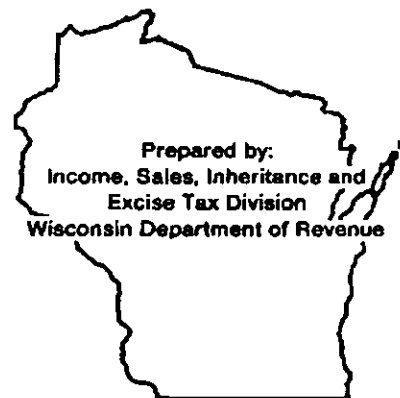


WISCONSIN TAX BULLETIN

April 1991
NUMBER 71

Subscriptions available from:

Wisconsin Department of
Administration
Document Sales
P.O. Box 7840
Madison, WI 53707
Annual cost \$6.00



NEW TAX LAWS TO BE ADDRESSED IN SPECIAL ISSUE

Various tax bills were still pending before the Wisconsin Legislature at the time this Bulletin went to press. If any of these bills become law, a special issue of the Wisconsin Tax Bulletin will be published to provide information about the tax law changes. See page 2 of this Bulletin for a summary of two bills signed into law by the Governor on March 13, 1991. These laws pertain to various tax benefits for persons participating in Operation Desert Shield and Operation Desert Storm.

TWELVE NEW COUNTIES ADOPT COUNTY TAX

On April 1, 1991, the 1/2% county sales and use tax began in twelve new counties: Bayfield, Chippewa, Crawford, Dane, Douglas, Iron, Jefferson, Kenosha, Milwaukee, Ozaukee, Pepin, and Washburn. Previously, 28 other counties had adopted the county tax. The December 1990 Tax Report included with *Wisconsin Tax Bulletin* 70 (January 1991) explains how this county tax applies to retailers and other persons, and lists all 40 counties with the county sales and use tax.

On pages 21 and 22 of this Bulletin is a copy of the March 1991 Tax Report, sent in late March to all retailers who have a seller's permit. It also lists the 40 counties with the county sales and use tax.

In This Issue

	Page
New Tax Laws to Be Addressed in Special Issue	1
Twelve New Counties Adopt County Tax	1
Nonfilers Face Stiff Penalties	1
Customs Project Unveils Unreported Use Tax	2
Voice Response Unit Answers Refund Inquiries	2
Federal Provisions Pertaining to Military Service in the Middle East Apply for Wisconsin	2
Wisconsin Legislature Enacts "Desert Shield/ Storm" Laws	2
Index Included in This Issue	3
Speakers Bureau	3
Automatic Extension Until September 15, 1991, for April and May Fiscal Filers to Pay Recycling Fee	3
Need An Easy Way to Research Wisconsin Tax Questions?	3
1991 Estimated Tax Requirements for Individuals, Estates, and Trusts	4
Extensions of Time to File for Individuals	4
Tax Kit Sent to Wisconsin High Schools	4
Gift Tax Reports Due April 15	4
Program Helps Farmers and Protects Wisconsin's Farmland	5
Criminal Enforcement Activities	5
Information or Inquiries?	6
Do You Have Suggestions for 1991 Tax Forms?	6
New ISI&E Division Rules and Rule Amendments in Process	6
Report on Litigation	7
Tax Releases	
Individual Income Taxes	13
Homestead Credit	14
Corporation Franchise or Income Taxes ...	15
Sales/Use Taxes	18
Private Letter Rulings	20
March Tax Report	21
Index to Wisconsin Tax Bulletin	23
Order Blank for Topical/Court Case Index, Etc.	43

NONFILERS FACE STIFF PENALTIES

Wisconsin residents are required to file a Wisconsin income tax return for 1990 if their Wisconsin adjusted gross income exceeds a certain amount, based on their age and marital status. For example, the income level is \$5,200 for a single taxpayer under age 65, and \$9,920 for a married couple, both over age 65, filing a joint return. There are other filing requirements for nonresidents, part-year residents, and married persons filing separate returns.

The Department of Revenue uses information from the federal Internal Revenue Service, other states' revenue departments, Wisconsin state agencies, and various other sources to identify individuals who are required to file a Wisconsin income tax return but have failed to do so.

Individuals identified as nonfilers are sent letters requesting them to file returns or explain why returns are not required to be filed.

For persons failing to file timely returns, a penalty of up to 25% of the tax may be imposed if negligence is involved. A fraud penalty of 100% of the tax may be imposed if there was an intent to defeat or evade the tax. In addition, delinquent interest accrues at the rate of 18% per year until the tax is paid.

A person convicted of willfully failing to file a return is guilty of a misdemeanor and may be fined up to \$10,000 and imprisoned for up to nine months.

CUSTOMS PROJECT UNVEILS UNREPORTED USE TAX

The Department of Revenue is working on a "Customs Project" that will affect taxpayers throughout the entire state. Records at the U.S. Customs offices were reviewed to determine taxpayers who have brought valuable items into this country from abroad. These taxpayers may be subject to Wisconsin Use Tax on these purchases.

Once a list of taxpayers was compiled using Customs records through December 31, 1989, an initial letter was mailed to the taxpayers, advising them of a possible Use Tax and how to file and report the tax due on these purchases. For those taxpayers who did not respond to the initial request, a second letter was mailed.

Taxpayers who fail to respond to either letter will be assessed, based on values determined by the Customs records.

VOICE RESPONSE UNIT ANSWERS REFUND INQUIRIES

In March 1991, an automated voice response unit (VRU) began answering telephone calls to the department's refund inquiry telephone number, (608) 266-8100.

Callers with touch-tone telephones will be prompted to enter their social security number and the dollar amount of the refund claimed on their return. Callers with rotary or push-button rotary (pulse) telephones will be transferred by the VRU to a department employee for assistance.

Rotary and push-button rotary callers may get assistance during regular business hours (7:45 a.m. to 4:15 p.m. on workdays), while touch-tone callers may get assistance from 6:00 a.m. to 1:00 a.m. seven days a week.

If the VRU does not have enough information from the taxpayer or the department's computer income tax history file to respond to the inquiry, employee intervention is required. Callers phoning during business

hours will automatically be transferred to a department employee for assistance. Callers phoning outside business hours will be given a telephone number and hours during which they may call for assistance.

Taxpayers should wait at least 10 weeks after filing their income tax return or home-stead credit claim before inquiring about a refund. Those filing a "quick refund" tax return should wait at least 6 weeks.

Taxpayers who prefer to write to the department about a refund rather than calling may write to: Wisconsin Department of Revenue, Post Office Box 8903, Madison, WI 53708. The inquiry should include the taxpayer's name, social security number, spouse's name and social security number if married, address, approximate date the return or claim was filed, the amount of the refund if known, and a daytime telephone number.

FEDERAL PROVISIONS PERTAINING TO MILITARY SERVICE IN THE MIDDLE EAST APPLY FOR WISCONSIN

Combat Pay Exclusion For federal tax purposes, enlisted members of the Armed Forces may exclude from gross income all pay received for any month which they served any part of in a combat zone. The exclusion available to commissioned officers is limited to \$500 per month (IRC Code sec. 112). (Note: Areas of the Middle East were not designated by the President as combat zones until January 17, 1991. Thus this provision does not apply to military pay reported on 1990 calendar year income tax returns.)

The starting point for determining Wisconsin taxable income is federal adjusted gross income. Since there is no modification for combat pay in Wisconsin law, combat pay which is excludable from gross income for federal tax purposes is also excludable for Wisconsin.

Extension of Time For Filing Returns For federal purposes, Armed Forces mem-

bers and civilians serving in support of the Armed Forces qualify for an extension for filing returns if:

1. they served in the Persian Gulf Desert Shield area during the period August 2, 1990 to January 17, 1991, or
2. they serve in a designated combat zone after January 16, 1991, or
3. they are hospitalized either inside or outside the United States as a result of an injury received while serving in a combat zone.

The extension is for the period of service in the combat zone or hospitalization, plus 180 days, except that no more than 5 years of hospitalization inside the United States may be taken into account. This extension is also available to such taxpayer's spouse who wishes to file a joint return, except that an extension is not available to the taxpayer's spouse while the taxpayer is hospitalized inside the United States (IRC Code sec. 7508 as amended by 1991 H.R. 4, January 31, 1991).

Section 71.03(7), Wis. Stats., (1989-90), provides that any extension of time granted by law or by the Internal Revenue Service for filing the federal return also extends the time for filing the corresponding Wisconsin return. Thus, the federal extension of time to file provisions of IRC Code sec. 7508 also apply for Wisconsin. A taxpayer who qualifies for this extension should attach an explanatory statement to the Wisconsin return when filed.

WISCONSIN LEGISLATURE ENACTS "DESERT SHIELD/STORM" LAWS

As a result of recent legislation (1991 Wisconsin Acts 2 and 3, enacted March 13, 1991), various Wisconsin tax benefits have become available to certain persons who participated in Operation Desert Shield or Operation Desert Storm.

Under 1991 Wisconsin Act 2, to the extent included in federal adjusted gross income,

a member of a reserve component of the U.S. Armed Forces may subtract all or a portion of basic, special, and incentive pay income or compensation received from the federal government for services performed for Operation Desert Shield or Operation Desert Storm in the Desert Shield or Desert Storm theater of operations ("theater").

"Services performed for Operation Desert Shield or Operation Desert Storm" means service in a unit of the U.S. Armed Forces if the service is performed by a person who is a member of a reserve component of the U.S. Armed Forces and is activated for Operation Desert Shield or Operation Desert Storm, and the service occurs during the period that there is in effect a designation by the President of the United States that the service is part of Operation Desert Shield or Operation Desert Storm.

The subtraction is limited to \$500 per month for a commissioned officer. There is no limitation for a person below the grade of commissioned officer.

For persons eligible for the subtraction, no penalty or interest that has been imposed by the department under Subchapter XII of Chapter 71 of the Wisconsin Statutes will accrue while the taxpayer is in the theater and for 180 days after the taxpayer leaves the theater.

The second new law, 1991 Wisconsin Act 3, provides that for the 1990 taxable year (1990 tax returns), certain persons are exempt from interest during the period of time an extension for filing a Wisconsin tax return is in effect. The exemption from interest applies to the following:

- (a) Persons who served in support of Operation Desert Shield, Operation Desert Storm, or a successor operation, in the United States.
- (b) Persons who served in Egypt, Israel, Diego Garcia, or Germany.
- (c) Persons who qualify for a federal extension of time to file under IRC Code sec. 7508 (extension due to service in a combat zone), who served outside the United States because of their partici-

pation in Operation Desert Shield, Operation Desert Storm, or a successor operation, in the theater.

INDEX INCLUDED IN THIS ISSUE

Once each year the *Wisconsin Tax Bulletin* includes an index of articles, tax releases, court cases, private letter rulings, and other materials that have appeared in past Bulletins. The index for issues 1 to 70 can be found on pages 23 to 42 of this Bulletin.

