Question 2: An Indian corporation is in the business of landscaping. The corporation has business activity off the reservation and in Wisconsin that constitutes "nexus" in Wisconsin under sec. Tax 2.82, Wis. Adm. Code, requiring that the corporation file a Wisconsin corporation franchise or income tax return. How does the corporation determine what portion of its income is taxable to Wisconsin?

Answer 2: An Indian corporation, considered to be operating in Wisconsin for franchise or income tax purposes, will determine its taxable income reportable to Wisconsin using the appropriate apportionment method provided by sec. 71.25, Wis. Stats. (1987-88). Generally, this is the 3-factor formula utilizing a property factor, payroll factor and sales factor.

III. Taxation of Indians - Wisconsin Withholding Tax

Statutes: Sections 71.63 and 71.64, Wis. Stats. (1987-88).

Background: The following definitions apply:

"Indians" means all persons of Indian descent who are enrolled members of any federally recognized tribe.

"Reservation" means all land within the boundaries of the Bad River, Forest County Potawatomi, Lac Courte Oreilles, Lac du Flambeau, Menominee, Mole Lake, Oneida, Red Cliff, St. Croix, and Stockbridge-Munsee reservations as well as any Winnebago Indian communities.

"Tribal reservation" means the reservation of the tribe of which an Indian is an enrolled member (e.g., the tribal reservation for an enrolled member of the Oneida tribe is the Oneida reservation).

Policy: Employers located on a reservation are not required to withhold Wisconsin income tax from the wages of an Indian who lives and works exclusively on his or her tribal reservation.

Employers located on a reservation must withhold Wisconsin income tax from the wages of (1) non-Indian employes, regardless of whether such employes live on or off the reservation, (2) Indian employes who live off their tribal reservation, and (3) Indian employes who live on their tribal reservation but work off the reservation. Such withholding is required because these employes have a potential Wisconsin income tax obligation. See Part I titled "Taxation of Indians - Wisconsin Individual Income Tax."

Employers located off a reservation are required to withhold from the wages of Indians, unless the Indian lives and works exclusively on his or her tribal reservation.

(Note: The above policy applies to all employers, regardless of whether the business is owned by Indians or non-Indians.)

Question 1: Are wages paid to an Indian who lives off his or her tribal reservation, but works on the tribal reservation, subject to Wisconsin withholding tax?

Answer 1: Yes. Wsconsin income tax must be withheld from wages paid to an Indian living off his or her tribal reservation, regardless of where he or she works. This is because the Indian has a Wisconsin income tax obligation.

Question 2: An employer has business operations in two locations. One location is on a reservation, the other location is not on a reservation. The employer has Indian employes who live on the reservation on which the business has a location, but who work at both business locations. Must the employer withhold Wisconsin income taxes from the wages of these Indian employes?

Answer 2: Yes. The employer must withhold from wages the Indian employes earn for working at the business location off the reservation. The amount of withholding should be based on only the wages earned off the reservation.

IV. Taxation of Indians - Sales and Use Tax

Statutes: Sections 77.53 and 77.54(1), Wis. Stats. (1987-88).

Background: The following definitions apply:

"Indians" means all persons of Indian descent who are enrolled members of any federally recognized tribe. "Indians" also includes Indian tribes, Indian housing authorities, Indian corporations (corporations in which Indians own at least 51% of the voting stock), and Indian partnerships (partnerships in which 51% of the investment is made by Indians, 51% of the entity is owned by Indians and 51% of profits or losses accrue to Indians). For purposes of the ownership tests, count only those Indians who are enrolled members of the same tribe.

"Reservation" means all land within the boundaries of the Bad River, Forest County Potawatomi, Lac Courte Oreilles, Lac du Flambeau, Menominee, Mole Lake, Oneida, Red Cliff, St. Croix, and Stockbridge-Munsee reservations as well as any Winnebago Indian communities.

"Sales" means sales of tangible personal property or taxable services.

"Tribal reservation" means the reservation of the tribe of which an Indian is an enrolled member (e.g., the tribal reservation for an enrolled member of the Oneida tribe is the Oneida reservation).

Policy:

A. Tax Treatment of Sales to Indians and Non-Indians

1. Sales to an Indian are taxable if delivery of the item to the Indian occurs off the Indian's tribal reservation, regardless of whether the retailer (seller) is an Indian or non-Indian.

2. Sales to an Indian are exempt from tax if delivery of the item to the Indian occurs on the Indian's tribal reservation, regardless of whether the retailer (seller) is an Indian or non-Indian.

   However, if the Indian retailer knows that the property or service is intended for consumption, use, or storage in Wisconsin but off the Indian's tribal reservation, the retailer is required to collect use tax on such property or services.

3. Sales to a non-Indian are taxable, regardless of whether delivery of the item to the non-Indian occurs on or off a reservation and whether the retailer (seller) is an Indian or non-Indian.

   NOTE: Sales of tangible personal property or taxable services by Indian retailers to non-Indians where delivery occurs off the reservation are subject to the sales tax. If delivery of such sales occurs on the reservation, the sales are not subject to sales tax. However, the Indian retailer is required to collect and remit use tax on such sales pursuant to sec. 77.53(3), Wis. Stats. (1987-88).

