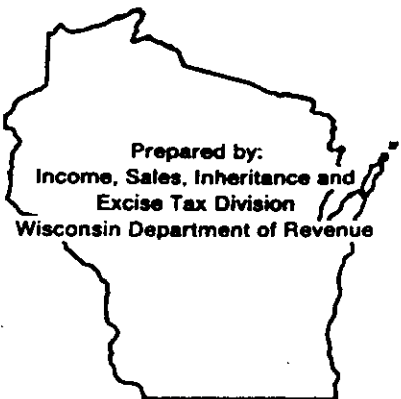


# WISCONSIN TAX BULLETIN

October 1991  
NUMBER 74

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## ☐ NEW TEMPORARY SURCHARGE AFFECTS CERTAIN TAXPAYERS

### Background

A recycling fee that was to apply for taxable years ending after April 1, 1991, and before April 1, 1993, was repealed by 1991 Wisconsin Act 39 and replaced with a "temporary surcharge." The temporary surcharge is effective for taxable years ending after April 1, 1991, and before April 1, 1999.

Corporations; partnerships; individuals, estates, and trusts having trade or business income; and exempt organizations having unrelated business taxable income are subject to the temporary surcharge. The temporary surcharge is imposed on the gross tax liability of a corporation, on the net income of a tax-option (S) corporation, and on the net business income of an individual, partnership, estate, or trust. For years that end after April 1, 1991, and before April 1, 1992, the temporary surcharge ranges from a minimum of \$25 to a maximum of \$9,800. The temporary surcharge is due on the date on which the entity's Wisconsin franchise or income tax return is due.

The Department of Revenue is required to deposit the temporary surcharge, interest, and penalties collected in the recycling fund under sec. 25.49, Wis. Stats.

The following describes how the temporary surcharge must be reported:

#### **Fiscal Year Filers**

All entities filing an income or franchise tax return on a fiscal year basis whose taxable year began in 1990 and ends during the period from April through November of 1991, must report the temporary surcharge on a special form (1990 Form S, Wisconsin Temporary Surcharge). In October of 1991 the department mailed forms to entities which may be subject to the temporary surcharge based on prior year income or franchise tax returns filed. Copies of Form S and instructions appear on pages 45 through 50 of this Bulletin.

Since forms were not available until October 1991, entities having a fiscal year ending in April, May, June, and July of 1991 were granted an *automatic extension* until November 15, 1991, to file and pay the temporary surcharge. A letter granting the automatic extension was sent to approximately 13,000 entities in September. No interest, penalties, or late filing fees will be charged on the temporary surcharge during this special extension period.

For taxable years beginning on or after January 1, 1991, all entities except partnerships will report the temporary surcharge on their regular income or franchise tax return, as described below for calendar year filers. Partnerships must report the temporary surcharge on Form 3S, Wisconsin Partnership Temporary Surcharge.

#### **Calendar Year Filers**

With the exception of partnerships, entities filing a Wisconsin income or franchise tax return on a calendar year basis will report the temporary surcharge directly on their regular return. A special form will not be required. For example, a corporation filing Wisconsin Form 5 for the calendar year 1991 will enter the temporary surcharge directly on Form 5.

Partnerships filing on a calendar year basis must use Form 3S to report the temporary surcharge.

#### **□ WISCONSIN HAS NEW MAGNETIC MEDIA REPORTING REQUIREMENTS**

Beginning January 1, 1992, persons (including corporations) required to file federal wage statements and information returns on magnetic media with the Internal Revenue Service must also file comparable Wisconsin forms on magnetic media with the Wisconsin Department of Revenue. The department has developed an informational publication, Publication 509, which explains which forms may have to be filed on magnetic media for Wisconsin, magnetic media requirements, and when and where to file on magnetic media for Wisconsin. A copy of Publication 509 appears on pages 51 and 52 of this Bulletin.

## ❑ WISCONSIN JOINS ELECTRONIC FILING TEST PROJECT

The Internal Revenue Service (IRS) and the Federation of Tax Administrators (FTA) are co-sponsoring a Joint Electronic Filing (JELF) project for the 1992 filing season. The goal of JELF is to provide one-stop service to the taxpayer by allowing both federal and state income tax returns to be submitted electronically to the IRS by tax preparers. The IRS will serve as a conduit for state income tax return data which will be retransmitted to the state revenue department.