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, sales, and withholding tax laws, audit procedures, common taxpayer errors, how tax laws apply to exempt organizations, sales tax problems of contractors or manufacturers, homestead credit, etc.

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

AUTOMATIC EXTENSION UNTIL SEPTEMBER 15, 1991, FOR APRIL AND MAY FISCAL FILERS TO PAY RECYCLING FEE

Taxpayers with fiscal years ending in April or May of 1991 will be granted an automatic extension until September 15, 1991, to pay the new Wisconsin recycling fee. In mid-April 1991, the department will send letters to approximately 300 taxpayers with fiscal years ending in April or May who may be subject to the recycling fee, advising them of this automatic extension.

The recycling fee, which first applies to taxable years ending after April 1, 1991, is payable on or before the due date, or extended due date, of the taxpayer's Wisconsin franchise or income tax return. The recycling fee is computed and paid on Form RF, Wisconsin Recycling Fee.

In lieu of the automatic extension until September 15, 1991, the due date of the recycling fee will be extended if the taxpayer receives either a federal or Wisconsin extension for filing its Wisconsin Franchise or income tax return. For example, if a corporation whose taxable year ends April 30, 1991, receives a 6-month federal extension until January 15, 1992, to file its tax return, its recycling fee will be due January 15, 1992. On the other hand, if that corporation receives a 30-day Wisconsin extension until August 15, 1991, to file its tax return, its recycling fee will be due September 15, 1991.

Proposed law changes to the fee that are currently pending before the Wisconsin Legislature would apply retroactively to years ending after April 1, 1991, and would significantly affect the Form RF and its instructions. In view of this pending legislation, the release of Form RF will be delayed until the Legislature has completed action on the proposed recycling fee law changes.

The department expects Form RF to be available about mid-August and will begin mailing it to taxpayers who may be subject to the fee at that time.

NEED AN EASY WAY TO RESEARCH WISCONSIN TAX QUESTIONS?

Subscribe to the Wisconsin Department of Revenue's 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.

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.

The annual cost of this index is \$14 per copy, plus sales tax. Subscribers will receive the full index upon receipt of the order, and also an addendum providing updated information in May 1991. To order your copy of the index, complete the order blank that appears on page 43 of this Bulletin. The order blank may also be used for subscribing to the Wisconsin Tax Bulletin and for ordering the Wisconsin Administrative Code.

1991 ESTIMATED TAX REQUIREMENTS FOR INDIVIDUALS, ESTATES, AND TRUSTS

Estimated income tax payments are tax deposits made during the year to prepay the income tax and minimum tax that will be due when an income tax return is filed. Every individual, married couple filing jointly, estate, or trust (except trusts subject to tax on unrelated business income) is required to pay 1991 Wisconsin estimated tax if they expect to owe \$200 or more on a 1991 Wisconsin income tax return. Form 1-ES, "1991 Wisconsin Estimated Tax Voucher," is filed with each estimated tax payment.

For calendar year taxpayers, the first estimated tax payment is due on April 15, 1991. Installment payments are also due on June 17, 1991, September 16, 1991, and January 15, 1992. For fiscal year taxpayers, installment payments are due on the 15th

day of the 4th, 6th, and 9th months of the fiscal year and the 1st month of the following fiscal year.

Full-year residents, part-year residents, estates, and trusts are subject to the estimated tax requirements for 1991. However, an estate is not required to pay estimated tax during the first two years of its existence.

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

EXTENSIONS OF TIME TO FILE FOR INDIVIDUALS

Any extension of time granted by the Internal Revenue Service (IRS) for filing a federal return also extends the time for filing the corresponding Wisconsin return, provided a copy of the federal extension or an explanatory statement is attached to the Wisconsin return at the time it is filed. See the "Federal Provisions ..." article on page 2 of this Bulletin for information about taxpayers serving in the Middle East.

Taxpayers are allowed the same 10-day grace period to file a return for Wisconsin as for the IRS when a federal extension request is denied. The denial must be attached to the Wisconsin return when filed in order to be recognized.

In lieu of the federal extension, a taxpayer may request from the Wisconsin Department of Revenue a 30-day extension of time to file a Wisconsin return.

See the article titled "Extensions of Time to File Tax Returns" in *Wisconsin Tax Bulletin* 70 (page 6) for more information about extensions.

REMINDERS

DO NOT submit copies of federal extension requests to the Department of Revenue at the time the federal request is made.

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

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

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

TAX KIT SENT TO WISCONSIN HIGH SCHOOLS

Wisconsin high schools received a tax kit in January 1991, to help teachers explain Wisconsin taxes to students.

The kit was developed by the Wisconsin Department of Revenue for use in conjunction with the IRS's Understanding Taxes Program.

The kit contains a student tax guide which explains various Wisconsin taxes and provides problems and instructions for completing Form 1A and Form WI-Z. It also includes a teacher's tax guide and an optional Form 1 problem.

GIFT TAX REPORTS DUE APRIL 15

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

1990 Wisconsin gift tax reports must be filed if the total value of taxable gifts given in 1990 by one donor (person giving the gift) to one donee (person receiving the gift) exceeds \$10,000. Gift tax reports of the donee and donor for 1990 must be filed by April 15, 1991. A report does not have to be filed if the value of the gift is \$10,000 or less.

The donor reports gifts made on Wisconsin Form 7. On this form, the donor enters the

description and value of the gifts made to each donee.

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

The gift tax due is figured on Wisconsin Form 6. In determining the 1990 gift tax due, an annual exemption of \$10,000 is allowed for all gifts made during a calendar year by one donor to one donee. Gifts to a spouse are completely exempt from Wisconsin gift tax. A lifetime personal exemption of \$50,000 is allowed for gifts to lineal issue (children, grandchildren), lineal ancestors (parents, grandparents), the wife or widow of a son, the husband or widower of a daughter, an adopted or mutually acknowledged child, and a mutually acknowledged parent. There is no lifetime exemption allowed to other donees.

PROGRAM HELPS FARMERS AND PROTECTS WISCONSIN'S FARMLAND

About 24,500 Wisconsin farmers claimed farmland preservation credits amounting to \$26.6 million in the fiscal year ending June 30, 1990. In addition to providing benefits averaging \$1,085 per claimant, the farmland preservation credit program is helping to protect 8.1 million acres of farmland.

The program distributes benefits to farmers based on property taxes, income, and other factors. It protects Wisconsin's farmland by encouraging local land use planning and sound soil conservation practices. Eligibility for payments is linked to exclusive agricultural use zoning or a farmland preservation agreement between the farmland owner and the state.

Participation in the program grew by 568 claimants during the fiscal year ending June 30, 1990 (to 24,542), in part because of a provision created in 1988 allowing farmland owners with preservation agreements

to claim a minimum credit equivalent to 10% of the first \$6,000 of property taxes. Prior to 1989, only participants covered by zoning restrictions could claim the minimum credit. This law change spurred greater interest in the farmland preservation program by land owners in parts of the state without exclusive agricultural zoning. In the year ending June 30, 1990, about 3,000 farmland owners with preservation agreements claimed the minimum credit.

County-by-county statistics show that 5 counties had more than 1,000 claimants, led by Dane County with 1,852 participants, followed by Fond du Lac, Jefferson, Rock and Iowa Counties. Total farmland preservation credits exceeded \$1 million in 7 counties: Dane, Iowa, Fond du Lac, Jefferson, Columbia, Rock, and Dodge.

Statewide, farmland preservation credits for the year were equivalent to 8.2% of the total agricultural property taxes paid by farmland owners. The estimated ratio of participation in the program was 40.9% statewide, and there were 5 counties (Iowa, Rock, Fond du Lac, Jefferson, and Kewaunee) with participation rates in excess of 85%.

CRIMINAL ENFORCEMENT ACTIVITIES

Income Taxes

A Tomah farmer has been ordered to serve four years in prison for violations of Wisconsin state income tax laws and for theft.

Franz Hellmut Scherreiks, Route 2, Tomah, was sentenced in Monroe County Circuit Court, Sparta, by Reserve Judge Karl Peplau on one count of theft by fraud, one count of filing a false and fraudulent 1987 Wisconsin income tax return, and one count of filing a false 1984 Wisconsin homestead credit claim. Judge Peplau ordered him to serve four years in prison on each count, to be served concurrently.

Scherreiks was charged with selling watered milk and evading state income taxes between 1983 and 1987. He entered into a plea agreement in August 1990.

Filing a false or fraudulent Wisconsin income tax return or homestead credit claim is a crime punishable by a fine of not more than \$10,000 or imprisonment not to exceed five years or both. In addition to criminal penalties, Wisconsin law provides for substantial civil penalties on the civil tax liability.

Sales And Use Taxes

A Milwaukee County man has been sentenced to five days in jail and fined \$500 for criminal violation of Wisconsin's sales and use tax law.

Walter W. Hollenberger, 3805 West Glenwood Drive, Franklin, was sentenced in Dane County Circuit Court by Judge Angela Bartell, after he pled no contest to one count of filing a false use tax statement in conjunction with registering a boat that he had purchased. Judge Bartell fined Hollenberger \$500, ordered payment of \$160 in court costs, and stayed the jail time, permitting Hollenberger to perform 96 hours of community service. She also ordered payment of restitution of \$1,750 to the Wisconsin Department of Revenue.

Hollenberger was charged with reporting the purchase price of a \$70,000 boat, which he bought from a private party, as \$35,000 in an attempt to evade the state sales and use tax due.

An Appleton man has been fined \$500 for criminal violation of the Wisconsin sales and use tax law, and two Green Bay men have been charged with similar violations.

Gordon L. Cummings, 154 Gardners Row, Appleton, was sentenced in Outagamie County Circuit Court, Appleton, by Judge Michael W. Gage after he pled no contest to one count of filing a false sales and use tax statement in connection with registering a motor vehicle that he had purchased from a private party. Judge Gage also ordered Cummings to pay \$160 in court costs.

Cummings was charged with reporting the purchase price of a motor home as \$3,500 instead of \$17,800 to evade \$715 in state sales and use tax.

Charged in Brown County Circuit Court were Donald R. Jadin, 3528 Briar Terrace and Richard Zuidmulder, 1977 Kane Lane, Green Bay. Zuidmulder was charged with understating the purchase price of a motor vehicle he purchased from Jadin in 1989, and Jadin was charged with understating the purchase price of a motor vehicle he purchased in 1988 when they each filed sales and use tax statements to register the vehicles.

Filing a false sales or use tax report is a crime punishable by a fine of not more than \$500 or imprisonment not to exceed 30 days or both. In addition to the criminal penalty, Wisconsin law provides for substantial civil penalties on the tax liability.