B. Construction Activities

1. The following construction activities on a reservation are exempt:

   a. The sale of construction materials to an Indian contractor if (1) delivery of the materials to the Indian contractor occurs on the Indian contractor's tribal reservation and (2) the construction materials will be used on the Indian contractor's tribal reservation.

      However, if the materials are later used off the Indian contractor's tribal reservation, the contractor will be subject to the Wisconsin use tax, unless b. below applies.

   b. The sale and delivery to an Indian or non-Indian contractor on or off the reservation, where the objectives of the federal regulatory scheme and the express federal policy of encouraging self-sufficiency preclude the state from imposing a tax on the construction activity and where the construction is financed by the federal government or one of its agencies, as set forth in *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832 (1982).

      Caution: A retailer should not accept or grant this exemption without first obtaining an opinion from the Department of Revenue as to whether the transaction qualifies for exemption. An opinion may be obtained by writing to: Wisconsin Department of Revenue, Administration Technical Services, Post Office Box 8933, Madison, WI 53708.

2. Construction materials are taxable if sold to a non-Indian contractor who incorporates the materials into realty on a reservation, regardless of whether the materials were delivered to the contractor off the reservation in Wisconsin or another state, or on the reservation (unless exempt from tax under the conditions in 1.b. above).

3. Some Indian tribes impose a tribal use tax on construction materials used by persons doing business on the reservation. This tribal use tax is in addition to, rather than in place of, the Wisconsin sales and use tax. Also, the statutes do not authorize a credit for tribal tax against the Wisconsin sales and use tax. It is possible to have both the tribal use tax and the Wisconsin sales or use tax (and 1/2% of county sales or use tax if applicable) imposed on the use of construction materials on the reservation.

Facts and Question 1: An Indian retailer sells sporting equipment to a non-Indian and delivery to the non-Indian occurs off the reservation. Is the sale subject to Wisconsin sales tax?

Answer 1: Yes. Sales by Indian retailers are subject to the Wisconsin sales tax when delivery occurs off the reservation.

Facts and Question 2: A non-Indian retailer makes a sale of clothing to an Indian living on his or her reservation. The Indian takes possession of the clothing off the reservation. Is the sale subject to Wisconsin sales tax?

Answer 2: Yes, because the transfer of possession of the clothing occurs off the reservation.

Facts and Question 3: An Indian retailer sells auto parts to a person (purchaser) who is of Indian descent but is *not* an enrolled member of the tribe. This person is therefore not an "Indian" according to the definition in "Background" above. The purchaser takes possession of the auto parts on the Indian retailer's reservation. Is this sale subject to Wisconsin sales or use tax?

Answer 3: The Indian retailer is required to collect use tax because the person (purchaser) is not an "Indian."

Facts and Question 4: A non-Indian contractor acquires road building materials (e.g., gravel) from an out-of-state seller without payment of Wisconsin sales tax. The contractor uses the materials to repair a federal highway on a reservation. Is Wisconsin use tax payable by the contractor on the materials used in real property construction activities (i.e., repairing a highway on the reservation)?

Answer 4: Yes. The contractor is the consumer of materials used in real property construction activities and is therefore required to pay use tax on such materials consumed.

Facts and Question 5: An Indian tribe operates a recreation center that provides bingo games on the reservation. Are the charges for admissions to the center to Indians and non-Indians subject to Wisconsin sales or use tax?

Answer 5: The charges to Indians are not taxable if the bingo games occur on the Indians' tribal reservation.

Under sec. 77.53, Wis. Stats. (1987-88), there is a use tax on sales of bingo admissions by Indian retailers to non-Indian customers.

V. Taxation of Indians - Wisconsin Inheritance Tax

Statutes: Section 72.11, Wis. Stats. (1987-88).

Background: The following definitions apply:

"Indians" means all persons of Indian descent who are enrolled members of any federally recognized tribe.

"Reservation" means all land within the boundaries of the Bad River, Forest County Potawatomi, Lac Courte Oreilles, Lac du Flambeau, Menominee, Mole Lake, Oneida, Red Cliff, St. Croix, and Stockbridge-Munsee reservations as well as any Winnebago Indian communities.

"Tribal reservation" means the reservation of the tribe of which an Indian is an enrolled member (e.g., the tribal reservation for an enrolled member of the Oneida tribe is the Oneida reservation).

Policy: If the decedent is an Indian who lives on his or her tribal reservation at the time of death, property transferred to distributees is exempt from Wisconsin inheritance tax, if the property is located on the reservation. Stocks, bonds, bank accounts, and other personal property are considered to be located on the reservation if the decedent resides on his or her tribal reservation at the time of death. Real property located in Wisconsin but off the tribal reservation is subject to inheritance tax, regardless of where the decedent's residence is at the time of death.

If the decedent is an Indian who lives off his or her tribal reservation at the time of death and is a resident of Wisconsin, property transferred to distributees is subject to Wisconsin inheritance tax in the same manner as for other decedents who were Wisconsin residents.