Wisconsin is one of seven states which will participate in the project in 1992. (The others are Kansas, Maine, New York, North Carolina, South Carolina, and West Virginia.) Three tax practitioners have been selected to participate in the pilot in Wisconsin. It is projected that between 3,000 and 5,000 Wisconsin returns will be electronically filed in 1992. In the 1991 season over 100,000 federal returns were filed electronically out of Wisconsin.

In order to use the JELF process, a taxpayer must file both the federal and Wisconsin return electronically. The Wisconsin return (Form 1, 1A, or WI-Z) must be a refund return, but the federal return can be either a refund or balance due return. The taxpayer must also send a paper "signature document" to the department and attach any W-2's to it.

Wisconsin tax refunds from electronically filed returns should be in the taxpayer's hand in from one to three weeks after the date the return is electronically transmitted to the IRS. Wisconsin will not offer direct deposit of refunds in 1992, although it is planned in future years.

Electronic filing is beneficial to tax practitioners because only one transmission is needed, the effort of producing and mailing paper returns is eliminated, and an acknowledgment of the receipt of the return is received. Taxpayers benefit by receiving a faster refund. The department benefits because electronic filing eliminates the mail opening, coding, validating, keying, alphabetizing, and filing steps of return processing.

The Department of Revenue is currently developing detailed procedures and specifications needed to implement this process. If you have questions or comments regarding this project, please contact Vicki Siekert in the Tax Processing Bureau at (608)266-9635.

## ❑ FORMS CHANGES FOR 1991

Following is a brief description of the major changes to the Wisconsin individual income tax, homestead credit, and farmland preservation credit forms for 1991.

### 1. Forms 1, 1A, and 1NPR

- Line 17 is added to Form 1 (line 44 to Form 1NPR) for reporting the temporary surcharge.
- Line 21 of Form 1A (line 24 of Form 1 and line 51 of Form 1NPR) is revised to refer to the federal basic credit for the computation of the Wisconsin earned income credit.
- The residence questionnaire (page 4 of Form 1NPR) is revised.

### 2. Schedules H and FC

- Line 8, Schedule 1 of Schedule H is revised (line 0, Schedule 2 of Schedule FC is added) to include nontaxable state and municipal bond interest in the computation of household income.

Proof copies of the 1991 Forms WI-Z, 1A, 1, and 1NPR and Schedules H and FC can be found on pages 32 to 44 of this Bulletin. The copies are subject to further revision.

**□ 1991 PACKAGE WI-X WILL BE AVAILABLE**

The department will again be offering Package WI-X which will contain actual size copies of most 1991 Wisconsin individual, fiduciary, and corporation income tax, gift tax, inheritance tax, motor fuel tax, sales tax, and withholding tax forms.

Package WI-X should be available by January 31, 1992. The cost is \$7.00 per copy. It may be ordered on the bulk order blank (Form P-744). The bulk order blank will be mailed in early November. See the following article for more information on bulk orders.

If you do not receive an order blank and wish to purchase copies of 1991 Package WI-X, requests indicating the number of copies along with the amount due should be mailed to Wisconsin Department of Revenue, Shipping and Mailing Section, P.O. Box 8903, Madison, WI 53708.

**□ BULK ORDERS OF TAX FORMS**

In early November, the department will mail the order blank (Form P-744) which tax preparers should use to request bulk orders of 1991 Wisconsin income tax forms. There is a handling charge on these orders.

The department will also mail order blanks (Forms P-744b and P-744L) which banks, post offices, and libraries should use to request bulk orders of 1991 Wisconsin income tax forms. No charge is made for forms used for distribution to the general public (for example, in a bank, library, or post office).

This year's mailing list for bulk order blanks contains the names of all persons and organizations who placed orders for 1990 forms. If you are not on this mailing list and do not receive a Form P-744, P-744b, or P-744L, you may request the bulk order blank by contacting any department office or by writing to Wisconsin Department of Revenue, Shipping and Mailing Section, P.O. Box 8903, Madison, WI 53708. You may also call the Shipping and Mailing Section at (608) 267-2025.

Orders should be placed as early as possible after you receive the order blank. Orders are expected to be filled in late December and early January. Package WI-X will be mailed separately in late January.

**□ TAX REPORT EXPLAINS NEW SALES/USE TAX LAWS**

The Wisconsin Legislature enacted many changes to Wisconsin tax laws in 1991, as described in *Wisconsin Tax Bulletin* 73, dated August 1991. The September Tax Report gives a more detailed explanation of the changes to the sales and use tax laws. See pages 53 to 56 of this Bulletin for a copy of the September Tax Report, which was sent in September to monthly and quarterly sales and use tax filers.