Fuel Taxes

A Wood County businessman has been ordered to serve jail time and probation for criminal violations of the Wisconsin state fuel tax laws.

Delbert H. Weiler, 11601 Stadt Road, Marshfield, owner and operator of Weiler Oil Company, was sentenced in Dane County Circuit Court, Madison, after he pled no contest to intentionally withholding and appropriating special fuel taxes belonging to the state in excess of \$100,000 from July 20, 1984 until November 20, 1987. Judge George Northrup sentenced Weiler to three years imprisonment, stayed execution of sentence, and ordered him to serve eighteen months probation. Under the conditions of probation, Weiler must serve six months in jail and pay a \$5,000 fine. Weiler paid the outstanding special fuel tax prior to sentencing.

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	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

DO YOU HAVE SUGGESTIONS FOR 1991 TAX FORMS?

Do you have suggestions for improving the Wisconsin tax forms or instructions? Send your suggestions to the Wisconsin Department of Revenue, Director of Technical Services, Post Office Box 8933, Madison, WI 53708. Please be specific and send your suggestions in early. The department appreciates hearing from you and has already begun preparing forms and instructions for next year's filing.

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 April 1, 1991. Part D lists rules adopted in 1991 but not yet effective. Part E lists new rules and amendments which became effective in the period from December 16, 1990 to April 1, 1991. ("A" means amendment, "NR" means new rule, "R" means repealed, and "R&R" means repealed and recreated.)

A. Rules at Legislative Council Rules Clearinghouse

11.05	Governmental units-A
11.33	Occasional sales-A
11.34	Occasional sales exemption for sale of a business or business assets-A
11.50	Auctions-A
11.69	Financial institutions-A
11.83	Motor vehicles-A
11.84	Aircraft-A
11.85	Boats, vessels and barges-A
11.88	Mobile homes-A

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

4.05	Taxicabs-NR
4.54	Security requirements-NR
4.55	Ownership and name changes-NR
9.68	Ownership and name changes-NR

C. Rules at Legislative Standing Committee

2.39	Apportionment method-R&R
11.03	Elementary and secondary schools and related organizations-A
11.10	Occasional sales-R
11.13	Sale of a business or business assets-R
11.33	Occasional sales-NR
11.34	Occasional sales exemption for sale of a business or business assets-NR
11.35	Occasional sales by nonprofit organizations on or after January 1, 1989-NR

D. Rules Adopted in 1991 But Not Yet Effective

- 2.165 Change in taxable year-A
- 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
- 8.24 Reciprocal interstate shipments of wine-NR
- 11.001 Forward and definitions-A
- 11.05 Governmental units-A
- 11.11 Waste treatment facilities (industrial or governmental)-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
- 11.29 Leases and rentals of tangible personal property-A
- 11.30 Credit sales, bad debts and reposessions-A
- 11.32 "Gross receipts" and "sales price"-A
- 11.46 Summer camps-A
- 11.50 Auctions-A
- 11.51 Grocers' guidelist-A
- 11.52 Coin-operated vending machines and amusement devices-A
- 11.57 Public utilities-A
- 11.63 Radio and television stations-A
- 11.65 Admissions-A
- 11.68 Construction contractors-A
- 11.72 Laundries, drycleaners, and linen and clothing suppliers-A
- 11.79 Leases of highway vehicles and equipment-A
- 11.80 Sales of ice-A
- 11.81 Industrial gases, welding rods and fluxing materials-A
- 11.83 Motor vehicles-A
- 11.84 Aircraft-A
- 11.85 Boats, vessels and barges-A
- 11.86 Utility transmission and distribution lines-R&R
- 11.87 Meals, food, food products and beverages-A
- 11.88 Mobile homes-A
- 11.91 Successor's liability-A
- 11.92 Records and record keeping-A

- 11.93 Annual filing of sales tax returns-A
- 11.94 Wisconsin sales and taxable transportation charges-A
- 11.96 Interest rates-A

E. Rules Effective in Period from December 16, 1990 to April 1, 1991 (effective date is given in parentheses)

- 1.11 Requirements for examination of returns-R&R (2/1/91)
- 2.02 Reciprocity-R&R (4/1/91)
- 2.95 Reporting of installment sales by natural persons and fiduciaries-A (4/1/91)
- 11.002 Permits, application, department determination-A (4/1/91)
- 11.01 Sales and use tax return forms-R&R (4/1/91)
- 11.08 Medical appliances, prosthetic devices and aids-A (4/1/91)
- 11.09 Medicines-A (4/1/91)
- 11.14 Exemption certificates, including resale certificates-A (4/1/91)
- 11.15 Containers and other packaging and shipping materials-A (4/1/91)
- 11.17 Hospitals, clinics and medical professions-A (4/1/91)
- 11.19 Printed material exemptions-A (4/1/91)
- 11.28 Gifts, advertising specialties, coupons, premiums and trading stamps-A (4/1/91)
- 11.40 Exemption of machines and processing equipment-A (4/1/91)
- 11.41 Exemption of property consumed or destroyed in manufacturing-A (4/1/91)
- 11.45 Sales by pharmacies and drug stores-A (4/1/91)
- 11.47 Commercial photographers and photographic services-A (4/1/91)
- 11.48 Landlords, hotels and motels-A (4/1/91)
- 11.49 Service stations and fuel oil dealers-A (4/1/91)
- 11.53 Temporary events-A (4/1/91)
- 11.54 Temporary amusement, entertainment or recreational events or places-A (4/1/91)
- 11.62 Barber or beauty shop operator-R&R (4/1/91)
- 11.66 Telecommunication and CATV services-A (4/1/91)

- 11.78 Stamps, coins and bullion-A (4/1/91)
- 11.925 Sales and use tax security deposits-A (4/1/91)
- 11.95 Retailer's discount-A (4/1/91)
- 11.97 "Engaged in business" in Wisconsin-A (4/1/91)
- 11.98 Reduction of delinquent interest rate under s. 77.62(1), Stats.-A (4/1/91)
- 14.01 Administrative provisions-A (2/1/91)
- 14.04 Property taxes accrued-A (2/1/91)
- 14.05 Gross rent and rent constituting property taxes accrued-A (2/1/91)

REPORT ON LITIGATION

This portion of the Wisconsin Tax Bulletin 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 has 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. 8)
Corporate liquidations—sec. 333

Laird C. Cleaver (p. 8)
Gain or loss—property transferred by gift

Corporation Franchise or Income Taxes

Freedom Savings and Loan Association (p. 8)
Filing requirement—franchise or income tax

Ins. Serv. Liquidating, Inc. et al (p. 9)
Liquidating corporations

William Wrigley, Jr. Co. (p. 9)
Nexus

Sales/Use Taxes

Arndt Enterprises, Inc. (p. 10)
Farming—gensing raising

Edward Craig, Jr. (p. 10)
Leases and rentals—taxicabs

Fort Howard Corporation (p. 10)
Manufacturing—exemption

Luetzow Industries (p. 11)
Parking and storage—aircraft;
Containers, packaging and shipping
materials—plastic garment bags

B.I. Moyle Associates, Inc. (p. 11)
Computer software—tangible vs. intan-
gible;
Nexus

Nelson Telephone Cooperative (p. 12)
Gross receipts—patronage dividends

Parks-Pioneer Corporation (p. 12)
Waste reduction and recycling

Joseph Sanfelippo (p. 12)
Leases and rentals—taxicabs

INDIVIDUAL INCOME TAXES

Corporate liquidations—sec. 333. *Keith Breyer vs. Wisconsin Department of Revenue* (Court of Appeals, District III, January 15, 1991). The Wisconsin Department of Revenue appeals from a judgment of the Circuit Court of Outagamie County, which overturned a ruling of the Wisconsin Tax Appeals Commission. The Commission upheld the department's determination that the taxpayer had not timely elected to defer recognition of realized gain on property distributions he received in a corporate liquidation. On review, the Circuit Court concluded that timely filing of a written election was not essential for a taxpayer to exercise the option to defer recognition of gain. See *Wisconsin Tax Bulletin* 65, page 12, and *Wisconsin Tax Bulletin* 69, page 7, for summaries of the prior decisions.

The Court of Appeals concluded that the Commission correctly interpreted the applicable Wisconsin tax statutes. Section 71.333(4), Wis. Stats. (1983-84), limited the gain certain shareholders must recognize on corporate liquidations to the greater of (1) cash and securities received or (2) a shareholder's ratable share of the liquidating company's "accumulated earnings and profits." However, in order to qualify for a limited gain recognition, an electing shareholder must file a written election with the Department of Revenue within thirty days of the date the corporation adopted its liquidation plan. Sec. 71.333(3), Wis. Stats. (1983-84). The Court of Appeals also held that the Circuit Court improperly concluded that the timely filing of a written election was unimportant.

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



Gain or loss—property transferred by gift. *Laird C. Cleaver vs. Wisconsin Department of Revenue* (Wisconsin Supreme Court, December 12, 1990). This is a review of a decision of the Court of Appeals affirming a judgment of the Circuit Court of Dane County, denying the taxpayer's claim for a state income tax refund for the taxable year 1977. See *Wisconsin Tax Bulletin* 59, page 7, and *Wisconsin Tax Bulletin* 66, page 9, for summaries of the prior decisions.

The issue in this case is whether sec. 1026 of the Deficit Reduction Act (DRA) enacted in 1984 affects the computation of Wisconsin adjusted gross income for tax year 1977 under sec. 71.02(2)(a), (b)3, and (e), Wis. Stats. (1977-78). Section 1026 of the DRA is a non-Internal Revenue Code provision which excludes net gifts made prior to the United States Supreme Court decision, *Diedrich v. Commissioner*, 457 U.S. 191 (1982), from the definition of gross income.

The Wisconsin Supreme Court concluded that the plain language of sec. 71.02(2)(a), (b)3 and (e), Wis. Stats. (1977-78), estab-

lishes that the taxpayer's Wisconsin adjusted gross income for 1977 is determined solely by looking to the Internal Revenue Code as it stood on December 31, 1976. Because sec. 1026 of the DRA was not in effect on December 31, 1976, it did not affect the taxpayer's responsibility for payment of the tax.

The taxpayer has not appealed this decision.

CORPORATION FRANCHISE OR INCOME TAXES

Filing requirement—franchise or income tax. *Freedom Savings & Loan Association, n/k/a Federated Financial Savings & Loan Association, vs. Wisconsin Department of Revenue* (Court of Appeals, District II, November 28, 1990). Freedom Savings & Loan Association appeals a Circuit Court judgment affirming a decision of the Wisconsin Tax Appeals Commission, which denied the taxpayer's petition for redetermination of taxes paid. See *Wisconsin Tax Bulletin* 65, page 13, and *Wisconsin Tax Bulletin* 70, page 12, for summaries of the prior decisions.