Property is not exempt from Wisconsin inheritance tax solely because it is transferred to a distributee who is an Indian living on or off his or her tribal reservation.

Facts and Question 1: An Indian living on the tribal reservation dies and his or her property is distributed. The property consists of a home on the reservation, bank accounts, and a cottage located off the reservation. The distributees are all Indians living in Wisconsin, on their tribal reservations. Will any of the property distributed be subject to Wisconsin inheritance tax?

Answer 1: Yes. The transfer of the cottage located off the reservation is subject to Wisconsin inheritance tax, regardless of whether the decedent or the distributees are Indians.

Facts and Question 2: A decedent, who is an Indian, was living off his or her tribal reservation at the time of death. The decedent's only assets were several parcels of land located on the tribal reservation. These assets were distributed to other Indians living on their tribal reservations. Are the transfers subject to Wisconsin inheritance tax?

Answer 2: Yes. Since the decedent lived off his or her tribal reservation at the time of death and was a resident of Wisconsin, all property transferred is subject to Wisconsin inheritance tax, regardless of where the property is located or where the distributees reside.

VI. Taxation of Indians - Wisconsin Gift Tax

Statutes: Section 72.75, Wis. Stats. (1987-88).

Background: The following definitions apply:

"Indians" means all persons of Indian descent who are enrolled members of any federally recognized tribe.

"Reservation" means all land within the boundaries of the Bad River, Forest County Potawatomi, Lac Courte Oreilles, Lac du Flambeau, Menominee, Mole Lake, Oneida, Red Cliff, St. Croix, and Stockbridge-Munsee reservations as well as any Winnebago Indian communities.

"Tribal reservation" means the reservation of the tribe of which an Indian is an enrolled member (e.g., the tribal reservation for an enrolled member of the Oneida tribe is the Oneida reservation).

Policy: If the donor is an Indian who lives on his or her tribal reservation on the date of making a gift, property transferred to donees is exempt from Wisconsin gift tax if the property is located on the tribal reservation. Stocks, bonds and other personal property are considered to be located on the tribal reservation if the donor resides on his or her tribal reservation at the time of making the gift. Gifts of real property located in Wisconsin, but off the donor's tribal

reservation, including real property on Wisconsin reservations of other tribes, are taxable in the same manner as for other donors who are Wisconsin residents.

If the donor is an Indian who lives off his or her tribal reservation on the date the gift is made and is a resident of Wisconsin on such date, property transferred to donees is subject to Wisconsin gift tax in the same manner as for other donors who are Wisconsin residents.

Property is not exempt from gift tax solely because the donee is an Indian, regardless of where he or she lives.

Facts and Question 1: An Indian living on his or her tribal reservation makes a gift to a non-Indian donee of property located on the tribal reservation. Is the transfer subject to Wisconsin gift tax?

Answer 1: No. Because the Indian lives on his or her tribal reservation and the property transferred is located on that reservation, the gift is exempt, regardless of whether the donee is an Indian or non-Indian.

Facts and Question 2: An Indian living on a reservation other than his or her tribal reservation makes a gift of stock to another Indian. Is the transfer subject to Wisconsin gift tax?

Answer 2: Yes. For the gift to be exempt, the donor would have to be living on his or her tribal reservation at the time of making the gift.

VII. Taxation of Indians - Wisconsin Cigarette Taxes

Statutes: Sections 139.30, 139.323, 139.325 and 139.38, Wis. Stats. (1987-88).

Wis. Adm. Code: Sections Tax 9.08 and 9.09, March 1984 Register.

Background: The following definitions apply:

"Indians" means all persons of Indian descent who are enrolled members of any federally recognized tribe.

"Reservation" means all land within the boundaries of the Bad River, Forest County Potawatomi, Lac Courte Oreilles, Lac du Flambeau, Menominee, Mole Lake, Oneida, Red Cliff, St. Croix, and Stockbridge-Munsee reservations as well as any Winnebago Indian communities.

"Tribal reservation" means the reservation of the tribe of which an Indian is an enrolled member (e.g., the tribal reservation for an enrolled member of the Oneida tribe is the Oneida reservation).

Policy: A state may not tax cigarettes sold on the reservation by an Indian tribe or its authorized retailer to resident tribal members for consumption on the reservation. The Department of Revenue will refund 70% of the taxes imposed under sec. 139.31(1), Wis. Stats. (1987-88), on all other sales by an Indian tribe or its authorized dealers if:

A. The Tribal Council has filed a claim for refund with the department.

B. The Tribal Council has approved the retailer.

C. The land on which the sale occurred was designated a reservation on or before January 1, 1983.

D. The cigarettes were not delivered by the retailer to the buyer by means of a common carrier or the U.S. postal service.

E. The retailer has not sold the cigarettes to another retailer or any other person acquiring stamped cigarettes from manufacturers or distributors for resale.

The procedures for paying and refunding the tax depend upon whether or not the Indian tribe has entered into a refund agreement with the Department of Revenue.

A. The following procedures apply for tribes with whom the department has entered into a refund agreement:

1. Only tax-paid stamped cigarettes may be sold by a cigarette distributor (licensed permittee) to the Tribal Council or its authorized retailers.