**□ CHANGE IN IRS STANDARD MILEAGE RATE ALSO APPLIES FOR WISCONSIN FOR 1991**

The optional standard mileage rate specified by the IRS for computing business automobile expenses for 1991 also applies for Wisconsin.

The IRS increased the rate from 26¢ per mile for all business miles driven, to 27.5¢ per mile. The 27.5¢ per mile rate is allowed without regard to whether the automobile was previously considered fully depreciated.

If the standard mileage rate of 27.5¢ per mile is used, depreciation is considered to be allowed at 11¢ per mile for 1991, the same as for 1990. However, no portion of the 27.5¢ per mile rate is considered to be depreciation after the adjusted basis of the automobile reaches zero.

The mileage rate used to calculate automobile expenses for charitable deduction purposes, which remains at 12¢ per mile in 1991, also applies for Wisconsin.

For both federal and Wisconsin purposes, a rate of 9¢ per mile is used in 1991 to calculate automobile expenses for medical and moving expense deductions.

#### **□ REMINDER: FILING DEADLINES FOR 1990 HOMESTEAD AND FARMLAND PRESERVATION CREDIT CLAIMS**

December 31, 1991, is the deadline for filing a 1990 homestead credit claim. Farmland preservation credit claims for 1990 must be filed no later than 12 months after the farmland owner's 1990 taxable year ends. December 31, 1991, is the deadline for filing a 1990 farmland preservation credit claim for farmland owners who are calendar year taxpayers.

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

#### **□ CRIMINAL ENFORCEMENT ACTIVITIES**

##### **Income Taxes**

An Outagamie County Circuit Court jury has returned guilty verdicts against an Appleton man on three counts of failing to file Wisconsin state income tax returns.

Alois C. Fischer, 1713 East Glendale Avenue, Appleton, was found guilty on all counts, and Judge Harold V. Froehlich ordered a presentence investigation.

Criminal charges were filed against Fischer for failing to file state income tax returns for the years 1985, 1986, and 1987 when he had gross income in excess of \$39,000 for 1985, \$14,000 for 1986, and \$23,000 for 1987.

Failing to file a Wisconsin state income tax return at the time required by law is a crime punishable by a fine of not more than \$10,000 or imprisonment not to exceed nine months, or both. In addition to the criminal penalties, Wisconsin law provides for substantial civil penalties on the civil tax liability.

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A Milwaukee County man has been charged with criminal violations of the Wisconsin state income tax law.

Gary T. Black, president of Mobile Telephone Company, Inc., 1400 N. Sixth Street, Milwaukee, was charged in Milwaukee County Circuit Court with five misdemeanor counts of failing to make deposits of state income taxes withheld from the wages of his employees during 1988. He was also charged with one felony count of theft with the intent to convert more than \$9,900 in withheld taxes to his own use in 1987 and 1988.

Failing to pay over state income taxes withheld from employees' wages is a crime punishable by a fine not to exceed \$10,000 or nine months in jail, or both, and theft of withheld taxes is a felony punishable by a fine not to exceed \$10,000 or ten years imprisonment, or both.

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### Homestead Credit

A Milwaukee man has been ordered to serve probation for filing false Wisconsin homestead credit claims.

Guy Alfred Ebbe, 905A East Center, Milwaukee, was convicted on three counts of filing false and fraudulent claims in 1987 and 1988 after he pled guilty to the charges. Milwaukee County Circuit Judge Laurence C. Gram, Jr. sentenced Ebbe to five years probation and ordered him to make restitution in the amount of \$7,230 as a condition of probation.

Filing a false Wisconsin homestead credit claim is a felony punishable by a fine not to exceed \$10,000 or imprisonment not to exceed five years, or both.

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### Sales and Use Taxes

Five Outagamie County people have been charged with criminal violations of the Wisconsin sales and use tax law.

Charged in Outagamie County Circuit Court were Harlow C. Drehpal, 1513 Lawe Street, Kaukauna; Wayne E. Glatz, 11318 CTH E, Kaukauna; Joseph R. Kunstman, 828 Leminwah, Appleton; Sandra K. Vandenbosch, W2677 Hillside Drive, Appleton; and Colleen M. Vanderloop, 918 Grignan Street, Kaukauna.

Each person was charged with filing a fraudulent sales/use tax report and underpaying the tax due in connection with an application for a motor vehicle title registration for a motor vehicle purchased from a private party.