The issue in this case is whether the taxpayer's final tax return for the period October 1, 1985 to January 31, 1986, was for the 1985 or 1986 tax year. If the return was for the 1986 tax year, the taxpayer was subject to the special franchise tax enacted on April 15, 1985 and first applicable to the 1986 tax year. The tax is applicable to corporations ceasing to do business in this state and is measured by the corporation's entire net income, including interest income from federal instruments or obligations.

The Court of Appeals affirmed the Circuit Court's judgment, concluding that the taxpayer's final tax return was a 1986 tax return under which it was obligated to pay the special franchise tax.

The taxpayer has not appealed this decision.



Liquidating corporations. *Ins. Serv. Liquidating, Inc. and Insurance Services, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, November 14, 1990). The issues in this case are:

A. To what extent the gain on the sale of corporate assets under a plan of liquidation was participated in by a Wisconsin resident shareholder within the meaning of sec. 71.337(1), Wis. Stats. (1985-86), if such shareholder was a Wisconsin resident at the time of the distribution of an installment note but subsequently moved out of state.

B. The constitutionality of sec. 71.337(1), Wis. Stats., as being invalid under Article IV, Section 2, Clause 1 of the United States Constitution and Section 1 of Article XIV of the Amendments to the United States Constitution.

Ins. Serv. Liquidating, Inc. ("Taxpayer"), formerly known as *Insurance Services, Inc.*, was a Wisconsin corporation which liquidated on March 7, 1984, pursuant to a Plan of Liquidation adopted on January 10, 1984. *Insurance Services, Inc.*, formerly known as *ISI Receiving Corp.* ("Purchaser"), is a Wisconsin corporation which purchased all of the assets of Taxpayer on March 7, 1984. The terms of sale required Purchaser to assume certain of Taxpayer's liabilities, including any present or future federal or state tax liabilities, and to pay Taxpayer \$2,103,844.26 of which \$213,844.26 was paid in cash and \$1,890,000 was paid in non-negotiable, but assignable, notes. On March 7, 1984, the same date as the sale described above, Taxpayer distributed all of the proceeds of the sale to its shareholders. Following Taxpayer's distribution of the sale proceeds, Purchaser made principal payments to shareholders on the notes (with interest as required).

When the sale of Taxpayer's assets and the distribution of proceeds occurred, all of Taxpayer's shareholders were Wisconsin residents. All of them continued to be Wisconsin residents during all times material hereto, except that Richard A. Stack became a Florida resident on February 1, 1985, and continued to be a Florida resident during all times material hereto. Mr. Stack filed income tax returns with the department for years 1984, 1985, and 1986. On

his 1985 and 1986 returns, he did not report the principal payments he received on such note during those years, since he was a resident of Florida at the time he received the payments. Mr. Stack received payments constituting 23.087% of the sales price of the assets sold by Taxpayer, while he was a resident of Florida, and gain to him contained in such payments was beyond the taxing jurisdiction of the state of Wisconsin.

Taxpayer and Purchaser also contend that the phrase "to the extent such gain or loss is participated in by Wisconsin resident shareholders," contained in sec. 71.337(1), Wis. Stats., is invalid under Article IV, Section 2, Clause 1, of the United States Constitution and Section 1 of Article XIV of the Amendments to the United States Constitution.

The Commission concluded as follows:

A. Taxpayer, at the time of its liquidation, met all of the requirements of sec. 71.337(1), Wis. Stats., for not recognizing any gain or loss from the sale of its assets in the course of its liquidation and thus did not have to recognize the gain upon the sale of its assets when the shareholders who "participate" in such gain are Wisconsin residents.

B. 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, and the Wisconsin Tax Appeals Commission does not have the jurisdiction to determine such constitutionality.

The department has appealed this decision to the Circuit Court.



Nexus. *William Wrigley, Jr. Co., vs. Wisconsin Department of Revenue* (Wisconsin Supreme Court, February 19, 1991). This is a review of a Court of Appeals decision which reversed an order of the Circuit Court of Dane County. The Circuit Court, reversing an order of the Wisconsin Tax Appeals Commission, held that under 15 USC sec. 381, the department does not have the power

to tax the net income of the taxpayer for the years 1973 to 1978, as its activities in Wisconsin were "inextricably connected to 'solicitation,'" as that term is used in 15 USC sec. 381. The Circuit Court did not decide the interest rate to be applied to the tax.

Upon appeal, the Court of Appeals determined that the solicitation of orders does not encompass post-sale activities which are not "inextricably related" to the solicitation of orders, and since the taxpayer engaged in such activities, Wisconsin is not prohibited from taxing it. The Court of Appeals also held that the franchise tax was "delinquent," and therefore subject to an eighteen percent penalty interest under sec. 71.13(1)(a), Wis. Stats. (1985-86).

See *Wisconsin Tax Bulletins* 50, 55, 59, and 66 for summaries of prior decisions in this case.

This case presents two issues for review:

A. Whether the taxpayer's activities in Wisconsin went beyond the "solicitation of orders" as that term is used in 15 USC sec. 381, so that Wisconsin could assess and collect a tax on its net income for the years 1973 to 1978.

B. If the taxpayer's activities are taxable, whether the assessed taxes are "delinquent" and therefore subject to an eighteen percent penalty interest rate pursuant to sec. 71.13(1)(a), Wis. Stats. (1985-86).

The Wisconsin Supreme Court concluded that the taxpayer's activities in Wisconsin did not go beyond the "solicitation of orders" as that term is used in 15 USC sec. 381, and therefore the department may not assess and collect a tax on its net income for the years 1973 to 1978. The Supreme Court held that each of the taxpayer's activities in Wisconsin during 1973-1978 were incidental to the solicitation of orders of gum, and any activities that could be considered as not being inextricably bound up in solicitation are so minor as to be *de minimis*. Because it held that the department is prohibited from taxing the taxpayer's net income, the Supreme Court did not reach the second issue.

The department has appealed this decision to the United States Supreme Court.



SALES/USE TAXES

Farming—ginseng raising. *Arndt Enterprises, Inc. vs. Wisconsin Department of Revenue* (Court of Appeals, District IV, January 31, 1991). This is an appeal from an order of the Circuit Court of Dane County, affirming a decision of the Wisconsin Tax Appeals Commission. The issue is whether a canopy system used in growing ginseng is a "machine" under sec. 77.54(3), Wis. Stats., and thus exempt from sales and use tax. See *Wisconsin Tax Bulletin* 65, page 14, and *Wisconsin Tax Bulletin* 70, page 15, for summaries of the prior decisions.

The taxpayer argues first that the component parts of the ginseng canopy — the wooden posts, cables, cable splicers, and ginseng cloth — are not subject to tax because the entire apparatus is a machine within the meaning of sec. 77.54(3), Wis. Stats. The taxpayer also contends that the jacks used to stretch the cables are part of the canopy, and that the wire used to construct cages to protect and house the animals in its mink farming operations is not subject to tax under sec. 77.54(3), Wis. Stats., because it is part of a machine.

The Court of Appeals concluded that the ginseng canopy is not a machine within the meaning of sec. 77.54(3), Wis. Stats., because it does not have fixed and moving parts for doing some kind of work. The poles, cloth, and cable do not move, and the canopy is simply a shelter for the plants. The Court also held that the jacks are tools used to adjust the canopy, rather than part of the canopy itself, and they are thus not exempt from tax pursuant to Wis. Adm. Code sec. Tax 11.12(4)(a)6.a, which provides that the exemption under sec. 77.54(3) does not apply to "tools used in construction or for making repairs" of farm machines. Finally, the Court of Appeals concluded that the wire mink cages are not farm machinery but rather storage areas for animals.

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



Leases and rentals—taxicabs. *Edward Craig, Jr. vs. Wisconsin Department of Revenue* (Circuit Court of Dane County, September 27, 1990). This is a petition for review of a Wisconsin Tax Appeals Commission (Commission) decision, which affirmed the department's denial of the taxpayer's request for redetermination of a sales tax assessment against him. The issues in this case are:

A. Whether it was reasonable for the Commission to find that gross receipts from the leasing of motor vehicles for use as taxicabs are subject to sales and use tax under sec. 77.52(1), Wis. Stats.

B. Whether the department is equitably estopped from collecting sales tax from the taxpayer by its not having advised him of the taxability of the lease payments.

During the period under review, 1980 through 1986, the taxpayer was a sole proprietor in the business of leasing taxicabs within the city of Milwaukee under the licensing ordinances of that city. The taxpayer leased his taxicabs to independent taxicab drivers under oral agreements. The drivers did not sublease the vehicles. Standard practice did not allow a driver to lease a taxicab to someone else. The taxpayer reported his lease receipts for income tax purposes but did not report and pay to the department Wisconsin sales tax which the department claims should have been paid on the gross lease receipts under sec. 77.52(1), Wis. Stats. The taxpayer claimed that he only became aware of a sales tax obligation in October 1986, after receiving a letter from the department regarding sales tax.

The Circuit Court concluded as follows:

A. *Reasonableness of Commission's Decision* The process of statutory interpretation led the Commission to decide that the taxpayer was a retailer whose leases of automobiles to lessee/taxicab drivers were

retail sales of tangible personal property for use or consumption of the lessees, but not for resale, and, therefore, taxable sales at retail. The Commission's findings are adequate and its interpretations of the statutes as they apply to the facts are reasonable.

B. *Equitable Estoppel* The Commission reasonably determined that the taxpayer has failed to establish the elements which would warrant the application of estoppel in this case.

The taxpayer has not appealed this decision.



Manufacturing—exemption. *Fort Howard Corporation f/k/a Fort Howard Paper Company vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, January 15, 1991). The issue in this case is whether raw materials used by the taxpayer in the manufacture of toilet paper and napkins destined for sale, otherwise exempt from sales and use tax under sec. 77.54(2), Wis. Stats., lose their exemption to the extent attributable to defective product or "seconds" distributed free to the taxpayer's employees.

During the period under review, 1981 through 1983, the taxpayer was engaged in the business of manufacturing paper and paper products such as napkins and toilet paper in Wisconsin, and therefore was subject to the sales and use tax provisions of Chapter 77 of the Wisconsin Statutes. The taxpayer's process of making napkins and toilet paper is the manufacture of tangible personal property within the meaning of sec. 77.54(2), Wis. Stats.

The first step in the taxpayer's manufacture of napkins and toilet paper takes place in the pulp processing department, where the end product is paper "stock." The second step takes place in the taxpayer's paper machine department, where the stock is dried into paper and wound on a large core; this is known as a "parent roll." The third and final step is the process of taking the paper from the parent roll and turning it into

a final product such as napkins or toilet paper.