2. All Wisconsin taxes paid on cigarettes sold by the Tribal Council or its authorized retailers on the reservation to resident Indian members of the tribe are refunded to the Tribal Council upon the filing of a valid claim on behalf of the enrolled members.

3. Seventy percent of all Wisconsin cigarette taxes paid on other cigarette sales by the Tribal Council or its authorized retailers are refunded to the Tribal Council upon the filing of a valid claim.

B. The following procedures apply to tribes with whom the department has not entered into a refund agreement:

1. Cigarettes a Tribal Council or authorized retailer intends to sell to resident Indian members of the tribe may be purchased tax-free without stamps from a cigarette distributor (licensed permittee). All other cigarettes purchased must be of tax-paid stamped cigarettes.

2. Seventy percent of all Wisconsin cigarette taxes paid by the Tribal Council or its authorized retailers will be refunded to the Tribal Council upon filing a valid claim.

3. If the authorized retailer sells tax-free cigarettes, detailed records of both taxable and tax-free transactions must be maintained. The required content of these records is set forth in sec. Tax 9.09(6), Wis. Adm. Code.

Question 1: May an Indian retailer personally deliver cigarettes to consumers off the reservation if the sale occurs on the reservation?

Answer 1: Yes. If the delivery is not by means of common carrier, contract carrier or the U.S. postal service, there is no other prohibition of personal delivery of cigarettes sold on the reservation.

Question 2: Would the Tribal Council be entitled to the 70% state tax refund under the circumstances in Question 1?

Answer 2: Yes. The 70% state tax refund would apply.

Question 3: May an Indian retailer accept an order over the telephone or otherwise, make delivery off the reservation, collecting payment at the time of delivery, provided there is a record of a sale at the retail business prior to delivery/collection?

Answer 3: No. An Indian retailer may not accept an order over the telephone or otherwise for future delivery off the reservation because this type of transaction does not meet the definition of a sale pursuant to sec. 139.323(4), Wis. Stats. (1987-88). "Sale" does not include the solicitation of orders for, or the sale for, future delivery.

VIII. Taxation of Indians - Wisconsin Liquor, Wine, Beer, Motor Fuel, Special Fuel and Aviation Fuel Taxes

Statutes: Sections 78.01(2)(c), 78.40(2)(b), 78.555, 139.02 and 139.03, Wis. Stats. (1987-88).

Background: The following definitions apply:

"Indians" means all persons of Indian descent who are enrolled members of any federally recognized tribe. Exemptions which apply to "Indians" will also apply to sales to Indian tribes, Indian housing authorities, Indian corporations (corporations in which Indians own at least 51% of the voting stock), and Indian partnerships (partnerships in which at least 51% of the investment is made by Indians, 51% of the entity is owned by Indians and 51% of profits or losses accrue to Indians). For purposes of the ownership tests, count only those Indians who are enrolled members of the same tribe.

"Reservation" means all land within the boundaries of the Bad River, Forest County Potawatomi, Lac Courte Oreilles, Lac du Flambeau, Menominee, Mole Lake, Oneida, Red Cliff, St. Croix, and Stockbridge-Munsee reservations as well as any Winnebago Indian communities.

"Tribal reservation" means the reservation of the tribe of which an Indian is an enrolled member (e.g., the tribal reservation for an enrolled member of the Oneida tribe is the Oneida reservation).

Policy: Indians living on or off their tribal reservations are not exempt from Wisconsin liquor, wine, beer, motor fuel, special fuel, and aviation fuel taxes, regardless of whether these items are purchased from retailers located on or off their tribal reservations.

Note: Menominee Tribal Enterprises has been held to be an agency of the federal government, and therefore may purchase motor fuel, special fuel, and aviation fuel without paying tax to the supplier. Motor fuel, special fuel, and aviation fuel placed by Menominee Tribal Enterprises into its own vehicles or aircraft will not be subject to tax. Menominee Tribal Enterprises will charge the tax on motor fuel, special fuel, or aviation fuel it sells to Indians and other persons, regardless of whether they live on or off the reservation. Menominee Tribal Enterprises will remit the tax in such instances to the Wisconsin Department of Revenue.

Also, in certain instances, any Indian tribe or related entity may be allowed to purchase fuel without tax if there is a federal preemption under the rationale of *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), which held that fuel taxes could not be imposed by an Indian or non-Indian retailer on logging activities conducted exclusively within the reservation on tribal land. A claim for exemption under "federal preemption" should not be accepted by a retailer without first obtaining an opinion from the Department of Revenue. Opinions may be obtained by writing to the department at P.O. Box 8905, Madison, WI 53708.

Facts and Question 1: An Indian retailer doing business on his or her tribal reservation sells motor fuel to Indians and non-Indians. Is the retailer required to charge Wisconsin motor fuel tax to (a) Indians, or (b) non-Indians?

Answer 1: Yes. An Indian retailer must charge Wisconsin fuel tax to all purchasers, whether they are Indian or non-Indian.

Facts and Question 2: An Indian retailer doing business on his or her tribal reservation sells special fuel to Indians and non-Indians. Is the retailer required to charge Wisconsin special fuel tax to (a) Indians, or (b) non-Indians?