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

### ❑ DEPARTMENT SENDS PARTNERCARE ENROLLMENT CARDS

In October 1991, the department mailed PartnerCare enrollment cards and an explanatory letter to approximately 135,000 homestead credit claimants. A copy of the letter appears on pages 57 and 58 of this Bulletin.

The department is required by law to mail these PartnerCare cards and material. The October 1991 mailing was sent to individuals who qualified for homestead credit for 1990, who were age 65 or older as of December 31, 1990, and whose 1990 household income did not exceed \$19,154.

For more information or assistance in obtaining an original card or replacement card, contact the local Office on Aging (see listing on page 2 of the explanatory letter).

### ❑ NEW AND REVISED ADMINISTRATIVE RULES SUMMARIZED

The *Wisconsin Tax Bulletin* regularly includes a listing of administrative rules in the various stages within the process of being "adopted," or put into effect as part of the "Tax" section of the Wisconsin Administrative Code. The rules are printed and distributed to subscribers and certain Department of Revenue employees and tax services, shortly after the effective date of adoption.

The final step in the adoption process includes sending an order to adopt the rule to the Secretary of State's Office and a copy of the approved rule to the Revisor of Statutes Bureau for printing. Beginning with this issue, for each rule being adopted the *Wisconsin Tax Bulletin* will include a brief description of the new rule or the substantive changes to the existing rule, and the effective date or anticipated effective date of the change or creation. In addition, the parts of any rule being amended will be published, showing any deletions from or additions to the previous rule.

Included in this issue is information regarding sections Tax 4.05, 4.54, 4.55, 9.68, and 11.03. The effective date for each of these sections is October 1, 1991.

Tax 4.05, relating to the refund of motor fuel and special fuel taxes consumed in operating a taxicab, is created to reflect the department's position as to what qualifies as a taxicab for purposes of obtaining refunds of motor fuel and special fuel taxes under sec. 78.75(1m)(a)1, Wis. Stats. Currently, there is no definition of taxicab provided by statute.

Tax 4.54 is created to clarify when security is required, the amount of security, types of security, and return of security with respect to the issuance of motor fuel, special fuel, and general aviation fuel licenses. The department may require any person liable for these taxes to post security in an amount not to exceed limits set by statute.

Tax 4.55 is created to clarify that a change in ownership of a business requires the application for a new fuel tax license as provided by statute and gives examples where a new license is or is not required.

Tax 9.68 is created to clarify that a change in ownership of a business requires the application for a new cigarette permit as provided by statute and gives examples where a new permit is or is not required.

Tax 11.03(title) is amended to add sec. 77.52(2)(a), Wis. Stats., which relates to taxable services. Tax 11.03(1)(a) and (2)(a)3 are amended to update language and clarify the department's position that not all rentals of auditoriums and gymnasiums by a school are exempt from tax. Tax 11.03(2)(a)4 is renumbered and new subd. 4 is created to clarify that the rental of auditoriums or gymnasiums for resale is exempt from tax. Tax 11.03(2)(b) is repealed and recreated to clarify that services subject to tax by schools include taxable services under sec. 77.52(2)(a), Wis. Stats., and that rental of auditoriums and gymnasiums is taxable if used by persons for self-enjoyment rather than for resale. Ball fields are added to the list of recreational facilities. Tax 11.03(3)(a) and (4)(c) are amended to update language per Legislative Council Rules Clearinghouse standards. The amended sections are shown below.

Tax 11.03(title) ELEMENTARY AND SECONDARY SCHOOLS AND RELATED ORGANIZATIONS. (ss. 77.52(2)(a) and 77.54(4), (9) and (9a), Stats.)

(1)(a) In this ~~rule~~ section, elementary school means a school providing any of the first 8 grades of a 12 grade system and kindergarten where applicable. Secondary school means a school providing grades 9 through 12 of a 12 grade system and includes the junior and senior trade schools described in s. 119.30, Stats.

(2)(a)3 Rental of auditoriums or gymnasiums, including any charges for lights, heat, janitor fees and equipment, when used for other than recreational, athletic, amusement or entertainment purposes.

Example: A school auditorium is rented to a religious group which conducts a religious revival. The gross receipts from the rental are exempt.

(3)(a) The sale of class rings, photographs or caps and gowns rented or sold to students by retailers or photographers whereby the school acts as a collection agent for the seller,

whether or not the school receives a commission for ~~such the~~ collection. The retailer ~~(e-g-r,~~  
a, such as a photographer), is subject to the tax on these sales.