Occasionally, the paper machine produces a defective parent roll or "cull." Some of this cull is recycled by sending it back to the pulp processing department to be made into new paper stock. Some of the cull is converted into nonsaleable or "seconds" toilet paper and napkins, and distributed free to the taxpayer's employees. The taxpayer does not use any seconds toilet paper or napkins at its plant, nor does it give any seconds to customers or to anyone other than its employees.

The Commission concluded that the taxpayer's raw materials used to manufacture napkins and toilet paper, including the portion attributable to defective items distributed free of charge to employees, is used in the manufacture of goods destined for sale, and therefore is exempt from sales and use tax under sec. 77.54(2), Wis. Stats.

The department has not appealed but has filed a notice of nonacquiescence in regard to this decision.



Parking and storage—aircraft; containers, packaging and shipping materials—plastic garment bags. *Luetzow Industries vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, November 14, 1990). The issues in this case are:

A. Whether the taxpayer, the owner of an aircraft hangar it leased to an entity the taxpayer claims was a federally-certified air carrier of persons and property in interstate commerce, was liable for sales taxes on the hangar rental receipts it received in 1984-1986 under a statute that taxes gross receipts derived from "providing parking space for ... aircraft for a consideration" (sec. 77.52(2)(a), Wis. Stats. (1983-84)), or exempt under a statute that exempts "gross receipts from the sale of and the storage, use or other consumption of [a]ircraft ... sold to persons using such aircraft as certified ... carriers of persons or property in interstate ... commerce" (sec. 77.54(5), Wis. Stats. (1983-84)).

B. Whether the taxpayer, also in the business of manufacturing plastic garment bags, was liable for sales taxes on the gross receipts from its 1984-1987 sales of the bags to dry cleaning establishments which used the bags to return clean laundry to their customers, or exempt under a statute that exempts "gross receipts from the sale of ... bags ... used by the purchaser to transfer merchandise to customers" (sec. 77.54(6), Wis. Stats. (1983-84)).

Based on the facts as stated in the statement of issues above, the Commission concluded:

A. Hangar rental receipts are taxable. Read in the light of its dual purposes, and in the context of the statutory design, the Commission held that sec. 77.52(2)(a), Wis. Stats., does not shelter aircraft hangar owners, such as the taxpayer, from sales tax on hangar rental charges. The only shelter the statute provides is from sales or use tax on aircraft transactions. The statute should not be read to exempt non-aircraft transactions, such as a hangar lease, which is a real estate transaction, just because the transaction happens to have some relationship with an article that is otherwise exempt.

B. The garment bags are taxable. The taxpayer argued that because the garment bags are used to transfer laundry to patrons of dry cleaning establishments, the gross receipts it received on the sale of the bags to the dry cleaners are exempt under sec. 77.54(6), Wis. Stats. The Commission held that transfers of laundry from dry cleaners to patrons are not "transfers of merchandise," because merchandise is "something bought and sold," and laundry is not bought and sold, only serviced. Accordingly, the sales of the bags are non-exempt transactions, taxable under the general sales tax statute.

The taxpayer has appealed this decision to the Circuit Court.



Computer software—tangible vs. intangible; nexus. *B.I. Moyle Associates, Inc. vs. Wisconsin Department of Revenue* (Wis-

consin Tax Appeals Commission, December 12, 1990). The issues in this case are:

A. Whether, during the period April 1, 1982, through June 30, 1985, Wisconsin had jurisdiction or nexus to impose use tax collection duties on the taxpayer.

B. Whether, during the period January 1, 1981, through March 31, 1982, Wisconsin had jurisdiction or nexus to impose use tax collection duties on the taxpayer.

C. If so, whether the licensing transactions that occurred during the period January 1, 1981 through March 31, 1982, were leases of tangible personal property subject to use taxes or transfers of intangible property not subject to use taxes.

The taxpayer is a Minnesota corporation, whose business during the period April 1, 1982 through June 30, 1985, consisted of licensing computer programs. The taxpayer's only "contacts" with Wisconsin during the period were the mailing of promotional literature from Minnesota into Wisconsin, the acceptance in Minnesota of orders placed from Wisconsin by telephone or mail, the fulfillment of those orders from Minnesota by shipment through the mail or by common carrier of copies of the program instruction manuals and the magnetic tapes containing the programs, the receipt in Minnesota of the license fees paid by Wisconsin customers, the temporary presence of the taxpayer's magnetic tapes in Wisconsin until the Wisconsin customers installed the programs into their computers and then returned those tapes to Minnesota, and in some cases the providing from Minnesota of future improvements or enhancements of the programs licensed, as well as telephone "support" as necessary to solve customer problems arising during and after the installation of the programs. The taxpayer's "contacts" with Wisconsin during the period January 1, 1981 through March 31, 1982, included those listed above and in addition included the performance of some computer consulting services in Wisconsin.

The programs the taxpayer licensed were "systems programs" that activate and control the computer hardware to facilitate its

use and to control the use and sharing of the basic resources of a computer system.

The Commission concluded as follows:

A. For transactions after March 31, 1982, Wisconsin had no nexus. The only "presence" the taxpayer had in Wisconsin was the temporary presence of the means or medium of delivery of the magnetic tapes embodying and transmitting the computer programs.

B. For transactions before April 1, 1982, Wisconsin had nexus. During that period, the taxpayer engaged in some computer programming consulting services in Wisconsin. As the taxpayer has the burden of proving the assessment at issue to be incorrect, the Commission held that the taxpayer's services constituted "doing business" in Wisconsin, thus creating a taxing nexus between the taxpayer and Wisconsin.

C. Computer programs are not tangible property. Since the use of the taxpayer's computer programs in Wisconsin constituted the use of intangible personal property, the license transactions are non-taxable irrespective of nexus.

The department has appealed this decision to the Circuit Court.

□

Gross receipts—patronage dividends. *Nelson Telephone Cooperative vs. Wisconsin Department of Revenue and State of Wisconsin Tax Appeals Commission* (Circuit Court of Dane County, December 7, 1989). The sole issue in this case is whether capital credits or patronage refunds by a cooperative out of net proceeds in excess of operating costs and expenses may be applied to reduce gross receipts subject to tax.

The taxpayer urged application of the exemption from "gross receipts" set out in sec. 77.51(4)(b)2, Wis. Stats. To be available, the exemption requires a refund of cash or credit arising from "... adjustments in sales price after the sale has been completed" The department argued for dis-

allowance of the exemption because the statute does not *specifically* refer to "patronage rebates," "patronage credits," or "patronage dividends." Under controlling case law "... everything is taxable at the retail level unless specifically exempted." *Dept. of Revenue v. Milwaukee Refining Corp.*, 80 Wis (2), 44, 49, (1977).

The Circuit Court concluded that while the exemption provided in sec. 77.51(4)(b)2, Wis. Stats., requires an adjustment in "sales price," net proceeds as determined by the taxpayer involve more than sales price alone. The Court also concluded that the result urged is incongruous, and that the credit provided to patrons of the taxpayer is not an adjustment in sales price so as to allow a reduction of "gross receipts" under sec. 77.51(4)(b)2, Wis. Stats.

The taxpayer has not appealed this decision.

□

Waste reduction and recycling. *Wisconsin Department of Revenue vs. Parks-Pioneer Corporation* (Circuit Court of Dane County, February 21, 1991). This is a petition for review of a decision of the Wisconsin Tax Appeals Commission, which found that certain machinery and equipment used in the taxpayer's business is exempt from Wisconsin sales and use taxes under the exemption for recycling activities set forth in sec. 77.54(26m), Wis. Stats. See *Wisconsin Tax Bulletin* 68, page 10, for a summary of that decision.

The department contends that the Legislature only intended to exempt machinery and equipment exclusively and directly involved in the recycling process, not to exempt collection and transportation activities. The taxpayer contends that its machinery and equipment were exempt because they were used exclusively and directly for recycling activities. The department also contends that the starting fluid used to start diesel engines on cranes used in the taxpayer's yard is not machinery, equipment, or parts therefor within the meaning of sec. 77.54(26m), Wis. Stats., while the taxpayer argues that since the

starting fluid is used in running machinery or equipment it is a "part therefor" within the meaning of the statute.

The Circuit Court concluded that sec. 77.54(26m), Wis. Stats., plainly exempts machinery and equipment, including parts therefor, which are used exclusively and directly in "activities" which are a part of recycling, and that collecting, transporting, and weighing the materials to be recycled are activities within the field of the act of recycling. The Court also found that the starting fluid is necessary to the operation of the taxpayer's cranes, and therefore, it is a part thereof exempt under sec. 77.54(26m), Wis. Stats.

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

□

Leases and rentals—taxicabs. *Joseph Sanfelippo vs. Wisconsin Department of Revenue* (Circuit Court of Dane County, February 27, 1991). This is a petition for judicial review of a decision of the Wisconsin Tax Appeals Commission (Commission), which affirmed the department's denial of the taxpayer's request for redetermination of a sales tax assessment for the years 1981-84. See *Wisconsin Tax Bulletin* 65, page 16, for a summary of that decision.

The taxpayer seeks reversal of the Commission's decision on two grounds: (1) the Commission misinterpreted the governing statute in concluding that the taxpayer's receipts from renting taxicabs he owns to cab drivers are subject to sales tax on the basis that the leases of the cabs were made by the taxpayer "at retail," and (2) even if the receipts are subject to taxation, the department is estopped from collecting the tax from him. The taxpayer's principal contention is that when he leases the cabs to the drivers, he is providing them with personal property which they, in turn, "resell" to the cab customers, and it is the transaction between driver and fare-paying passenger which is at retail, not the transaction the department attempts to tax.

The Circuit Court concluded that the transactions between the taxpayer and his drivers are not taxable, because it is the transactions between the drivers and their customers which are the final and ultimate employment of the cabs which withdraws them from the marketplace of goods and services

and are thus the retail sale subject to sales tax. Because it concluded that the transactions on which sales tax were imposed by the department's assessment are not taxable, the Court did not address whether the department is estopped from collecting the tax.

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

□

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

1. Effect of a Farmland Preservation Credit on Property Taxes Allowable for the School Property Tax Credit (p. 13)
2. Interest Received From Resolution Funding Corporation Bonds (p. 14)

Homestead Credit

1. Gross Rent Includes Separate Charges (p. 14)
2. Rent/Property Tax Reduction for AFDC Recipients (p. 15)

Corporation Franchise or Income Taxes

1. Section 338(h)(10), IRC, Election (p. 15)
2. Wisconsin Tax Treatment of Qualified REIT Subsidiaries (p. 17)
3. Wisconsin Treatment of United Kingdom Advance Corporation Tax (ACT) Refunds (p. 18)

Sales/Use Taxes

1. Compression Hosiery (p. 18)
2. Gross Receipts for Purposes of Wisconsin Sales and Use Tax - Federal Luxury Tax (p. 19)
3. Photographic Services Furnished in Taxable County (p. 19)

INDIVIDUAL INCOME TAXES

1. Effect of a Farmland Preservation Credit on Property Taxes Allowable for the School Property Tax Credit

STATUTES: Section 71.07(9), Wis. Stats. (1989-90)

BACKGROUND: The Wisconsin farmland preservation credit is a

refundable credit to owners of qualified Wisconsin farmland. The credit is based on property taxes accrued on qualified farmland (including improvements). Based on a letter ruling received from the Internal Revenue Service dated February 25, 1980, the amount of farmland preservation credit is a recovery of the property tax upon which the credit is based.