Answer 2: Yes. If the Indian retailer sells special fuel for use in motor vehicles, he or she would buy the special fuel without tax. Upon resale to both Indians and non-Indians for use in their licensed motor vehicles the retailer would collect the Wisconsin special fuel tax and remit the tax to the department.

Facts and Question 3: An Indian retailer doing business on his or her tribal reservation sells beer, liquor, or wine to Indians and non-Indians. Is the retailer exempt from the Wisconsin beer, liquor or wine tax on sales to (a) Indians, or (b) non-Indians?

Answer 3: No. As a licensed retailer, the retailer purchases these alcoholic beverages from Wisconsin wholesalers on a tax-paid basis. Upon resale, the retailer may pass on the Wisconsin alcoholic beverage tax to all purchasers, whether they are Indian or non-Indian. Indians living on or off the reservation are not exempt from these taxes, regardless of whether the items are purchased from retailers located on or off the reservation.

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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 three 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 requestor). The date following the 7-digit number is the date the ruling was mailed to the requestor.

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.

W9027004, April 17, 1990

Type Tax: Sales/Use

Statutes: Sections 77.51(9)(am), (13)(b) and (14)(a) and (e) and 77.54(7), Wis. Stats. (1987-88)

Issue: Disposition of business assets—occasional sales exemption

This letter responds to your request for a private letter ruling regarding the disposition of various business assets.

Facts

Company A, a division of Corporation B, is in the business of performing general contracting services for large construction projects in Wisconsin and Illinois.

Prior to February 1, 1990, Company A held a valid seller's permit for its Wisconsin office location. Company A rents land in Wisconsin for the purpose of storing and maintaining certain construction equipment. During the period preceding February 1, 1990, Company A would periodically rent certain construction equipment from the Wisconsin yard to other contractors. Although these transactions were neither large dollars nor numerous, Company A collected sales tax on such rentals and remitted the collections to the Wisconsin Department of Revenue.

On October 20, 1989, the Board of Directors of Corporation B decided to complete the work under signed construction contracts existing at that date and dispose of the assets of the construction division. No new contracts would be entered into after that date.

As of February 1, 1990, the division is in the process of completing its obligations under two contracts in Illinois. The projected date of substantial completion for these contracts is approximately August 1, 1990. All contracts in Wisconsin are substantially complete. However, there is some work being performed to "finalize" these Wisconsin contracts in a manner which is acceptable to the owner of the project (e.g. completion of construction punchlists and warranty work).

Company A warrants its work under construction contracts for a period of one year after substantial completion of the project. Therefore, Company A will continue to incur warranty costs over the next year. The estimate of man hours required for warranty work is 1% of man hours projected for the projects or approximately 3,500 hours. No additional revenues are derived from warranty work. The management and administration of the warranty work is expected to be performed from the Wisconsin office location.

Company A's seller's permit was surrendered to the Wisconsin Department of Revenue on January 31, 1990. Company A no longer rents equipment to other contractors and conducts no other activities except those which are subject to this ruling request which would require Company A to have a seller's permit. Corporation B has two other divisions. The other divisions continue to hold seller's permits.

Company A's office and yard locations are regular business locations for Company A but are separate and distinct from all other operations of Corporation B.

Company A has hired a professional auction service to conduct an auction in early April 1990 to dispose of the majority of the assets of the construction business. The auction will be held at the yard location. In addition, office furniture will be sold from the office location as the business is concluded over the next year. It is also possible that Company A will sell certain equipment directly from either of the two Illinois construction jobsites.

Request

You have requested a ruling that the sales of the construction equipment and office furniture are exempt from sales and use tax as an "occasional" sale under sec. 77.51(9)(am), Wis. Stats.

You ask whether the fact that Company A has decided to liquidate its business, take on no new contracts and has discontinued renting equipment from the yard location, is sufficient for the taxpayer to meet the requirement that the taxpayer has "ceased operating the business at that location", even though Company A (as the general contractor) is in the process of completing construction work in Illinois and providing warranty work and completing punchlists in Wisconsin.

Ruling

The sale of construction equipment and office furniture at auction does not qualify as an exempt occasional sale. Rather the receipts from the auction sale of such items are taxable to the auction company.

The non-auction sale of construction equipment and office furniture from the yard, the office, or directly from a construction site administered by the office, by Company A after the February 1, 1990 surrender of its sellers permit may qualify as exempt occasional sales under secs. 77.51(9)(am) and 77.54(7), Wis. Stats.

Analysis

The auction company will provide a complete auction service and is deemed the retailer of property sold at the auction under rule Tax 11.50(2) Wis. Adm. Code and secs. 77.51(13)(b) and (14)(a) Wis. Stats. The auction company is making the retail sale under 77.51(14)(e) Wis. Stats., thus the auction company's receipts from the sale of Company A's equipment are subject to sales and use tax regardless of whether Company A held or is required to hold a sellers permit at the time of the auction.

As for the balance of equipment or furniture, not sold at auction, to be exempt from sales tax as an "occasional sale" under Wisconsin Statute 77.54(7), all three of the following conditions under sec. 77.51(9)(am) Wis. Stats., must be met:

1. The sale is of personal property (other than inventory held for sale) previously used by the seller to conduct its trade or business at a location.

2. The sale occurs after the seller ceased operating the business at that location.

3. The seller delivers its seller's permit to the Department of Revenue for cancellation within ten days after the last sale of personal property (other than inventory held for sale) at that location.

Requirement one has been met. The construction equipment and office furniture are personal property previously used in the construction business, rather than items held in inventory for resale. As a general contractor, Company A is considered the consumer of such items.

It should be noted that Company A stored certain construction equipment at the yard when not being used. Occasionally this equipment was rented to other contractors. The rental of the equipment was minor in relation to its use in Company A's construction projects. This incidental rental does not preclude its being sold as an exempt occasional sale under sec. 77.51(9)(am), Wis. Stats.

Requirement two is the primary issue on which the taxpayer is requesting a ruling. Has Company A ceased operating the equipment leasing and construction business at its Wisconsin office and yard location?

The construction business is a unique business unlike a retail store. Very little, if any, of Company A's construction work is actually done at its business (i.e., office) location. The business location is where the administrative portion of the transaction takes place. Invitations to bid are delivered and contemplated there. Bids are initiated there and accepted bids are delivered there. Purchases of various supplies and materials to be used on the various projects are initiated there. Billing and collection activity would be conducted from that office location. However, the actual construction activities would be conducted at the various job sites around the state and/or country.

The business office is considered to be Company A's "place of operations" which required the holding of the seller's permit. That permit for the business office covered Company A's various construction projects throughout the state rather than having a permit for each individual job site.

The question is not whether all business activities cease at the business location, but whether all activities which require the holding of a sellers permit cease for business centered at that location.

The activities Company A will conduct from its business location after February 1, 1990 fall into two categories.

First, there are two construction projects located in Illinois. Personal property construction contracts performed outside of Wisconsin are not Wisconsin sales and thus not subject to Wisconsin sales tax, providing possession of the items transferred outside of Wisconsin. Real property construction contacts are not subject to sales tax whether performed in Wisconsin or elsewhere. No Wisconsin's sellers' permit is needed for these projects.

Second, all Wisconsin contracts are substantially complete except for some work being performed to "finalize" the contracts in a manner which is acceptable to the owner of the project. Company A warrants its work for one year after substantial completion. They could continue to conduct warranty work over the next year or so. The cost to the project owner for any warranty work would have been calculated in the original contract price. There will be no additional revenues (i.e., taxable receipts) from conducting the warranty work.

Under the particular facts and circumstances presented, Company A is no longer conducting any activities from its Wisconsin business location which require the holding of a seller's permit. For the purposes of requirement number two and sec. 77.51(9)(am) Wis. Stats., Company A has ceased operating the business at these locations.

Requirement three has already been met. Effective January 31, 1990, Company A surrendered all sellers' permits for the construction division.

Any sales of personal property directly from either of the Illinois construction sites where possession takes place in Illinois are not subject to Wisconsin sales tax if Company A does not hold or is not required to hold a Wisconsin seller's permit.

A sale of personal property from a location other than the Wisconsin yard, the Wisconsin office, or a Wisconsin construction site administered from the office, would not meet the requirements of "occasional sale" under sec. 77.51(9)(a) or (am), Wis. Stats., since Corporation B holds active seller's permits.

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W9027005, April 18, 1990

Type Tax: Sales/Use

Statutes: Sections 77.51(9)(am), 77.52(7) and (9) and 77.54(7), Wis. Stats. (1987-88)

Issue: Sale of business assets — occasional sales exemption

This letter responds to your request for a Private Letter Ruling regarding the sales and use tax status of the sale of various cable television system assets as an exempt occasional sale.

Facts

Company A is the seller in this transaction.

Company A holds franchises to operate cable television systems in Wisconsin communities and is currently operating in those communities. These systems operate continuously, on a 24-hour, 7-day a week basis.

Company A presently operates its business from its offices in Wisconsin. Company A has a seller's permit.

The purchaser is Company B, or an affiliate or assignee to whom Company B may assign its rights under the Purchase Agreement (as defined below) prior to the closing (collectively, Company B).

Company B currently operates cable television systems in a number of Wisconsin communities. Company B is also registered to collect sales tax on its monthly billings to subscribers and to report and remit the sales tax to the Department.

The provision of cable television services is a taxable service under Section 77.52(2)(a)12, Wis. Stats.

Company A and Company B signed an Asset Purchase Agreement (the "Purchase Agreement"), pursuant to which Company A agreed to sell to Company B and Company B agreed to purchase from Company A certain assets used by Company A in the operation of its cable television system. The closing date has not yet been set.

Certain assets will be excluded from the sale, pursuant to the Purchase Agreement which Company A intends to retain. These assets are equipment that has been used, and is currently being used, by Company A, in its various construction activities. Company A will transfer ownership of such assets to corporations controlled by one of Company A's principals. You have indicated that such corporations hold seller's permits and are registered to collect, report and remit sales tax as required.