Section 71.07(9), Wis. Stats. (1989-90), provides for the Wisconsin school property tax credit. The Wisconsin school property tax credit is equal to a percentage of the property taxes paid on the taxpayer's principal residence during the tax year.

QUESTION: The property taxes used to compute a farmland preservation credit may include the property taxes on the taxpayer's principal residence located on the farm. In these cases, does the receipt of the farmland preservation credit affect the amount of property taxes which can be used to compute the Wisconsin school property tax credit?

ANSWER: Yes, but only when receipt of the farmland preservation credit and payment of the property taxes used to compute that credit occur during the same tax year. When payment of the tax and recovery of a portion of the tax (through the farmland preservation credit) occur during the same year, the portion of the farmland preservation credit allocable to taxes on the principal residence will reduce the amount of taxes which can be used to compute the Wisconsin school property tax credit.

(Note: This means that the property taxes which may be used to compute a Wisconsin school property tax credit are the same as those which may be deducted as an itemized deduction for federal tax purposes on federal Schedule A.)

Example 1:

Facts and Question:

1. A calendar year taxpayer paid 1989 property taxes accrued of \$6,000 during 1990.
2. Of the \$6,000 of property taxes, \$4,800 (80%) are determined to be farm property taxes and \$1,200 (20%) are determined to be taxes on the taxpayer's principal residence.
3. During 1990, the taxpayer received a 1989 farmland preservation credit of \$2,000 which was based on the 1989 property taxes accrued of \$6,000.

What amount of 1989 property taxes on the principal residence can be used to compute the 1990 Wisconsin school property tax credit?

Answer: The amount of 1989 property taxes on the principal residence which can be used in computing the 1990 Wisconsin school property tax credit is \$800 (\$6,000 of property taxes paid in 1990 less \$2,000 of farmland preservation credit received in 1990 times 20% principal residence portion).

Example 2:

Facts and Question:

1. A calendar year taxpayer paid 1989 property taxes accrued of \$6,000 during 1989 of which \$4,800 (80%) are determined to be farm property taxes and \$1,200 (20%) are determined to be taxes on the taxpayer's principal residence.
2. During 1990, the taxpayer received a 1989 farmland preservation credit of \$2,000 which was based on the 1989 property taxes accrued of \$6,000.
3. The taxpayer paid 1990 property taxes accrued of \$6,500 in 1990 of which \$1,365 (21%) relate to the taxpayer's principal residence.

What amount of 1990 property taxes on the principal residence can be used to compute the 1990 Wisconsin school property tax credit?

Answer: The amount of 1990 property taxes on the principal residence which can be used in computing the 1990 Wisconsin school property tax credit is \$1,365. The 1990 property taxes paid in 1990 do not have to be reduced by the 1989 farmland preservation credit received in 1990. The 1989 farmland preservation credit is a recovery of 1989 property taxes accrued and has no effect on the amount of 1990 property taxes accrued and paid in 1990 which can be used to compute the Wisconsin school property tax credit.

Example 3:

Facts and Question:

1. A calendar year taxpayer paid one-half (\$3,000) of 1989 property taxes accrued of \$6,000 in 1989 and the remaining one-half in 1990.
2. Of the \$6,000 of property taxes, \$4,800 (80%) are determined to be farm property taxes, and \$1,200 (20%) are determined to be taxes on the taxpayer's principal residence.
3. During 1990, the taxpayer received a 1989 farmland preservation credit of \$2,000 which was based on the 1989 property taxes accrued of \$6,000.

What amount of 1989 property taxes on the principal residence can be used to compute the 1990 Wisconsin school property tax credit?

Answer: The amount of 1989 property taxes on the principal residence which can be used in computing the 1990 Wisconsin school property tax credit is \$200 (\$3,000 of 1989 property taxes paid in 1990 less \$2,000 of 1989 farmland preservation credit received in 1990 times 20% principal residence portion).

□

2. Interest Received From Resolution Funding Corporation Bonds

STATUTES: Section 71.05(6)(b)1, Wis. Stats. (1989-90)

BACKGROUND: Section 71.05(6)(b)1, Wis. Stats. (1989-90), provides that the amount of interest income which is by federal law exempt from taxation by Wisconsin may be subtracted from federal adjusted gross income in computing Wisconsin taxable income.

FACTS AND QUESTION: A Wisconsin resident receives interest income from bonds issued by the Resolution Funding Corporation. Is the interest income received from this security exempt from Wisconsin income tax?

ANSWER: Yes, interest income which an individual receives from bonds issued by the Resolution Funding Corporation is exempt from Wisconsin income tax. Federal law (12 USC sec. 1441b(f)(7)) prohibits states from taxing interest income from these bonds (except surtaxes, estate, inheritance, and gift taxes). Therefore, if interest income from bonds issued by the Resolution Funding Corporation is included in federal adjusted gross income, such interest may be subtracted from federal adjusted gross income in computing Wisconsin taxable income.

□

HOMESTEAD CREDIT

1. Gross Rent Includes Separate Charges

STATUTES: Section 71.52(2), Wis. Stats. (1989-90)

WIS. ADM. CODE: Section Tax 14.05(2)(a), February 1990 Register

BACKGROUND: Under sec. 71.52(2), Wis. Stats. (1989-90) and sec. Tax 14.05(2)(a), Wis. Adm. Code, February 1990 Register, "gross rent" means rental paid at arm's length, solely for the right of occupancy of a homestead. However, "gross rent" does not include charges for food, medical services, or other personal services provided by the landlord.

FACTS AND QUESTION: A homestead credit claimant pays \$350 to his landlord for each month of 1990. This includes \$300 for rental of his apartment, \$30 for the use of a garage, and \$20 for the use of a

stove, refrigerator, and window air conditioner. The garage and appliances are "optional" items which the claimant would not be required to use in order to rent the apartment.

May the "optional" payments for the garage and appliances be included as rent in determining the claimant's allowable homestead credit for 1990?

ANSWER: Yes. Amounts paid by a claimant to a landlord in addition to basic rental for items normally associated with the occupancy of a homestead are considered to be a part of the total rent for purposes of determining the claimant's allowable homestead credit. Examples of additional amounts which are considered rent include payments to a landlord for a garage or other parking space, appliances, furniture, or utilities. (Caution: Allowable rent for homestead credit purposes does not include amounts paid to a landlord for food, medical services, or other personal services, as these items are expressly excluded from the definition of "gross rent" by statute.)

NOTE: The definition of "gross rent" as discussed in this Tax Release applies only with respect to 1988 and subsequent years' homestead credit claims. For a 1987 homestead credit claim, the value of medical services and other personal services was not excluded from the definition of gross rent. For a 1986 or prior year's homestead credit claim, the definition of gross rent excluded the rental value of services, appliances, utilities, furniture, and other furnishings provided by the landlord. Thus, the \$20 payment for appliances in the "Facts and Question" above could not be included in a claimant's rent for 1986 and prior years.

□

2. Rent/Property Tax Reduction for AFDC Recipients

STATUTES: Section 71.54(2)(a), Wis. Stats. (1989-90)

BACKGROUND: Section 71.54(2)(a), Wis. Stats. (1989-90), provides that a one-twelfth reduction of property taxes and/or rent constituting property taxes must be made by a homestead credit claimant for each month the claimant receives either \$400 or more of general relief payments or any amount of Aid to Families with Dependent Children (AFDC). Under sec. 71.54(2)(a)2, Wis. Stats. (1989-90), however, the one-twelfth reduction is not necessary if the AFDC benefits the claimant receives are either 1) foster care payments or 2) assistance received as a relative other than a parent with whom a dependent child is living, which does not include any aid to meet the needs of the claimant or the claimant's spouse or children.

QUESTION 1: Does the one-twelfth reduction of property taxes or rent constituting property taxes apply to a claimant who receives AFDC payments solely on behalf of his or her dependent grandchild living with the claimant?

ANSWER 1: No. Since the claimant is a relative other than a parent with whom a dependent child is living, and since the assistance is solely for the needs of the dependent and not for the needs of the claimant or the claimant's spouse or children, the one-twelfth reduction does not apply to the claimant.

EXAMPLE 1: A claimant receives AFDC payments of \$400 per month for the care of her dependent grandchild, who lives with her. The AFDC grant provides that the payments are solely for the care of the grandchild. The one-twelfth reduction does not apply.

QUESTION 2: Does the one-twelfth reduction apply to a claimant who receives AFDC payments for use both to pay for a dependent grandchild's care while living with the claimant, and to help pay the rent and other household expenses?

ANSWER 2: Yes. Even though the claimant is a relative other than a parent with whom a dependent child is living, the claimant receives the aid to meet the needs of both the dependent child and the claimant or the claimant's spouse or children. The one-twelfth reduction thus applies to the claimant.

EXAMPLE 2: A claimant receives AFDC payments of \$400 per month. The grant specifies that the payments may be used to help pay the rent and other household bills, as well as for the care of her grandchild living with her. The one-twelfth reduction does apply, since the assistance includes aid to meet the needs of the claimant or the claimant's spouse or children.

QUESTION 3: Does the one-twelfth reduction apply if a claimant who is a relative of a dependent other than its parent becomes the dependent's legal guardian?

ANSWER 3: No. A dependent's legal guardian is not considered to be the dependent's parent, and the claimant is thus a relative other than a parent. The one-twelfth reduction does not apply to the claimant.

QUESTION 4: Does the one-twelfth reduction apply if a claimant is a dependent child's relative other than its parent, but the claimant subsequently adopts the child?

ANSWER 4: Yes. The adoptive parent is considered to be the dependent's parent, and thus the exception under sec. 71.54(2)(a)2, Wis. Stats. (1989-90), does not apply. The one-twelfth reduction is required.

□

CORPORATION FRANCHISE OR INCOME TAXES

1. Section 338(h)(10), IRC, Election

STATUTES: Sections 71.26(2) and (3) and 71.30(1)(a), Wis. Stats. (1989-90)

BACKGROUND: Under section 338(h)(10) of the Internal Revenue Code (IRC), a corporation which makes a qualified stock purchase of another corporation (the "target") can elect to treat the stock purchase as an asset purchase. Under such an election, the target corporation is treated as if it sold all of its assets in a single transaction at the close of the acquisition date. The target corporation must report any resulting gain or loss on this deemed sale. The selling corporation does not recognize the gain or loss on the sale of the stock of the target corporation. In addition, the target corporation is treated as a new corporation that purchased the assets on the day after the acquisition date and is allowed to adjust the basis of its assets to fair market value at that date.