Under FCC regulations certain consents, based on subscriber or subscriber equivalents, must be obtained before a cable television system franchise can be transferred.

In the event Company A is unable to acquire the necessary consents to transfer some franchises (i.e. system community units), those unconsented franchises will also be excluded from the assets transferred to Company B. Company B will act as manager of the retained franchises until such time as the necessary consents are obtained and the remaining franchises are transferred to Company B. Company B is to be responsible for collecting, reporting and remitting sales tax due for the providing of cable television system service for the franchises it manages.

Under the Purchase Agreement, all expenses and income attributable to the cable television business prior to the closing date are for the account of Company A and all expenses and income attributable to the cable television business for the period on and after the closing date are for the account of Company B.

The procedure will be one of the alternatives described in Alternatives (A) and (B), below.

Alternative (A). On the closing date, the representatives of Company A and Company B will meet to sign the various documents necessary to consummate the transactions. Such documents will be exchanged at such meeting, and the purchase price will be paid to Company A. Title to the subject assets will be deemed to pass to Company B effective as of immediately after the preceding midnight. Company A will discharge all Company A employes employed solely in connection with Company A's cable television operations effective as of immediately before the midnight preceding the closing date. All business activity from immediately after the midnight preceding the closing date will be attributed to Company B. At no time will programming services be discontinued by going "off the air."

Alternative (B). On the day before the closing date, the representatives of Company A and Company B will meet to sign the various documents necessary to consummate the transaction, and such documents, together with the purchase price, will be placed in escrow. Interest earned on the purchase price placed in escrow pending disbursement of the purchase price will be paid to Company B. Effective as of 11:59 p.m. on the day before the closing date, Company A will discharge all Company A employes employed solely in connection with Company A's cable television operations, and, at 11:59 p.m. on that date, Company A will discontinue all of its programming services in all communities by going "off the air." At 12:01 a.m., Company A and Company B will provide notice to the escrow agent indicating whether their respective conditions to closing have been satisfied. If such notice is to the effect that such conditions have been satisfied, the transaction shall be irrevocably

closed and Company B shall assume responsibility for the operation of the subject assets (including the risk of loss) and will resume the programming services by going back "on the air." If such notice is to the effect that such conditions have not been satisfied, the transaction will be abandoned, and Company A will reassume responsibility for the operation of the subject assets (including the risk of loss) and will resume the programming services by going back "on the air". Later that day, i.e., on the closing date, the escrow agent shall distribute the documents and funds to the parties entitled to receive them.

Under either Alternative (A) or (B), on the closing date, or within ten (10) days after the closing date, Company A will surrender its seller's permit to the Department for cancellation.

Request

Company A requests a ruling that the transaction described as alternative A qualifies as an exempt occasional sale under sec. 77.51(9)(am), Wis. Stats., or if the department will not rule that the procedure described in alternative A qualifies as an exempt occasional sale, Company A requests a ruling that the procedure described as Alternative B qualifies as an exempt occasional sale under sec. 77.51(9)(am), Wis. Stats.

Ruling

Based on the information submitted, the transaction described as Alternative A may be structured to qualify as an exempt occasional sale under secs. 77.51(9)(am) and 77.54(7) Wis. Stats.

Analysis

Occasional sales are exempt from sales and use tax under sec. 77.54(7) Wis. Stats., and are defined in part in sec. 77.51(9)(am) Wis. Stats. as follows:

> "The sale of personal property, other than inventory held for sale, previously used by a seller to conduct its trade or business at a location after that person has ceased actively operating in the regular course of business as a seller of tangible personal property or taxable services at that location if the seller delivers its seller's permit to the department for cancellation within 10 days after the last sale at that location of that personal property other than inventory held for sale. This transaction is an occasional sale, even though the seller holds a seller's permit for one or more other locations."

There are essentially 3 requirements that must be met under this statute. First, the property must have been previously used by the seller to conduct its trade or business at a particular location. This exemption does not include items which the seller sold or held for sale in its regular course of business.

Second, the sale must occur after the seller has ceased actively operating in the regular course of business as a seller of tangible personal property or taxable service (i.e., any activity that would require the holding of a seller's permit) at that location.

Third, the seller must deliver its sellers permit for that location, to the Department of Revenue within 10 days after the last sale of this business property at that location.

We must examine the facts presented in the ruling request to determine if they meet these requirements.

The property which is the subject of this ruling request is described as "assets used by Company A in the operation of its cable television system." The assets in question are not inventory to Company A, thus the first requirement has been met.

The second requirement contains two parts which must be addressed. When has a seller ceased actively operating as a seller of tangible personal property or tangible services, and perhaps unique to the cable television industry, what is the definition of location for which a seller's permit is required for the operation of a cable television system?

Section 77.52(7) and (9), Wis. Stats., provide that persons desiring to operate as a seller in Wisconsin shall have a separate seller's permit for each place of operations. This department has previously indicated its opinion that each "system community unit" owned by a cable television operator constitutes a "place of operations (i.e. location) which requires the holding of a seller's permit under sec. 77.52(7) and (9) Wis. Stats.