The target corporation must file two short-period returns for federal purposes. The first return is for the period that begins on the first day of the taxable year and ends on the date of acquisition of the stock. This return, which is included in the consolidated federal return of the selling corporation, includes the gain or loss on the deemed sale of the assets. The second return is for the period that begins on the day after the acquisition date and ends on the last day of the taxable year of the target. The stepped-up (or stepped-down) basis of the assets is recognized on this return, which is included in the consolidated federal return of the purchasing corporation.

EXAMPLE: On March 31, 1989, Corporation P purchases 100% of the stock of Corporation T from Corporation S for \$100,000. All three corporations are calendar-year tax filers. Corporation S had a basis of \$50,000 in the stock of Corporation T. Corporation T had a basis of \$70,000 in its assets. If a section 338(h)(10) election is made, Corporation S will not report the \$50,000 gain on the sale of Corporation T's stock.

In addition, Corporation T must file two returns. The first return is for January 1, 1989, through March 31, 1989. On this return, which is filed with the consolidated federal return of Corporation S, Corporation T reports the \$30,000 gain on the deemed sale of its assets. Corporation T's second return is for April 1, 1989, through December 31, 1989. On this return, which is filed with the consolidated federal return of Corporation P, Corporation T adjusts the basis of its assets to \$100,000.

QUESTION 1: Does IRC sec. 338(h)(10) apply for Wisconsin purposes?

ANSWER 1: Yes. Wisconsin net income for corporation franchise and income tax purposes is determined under the Internal Revenue Code with certain modifications. Since there is no modification under the state statutes for IRC sec. 338, this provision is the same for both state and federal purposes.

However, a corporation may make a section 338 election for federal purposes but not for Wisconsin, and vice versa. Although sec. 71.30(1)(a), Wis. Stats. (1989-90), requires a corporation to use the same method of accounting for both state and federal purposes, a section 338 election is not considered to be a method of accounting. Therefore, the same election does not have to be made for federal and state purposes.

QUESTION 2: How is a section 338(h)(10) election made for Wisconsin purposes?

ANSWER 2: If the same election is being made for federal and state purposes, a separate election is not required for Wisconsin. However, the corporations involved must file a complete copy of their federal returns and all attachments with their Wisconsin returns. Therefore, the target corporation must attach a copy of the federal Form 8023 and any additional data and materials required to be filed with that form to the final Wisconsin return of the old target and to the first return of the new target. The selling corporation must also attach a copy of the federal Form 8023 to its Wisconsin return.

To make a different election for state purposes than that made for federal purposes, the target corporation and the selling corporation must attach a statement to the Wisconsin returns being filed. If making a section 338(h)(10) election for Wisconsin purposes but not federally, the statement must include the information required by federal Form 8023. The election must be made within the time prescribed by federal law. Generally, this is the 15th day of the 9th month beginning after the month in which the acquisition date occurred. Once made, the election is irrevocable.

QUESTION 3: How is the result of a section 338(h)(10) election reflected on the Wisconsin corporation franchise or income tax returns of the corporations involved in such a transaction?

ANSWER 3: Since Wisconsin is a separate entity state (that is, combined or consolidated returns are not allowed), each corporation must file a Wisconsin return if it has a Wisconsin filing requirement. Assuming all three corporations in the above example have a Wisconsin filing requirement, the returns required for Wisconsin are as follows:

Corporation P: A return for the 1989 calendar year is required. The net income (loss) on this return is unaffected by the section 338(h)(10) election.

Corporation T: Two short-period returns, covering the same periods as the federal returns, are required. The gain on the deemed sale of its assets is reported on the first return and the stepped-up basis in the assets is recognized on the second return. Corporation T will pay any tax due on the deemed sale. Both returns are due on the corresponding federal due date(s), including applicable extensions.

Corporation S: A return for the 1989 calendar year is required. The gain on the sale of the stock of Corporation T is excluded from the computation of Wisconsin net income.

QUESTION 4: If a section 338(h)(10) election is made for federal purposes but not for Wisconsin, how is this difference reflected on the Wisconsin franchise or income tax returns?

ANSWER 4: Both the target corporation and the selling corporation must attach statements to their Wisconsin franchise or income tax returns, explaining that the transaction is being treated as a stock

sale for Wisconsin purposes rather than as a sale of assets. Assuming all three corporations in the above example have a Wisconsin filing requirement, the returns required for Wisconsin are as follows:

Corporation P: A return for the 1989 calendar year is required. The net income (loss) on this return is unaffected by the section 338(h)(10) election.

Corporation T: Two short-period returns, covering the same periods as the federal returns, are required. The taxable year for Wisconsin purposes is the taxable period upon the basis of which the taxpayer computes its income for federal income tax purposes. Sec. 71.22(10), Wis. Stats. (1989-90). The gain on the deemed sale of the assets is subtracted from federal taxable income on the first return, and the assets will not receive a basis adjustment on the second return. Both returns are due on the corresponding federal due date(s), including applicable extensions.

Corporation S: A return for the 1989 calendar year is required. The \$50,000 gain on the sale of the stock of Corporation T is added to federal taxable income to arrive at Wisconsin net income.

QUESTION 5: If a section 338(h)(10) election is made for Wisconsin purposes, must the new target corporation compute depreciation under the law in effect when the old target originally placed the property in service or when the deemed asset purchase occurs?

ANSWER 5: The new target corporation computes depreciation on the stepped-up (or stepped-down) basis of the assets under the law in effect when the deemed purchase occurs. In addition, temporary federal regulations provide that the new target corporation generally may make new elections under IRC sec. 168 without regard to the elections made by the old target. For purposes of the "antichurning" rules, the old target is not a related person with respect to the new target corporation. Temporary Regulation sec. 1.338-4T(1)(2), Question and Answer 2. This treatment also applies for Wisconsin purposes.

QUESTION 6: If a section 338(h)(10) election is made for Wisconsin purposes, what is the post-transaction basis of the assets in the new target corporation's property factor for apportionment purposes?

ANSWER 6: The post-transaction basis of the assets for apportionment purposes is the stepped-up (or stepped-down) basis of the assets in the deemed purchase, computed without regard to accumulated depreciation. Therefore, the year-end balances for owned property on the final Wisconsin return of the old target will differ from the beginning balances for that property on the first Wisconsin return of the new target corporation.

QUESTION 7: If a section 338(h)(10) election is made for Wisconsin purposes, is the gain or loss on the deemed sale of the business assets included in the old target corporation's sales factor for apportionment purposes?

ANSWER 7: The deemed sale of inventory is included in the old target corporation's sales factor. However, the gain or loss on the deemed sale of the old target's other tangible business assets is not included in the sales factor. For purposes of the sales factor, sales include gross receipts from the sale of inventory. Sec. 71.25(9)(e), Wis. Stats. (1989-90). Sales do not include gross receipts and gain or loss from the sale of tangible business assets other than sales of inventory, scrap, or by-products or from the operation of a farm, mine, or quarry. Sec. 71.25(9)(f), Wis. Stats. (1989-90).

QUESTION 8: If a section 338(h)(10) election is made for Wisconsin purposes, is the transaction subject to Wisconsin sales or use taxes?

ANSWER 8: No, the transaction is not subject to Wisconsin sales or use taxes. Wisconsin sales tax is imposed on a retailer's gross receipts from the sale of tangible personal property in Wisconsin, while use tax is imposed on the purchase of tangible personal property stored, used, or consumed in Wisconsin if no state sales or use tax was previously paid. Secs. 77.52(1) and 77.53(1), Wis. Stats. (1989-90). Although treated as the sale of the target corporation's assets for franchise or income tax purposes, the transaction actually is a sale of stock and is treated as such for sales and use tax purposes. Since stock is an intangible asset, the transaction is not subject to Wisconsin sales or use taxes.

□

2. Wisconsin Tax Treatment of Qualified REIT Subsidiaries

STATUTES: Section 71.26(2)(b), Wis. Stats. (1989-90)

NOTE: This Tax Release applies for taxable years beginning after December 31, 1986.

BACKGROUND: For taxable years beginning after December 31, 1986, Internal Revenue Code section 856(i) provides that a corporate subsidiary of a real estate investment trust (REIT) is not treated as a separate entity, and all of its assets, liabilities, and items of income, deduction, and credit are treated as attributes of the REIT. This treatment applies to a qualified REIT subsidiary, which is any corporation if 100 percent of the stock of such corporation is held by the REIT at all times during the period the corporation was in existence.

FACTS: REIT and its wholly-owned subsidiary, REITSUB, are both entities which are organized outside Wisconsin and do not transact any business in Wisconsin. REITSUB owns 100 percent of WISC, a corporation which owns real estate in Wisconsin. In addition, REITSUB owns all the stock of other similar corporations in other states.

For federal income tax purposes, REIT, REITSUB, WISC, and the other subsidiaries of REITSUB are required to be treated as part of the REIT itself. Accordingly, REITSUB, WISC, and the other subsidiaries of REITSUB do not have income or loss as separate

entities, since their income and loss is treated as the income or loss of REIT.

QUESTION: What are the reporting requirements of REIT, REITSUB, and WISC for Wisconsin franchise or income tax purposes and how is the income attributable to Wisconsin determined?

ANSWER: For Wisconsin franchise or income tax purposes, REIT, REITSUB, WISC, and the other wholly owned subsidiaries of REITSUB must report as one entity, the same as for federal purposes. The entity must apportion a part of its income to Wisconsin using the standard 3-factor apportionment percentage.

For a corporation, conduit, or common law trust which qualifies as a REIT, net income means the federal real estate investment trust taxable income of the corporation, conduit, or trust as determined under the Internal Revenue Code. Sec. 71.26(2)(b), Wis. Stats. (1989-90). Federal taxable income is determined based on WISC not being treated as a separate entity, REIT being considered the owner of the Wisconsin real estate, and REIT's federal taxable income including the income derived from such real estate.

Therefore, REIT must file, as the taxpayer, using Wisconsin Form 4, and attach any applicable supplemental schedules, including Wisconsin Form 4B, Computation of Wisconsin Apportionment Data.

□

3. Wisconsin Treatment of United Kingdom Advance Corporation Tax (ACT) Refunds

STATUTES: Section 71.26(2)(a), Wis. Stats. (1989-90)

NOTE: This Tax Release applies with respect to the 1987 taxable year and thereafter. As a result of 1987 Wisconsin Act 27 which generally federalized Wisconsin's corporate franchise and income tax law, the Tax Release titled "Taxability of ACT (Advance Corporation Tax) Refunds" which was published in *Wisconsin Tax Bulletin* 44 (October 1985) does not apply to the 1987 taxable year and subsequent taxable years.