Under alternative A, Company A will cease actively operating its cable television system as of midnight preceding the closing. Title to the subject assets are deemed in the closing documents to have passed to Company B effective as of immediately after the preceding midnight. Company A will discharge all its employes (employed solely in connection with the cable tv operations) as of immediately before the midnight preceding the closing date. All business activity on the closing date will be attributed to Company B.

For purposes of sec. 77.54(9)(am), Company A will cease actively operating in the regular course of business as the seller of taxable cable television service as of midnight preceding the closing date, thus the second requirement will be met.

Company A must then surrender its seller's permit for each system community unit that is being sold within 10 days of the sale.

This procedure can be repeated for each of the retained system community units at such time as those units are sold.

It is noted that Company A holds a single seller's permit for its numerous system community units. This does not preclude Company A from the occasional sale exemption even if it will continue to need a seller's permit to operate the retained systems.

Company A should immediately apply for sellers permits for each place of operations and include the $5.00 fee for each location. If at

the appropriate time Company A has the locational seller's permits in its possession it can surrender them as necessary. If at the appropriate time Company A has not yet received the permits (i.e., Application has been made but the physical permit has not yet been received), Company A should follow the procedure outlined in sec. Tax 11.13(3)(c) Wis. Adm. Code, for surrendering a lost or otherwise unavailable seller's permit and clearly identify the locations being sold. The letter of explanation should indicate that Company A has applied for separate multiple location permits for each system community unit, but that it has not yet received the permits, and that it wishes them to be considered surrendered.

Since alternative A may qualify as an exempt occasional sale under sec. 77.51(9)(am) Wis. Stats., and alternative A was the primary position in the ruling request, alternative B is not examined or ruled upon herein.

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W9033007, May 24, 1990

Type Tax: Sales/Use

Statutes: Section 77.54(5)(b), Wis. Stats. (1987-88)

Issue: Contract carrier — transfer of assets

This letter responds to your request for a private letter ruling regarding the sales and use tax status of the transfer of transportation assets from a parent to a subsidiary that operates as a contract carrier.

Facts

Company A is a 100% owned subsidiary of Company B, both of which are located in Wisconsin. Company A operates exclusively as a contract carrier for Company B and other unrelated companies. Company A holds a licensed carrier (L.C.) number.

Company B wishes to transfer to Company A the transportation assets it holds in a nontaxable exchange under sec. 351 of the Internal Revenue Code.

Requests

The following questions are raised as part of this request:

1. May Company A purchase qualified vehicles for use in its operation as a contract carrier without payment of Wisconsin sales tax or use tax by operation of sec. 77.54(5)(b), Wis. Stats. (1987-88)?

2. Is the transfer of transportation assets from Company B to Company A exempt from Wisconsin sales or use tax under sec. 77.54(5)(b), Wis. Stats. (1987-88)?

3. May Company A purchase replacement and repair parts and maintenance services with respect to these vehicles without payment of Wisconsin sales or use tax by operation of sec. 77.54(5)(b), Wis. Stats. (1987-88)?

Ruling

1. Company A may purchase motor trucks, truck tractors, road tractors, buses, trailers and semi-trailers without payment of Wisconsin sales or use tax provided Company A uses these vehicles exclusively for hire. Although Company A acts as a contract carrier for its parent company, the exemption is not invalidated provided the contract is for hire.

2. The transfer of transportation assets from Company B to Company A is not subject to Wisconsin sales or use tax provided the transportation assets are motor trucks, truck tractors, road tractors, buses, trailers or semi-trailers or are accessories, attachments, parts, supplies or materials relating to such vehicles used exclusively as contract carriers.

3. Replacement parts, repair parts, and maintenance services Company A purchases for motor trucks, truck tractors, road tractors, buses, trailer or semi-trailers used exclusively in its contract carrier operation are exempt from Wisconsin sales or use tax.

Note: The fact that Company A holds an L.C. number is not sufficient to qualify for the exemption under sec. 77.54(5)(b), Wis. Stats. (1987-88). Any person hauling the goods of others for hire is required to hold an LC authority, according to Department of Transportation regulations. The sales tax exemption only applies to vehicles used exclusively in hauling the goods of others for hire.

Analysis

Section 77.54(5)(b), Wis. Stats. (1987-88), provides an exemption from Wisconsin sales or use tax for:

> "Motor trucks, truck tractors, road tractors, buses, trailers and semitrailers, and accessories, attachments, parts, supplies and materials therefor, sold to common or contract carriers who use such motor trucks, truck tractors, road tractors, buses, trailers and semitrailers exclusively as common or contract carriers ..."

Section Tax 11.16(1)(a), Wis. Adm. Code, defines "exclusively" to mean used as common or contract carriers to the exclusion of all other uses, except that the exemption will not be invalidated by infrequent and sporadic use other than as a common or contract carrier.

With respect to the exemption for maintenance services on the vehicles used as contract carriers, sec. 77.52(2)(a)10, Wis. Stats. (1987-88), provides that if tangible personal property is exempt from sales and use tax, the repair, service, alteration, fitting, cleaning, painting, coating, towing, inspection and maintenance of such exempt tangible personal property is also exempt from sales and use tax.

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