FACTS AND QUESTION: The United Kingdom levies the Advance Corporation Tax (ACT) on a corporation upon the payment of a dividend by that corporation to its shareholders. ACT is an advance payment of the corporation's general corporate tax. The Income Tax Convention established between the United States and the United Kingdom provides for a payment of a refund of ACT to qualifying U.S. shareholders. Pursuant to the Income Tax Convention, the Technical Explanation of the Convention, and Revenue Procedure 80-18, the refunded ACT is considered for federal income tax purposes to be a dividend for a U.S. shareholder.

Beginning with the 1987 taxable year, Wisconsin corporate net income is determined under the Internal Revenue Code, with certain modifications. Sec. 71.26(2)(a), Wis. Stats. (1989-90).

As a result of the federalization of Wisconsin's corporate franchise and income tax law, are ACT refunds treated as dividends for Wisconsin purposes for the 1987 taxable year and thereafter?

ANSWER: Yes. For 1987 and subsequent taxable years, ACT refunds are treated as dividends for Wisconsin franchise and income tax purposes to the extent that they are treated as dividends for federal income tax purposes. Wisconsin law does not include any modification which would change the characterization of ACT refunds included in federal gross income; therefore, the same treatment applies for Wisconsin purposes.

As a result of being characterized as dividends, ACT refunds may qualify for the Wisconsin dividends received deduction under sec. 71.26(3)(j), Wis. Stats. (1989-90). This statute permits the deduction of dividends received during the year from payor corporations which meet certain requirements based on the relationship between the payor and the recipient or based on the Wisconsin activity of the payor. For example, a dividend is deductible if paid on common stock and the corporation receiving the dividend owns, directly or indirectly, during the entire taxable year at least 80% of the total combined voting stock of the payor corporation.

□

SALES/USE TAXES

1. Compression Hosiery

STATUTES: Section 77.54(22)(f), Wis. Stats. (1989-90)

NOTE: This Tax Release applies only with respect to sales on or after October 1, 1989.

BACKGROUND: Section 77.54(22)(f), Wis. Stats., as created by 1989 Wisconsin Act 31, exempts from sales and use tax "[a]ntiembolism elastic hose and stockings that are prescribed by a physician and sold to the ultimate consumer."

FACTS AND QUESTION: There are generally 4 maladies which are treated by compression hosiery:

- 1) Embolisms - an embolism is an abnormal circulatory condition in which an embolus (a foreign object, a quantity of air or gas or a bit of tissue or tumor) travels through the bloodstream and becomes lodged in a blood vessel.
- 2) Venous insufficiency - deep venous insufficiency is an abnormal circulatory condition characterized by decreased return of the venous blood from the legs to the trunk of the body.
- 3) Varicose veins - varicose veins are tortuous, dilated veins with incompetent valves. They have various causes and are common, especially in women.

- 4) Tired muscles - persons whose leg muscles tire easily or swell wear various types of support hose.

Some stockings used to treat embolisms are lighter in compression (15-20 mg.) than the venous insufficiency stockings (20-30 mg., 30-40 mg., 40-50 mg., and 50-60 mg.). However, some types of stockings may be used to treat more than one of these maladies.

Which types of compression stockings or hose are exempt from sales and use tax under sec. 77.54(22)(f), Wis. Stats.?

ANSWER: To be exempt from sales and use tax under sec. 77.54(22)(f), Wis. Stats., compression stockings must:

- 1) require a prescription to be sold, and
- 2) be specifically prescribed to treat, prevent or stabilize an embolus.

Therefore, compression stockings and elastic hose that are prescribed to treat embolisms are exempt. Compression stockings and hose prescribed to treat venous insufficiency, varicose veins or tired muscles are taxable.



2. Gross Receipts for Purposes of Wisconsin Sales and Use Tax - Federal Luxury Tax

STATUTES: Section 77.51(4)(a)4, Wis. Stats. (1989-90)

WIS. ADM. CODE: Section Tax 11.26(3)(b), April 1990 Register

BACKGROUND: Effective January 1, 1991, the Revenue Reconciliation Act of 1990 (P.L. 101-508) created a new excise tax imposed on the first retail sale of high-cost cars, boats, aircraft, jewelry, and furs. The tax is equal to 10% of the excess of the sales price over a threshold amount.

QUESTION: Is the 10% luxury tax under secs. 4001 through 4007 of the Internal Revenue Code included in gross receipts or sales price for purposes of imposing Wisconsin sales or use tax?

ANSWER: No. Section 77.51(4)(a)4, Wis. Stats. (1989-90), and sec. Tax 11.26(3)(b), Wis. Adm. Code, provide that "gross receipts" and "sales price" for purposes of imposing Wisconsin sales and use taxes do not include any tax imposed by the United States upon or with respect to retail sales, whether imposed upon the retailer or consumer, if measured by a percentage of sales price or gross receipts and if the retailer is required to pay the tax to the governmental unit which levied the tax.

EXAMPLE: Customer A purchases an automobile for \$40,000 from Retailer B. The luxury excise tax to be paid by Customer A to Retailer B is \$1,000 (\$40,000 - \$30,000 threshold amount X 10%).

Gross receipts for purposes of imposing Wisconsin sales tax is \$40,000.



3. Photographic Services Furnished in Taxable County

STATUTES: Sections 77.52(2)(a)7, 77.71(1) and 77.72(3)(a), Wis. Stats. (1989-90)

BACKGROUND: Section 77.52(2)(a)7, Wis. Stats. (1989-90), provides that the furnishing of photographic services, including the processing, printing and enlarging of film, as well as the service of photographers for the taking, reproducing, and sale of photographs, is subject to Wisconsin sales or use tax.

Section 77.71(1), Wis. Stats. (1989-90), provides that a county sales tax of 1/2% is imposed on the gross receipts from furnishing services described in sec. 77.52(2), Wis. Stats. (1989-90), in a county that has adopted the county tax. For purposes of determining in what county the sale of services takes place, sec. 77.72(3)(a), Wis. Stats. (1989-90), provides that services have a situs at the location where they are furnished.

FACTS AND QUESTION 1: A photographer is hired to take photographs of a wedding that takes place in a taxable county. The photographer processes the film and prints the photographs at his business location in a nontaxable county. The newlyweds take possession of the photographs in a taxable county.

Is the charge by the photographer for providing the photographic services subject to the county sales tax?

ANSWER 1: Yes. This service is considered furnished at the place where the buyer takes possession of the related property (i.e., pictures). Because the buyer takes possession of the photographs in a taxable county, the sale has a situs in a taxable county and the gross receipts from furnishing the photographic services are subject to the county sales tax.

FACTS AND QUESTION 2: Assume the same facts as in Facts and Question 1 except that the newlyweds take possession of the photographs at the photographer's business location in a nontaxable county.

Is the charge by the photographer for providing the photographic services subject to the county sales tax?

ANSWER 2: No. Because the buyer takes possession of the photographs in a nontaxable county, the sale has a situs in a nontaxable county and the gross receipts from furnishing the photographic services are not subject to the county tax.

FACTS AND QUESTION 3: A photographer contracts with a Wisconsin calendar publisher to take photographs of various scenic areas in

Wisconsin. The photographer's place of business is in a nontaxable county. The calendar publisher is located in a taxable county. The photographer delivers the photographs to the calendar publisher. The publisher decides not to use any of the photographs and returns them to the photographer. The photographer bills the publisher \$500 for the photographer's services furnished.

Is the \$500 charge subject to the county sales tax?

ANSWER 3: Yes. This service is considered furnished at the place where the publisher takes possession of the photographs for approval. Because the publisher took possession of the photographs in a taxable county, gross receipts from furnishing the photographic service are subject to the county sales tax.

FACTS AND QUESTION 4: Assume the same facts as in Facts and Question 3 except that the publisher reviews the photographs at the photographer's place of business.

Is the \$500 charge subject to the county sales tax?

ANSWER 4: No. Because the publisher took possession of the photographs for approval in a nontaxable county, gross receipts from furnishing the photographic service are not subject to the county sales tax.



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 "W" is for "Wisconsin," the first two digits are the year the ruling becomes available for publication (80 days after the ruling is issued to the taxpayer), the next two digits are the week of the year, and the last three digits are the number in the series of rulings in that year. 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 Wisconsin Department of Revenue," contains additional information about private letter rulings.

The following ruling is included:

W9106001, November 15, 1990

TYPE TAX: Sales/Use

STATUTES: Sections 77.51(20) and 77.52(1) and (2)(a)2 and 9, Wis. Stats. (1987-88)

ISSUE: Mobile home lot rental

This letter responds to your request for a private letter ruling regarding the rental of mobile home lots for Wisconsin sales and use tax purposes.

FACTS

You own a mobile home. You rent a lot on which your mobile home is affixed in a mobile home park. The mobile home is permanently affixed to the land and is connected to utilities. The rental of the lot includes water and sewer services. No other services or facilities are provided (i.e., electricity, garbage removal, clubhouse, pier, raft, pool, laundry room, picnic tables, playground, or other improvements).

RULING REQUEST

You ask whether the rental of the mobile home lot is subject to Wisconsin sales tax.

RULING

The gross receipts from the rental of mobile home lots, which are not part of a campground facility that offers others services or facilities, are not subject to Wisconsin sales tax.

ANALYSIS

Section 77.52(1), Wis. Stats. (1987-88), provides that a sales tax shall be imposed on the gross receipts from the lease or rental of tangible personal property at retail in Wisconsin. Section 77.51(20), Wis. Stats. (1987-88), defines "tangible personal property" to mean all tangible personal property of every kind and description. Land is commonly known to be real property.

Section 77.52(2)(a)2, Wis. Stats. (1987-88), imposes a sales tax on the sale of admissions to amusement, athletic, entertainment or recreational events or places (such as a campground).

Section 77.52(2)(a)9, Wis. Stats. (1987-88), provides that parking or providing storage space for motor vehicles is subject to sales tax. Motor vehicle is defined in sec. Tax 11.83(1), Wis. Adm. Code, as a self-propelled vehicle designed for and capable of transporting persons or property on a highway.

Because the rental of the lot in question is the rental of real property, rather than tangible personal property, sec. 77.52(1), Wis. Stats. (1987-88), does not apply. Because the fee paid to the mobile home park owner is for rent only and not for recreational services or facilities, sec. 77.52(2)(a)2, Wis. Stats. (1987-88), does not apply. Because the mobile home in question is not a motor vehicle, as defined in sec. Tax 11.83(1), Wis. Adm. Code, sec. 77.52(2)(a)9, Wis. Stats. (1987-88), does not apply. Therefore, the rental of your mobile home lot is not subject to Wisconsin sales tax.