(4)(c) Related organizations of private or public schools having certificates of exempt status. ~~Such organizations include, such as~~ parent-teacher associations and student organizations.

#### **☐ TELEPHONE INFORMATION AVAILABLE ON HOW TO OBTAIN COPIES OF TAX RETURNS**

The Wisconsin Department of Revenue's Central Files Section in Madison has installed an answering machine to provide a taped informational message on how to obtain copies of previously filed tax returns.

Copies of individual income tax returns may be requested only by the individual who filed and signed the return. Corporation, partnership, sales, and withholding tax returns may be requested by a current officer, current partner, or individuals listed on the Seller's or Withholding Permit application, respectively.

The telephone message provides information on who may request copies, how and where to request copies, what information is available, and the cost of providing this information.

Requests for copies of tax returns must be made in person or in writing, to allow verification of the identity of the requester. The taped message is intended only to provide information on how to properly make a request for copies.

To reach the informational message, call (608) 267-1266.

#### **☐ TOPICAL/COURT CASE INDEX AVAILABLE**

If you need an easy way to research Wisconsin tax questions, you should consider subscribing 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, 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, 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, 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, plus sales tax. To order your copy, complete the order blank that appears on page 59 of this Bulletin. The order blank may also be used for subscribing to the Wisconsin Tax Bulletin and for ordering the Wisconsin Administrative Code.

#### **☐ 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 individual 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.

#### **□ U.S. GOVERNMENT BANKCARD**

The federal government uses a variety of credit cards to facilitate government purchases and travel by its employees. Probably the best-known is the Diner's Club card which is used by federal employees to pay for work-related travel and lodging. Also in widespread use are various gasoline and fleet credit cards used when driving government vehicles on business.

Another type of credit card that has been used by federal employees for the past two years is the International Merchant Purchase Authorization Card (I.M.P.A.C.). There are now 30,000 I.M.P.A.C. Visa cards in use, accounting for \$11 million in federal purchases each month.

The card is distinctive. It is designed on the blue field of stars from the U.S. flag and is decorated with the Great Seal of the U.S. On the front of the card at the top are the words "United States of America, I.M.P.A.C., For Official Use Only." An employee's name and the expiration date are embossed on the front, along with the words "U.S. Government Tax Exempt." A Visa symbol is prominent. All of the card numbers begin with "4716," which is the bank identification number for the issuing bank, Rocky Mountain BankCard System Inc. While the name of the issuing government agency is not written on the card, the next two letters of the card number will identify the principal federal agency.

This card is meant to facilitate routine federal government purchases. Purchases made with this card are exempt from Wisconsin's sales tax under sec. 77.55(1), Wis. Stats. (1989-90), which provides a sales tax exemption for sales to the United States.

For additional information, see the tax release titled "U.S. Government Bankcard Charges" in *Wisconsin Tax Bulletin* 57, July 1988.

#### **□ TAX RETURN STATISTICS FOR 1990-91**

There were 2,533,000 Wisconsin individual income tax returns filed during the period July 1, 1990, to June 30, 1991. This compares to 2,453,000 income tax returns filed for the prior 12 months. The 2,533,000 returns were filed by 3,651,000 individuals.

There were 259,000 homestead credit claims and 25,000 farmland preservation credit claims filed during the year. This compares to 253,000 homestead credit claims and 24,000 farmland preservation credit claims filed for the prior year.

Taxpayers were issued a total of 1,723,000 income tax refunds during the 12 months ending June 30, 1991, for an average refund of \$296. The average refund for the prior year was \$288.

Homestead credit refunds averaged \$438 per claimant, an increase from the average refund of \$427 issued last year. About 49% of the claimants were age 65 or older. Of all individuals claiming homestead credit, 48% were renters and 52% were homeowners.

An average farmland preservation credit of \$1,115 was issued to each claimant. The average payment for 1990 was \$1,086.

An itemized deduction credit was claimed by 22% of the taxpayers on 1990 tax returns. The average credit allowed was \$326.

**□ CONTRIBUTIONS TO ENDANGERED RESOURCES PROGRAM INCREASE**

The 1990 Wisconsin income tax returns, Forms WI-Z, 1A, 1, and 1NPR, included a line for taxpayers to contribute to the Wisconsin Endangered Resources Fund. These donations either reduce a taxpayer's income tax refund or increase the amount of income tax owed. Amounts contributed go to the Wisconsin Department of Natural Resources to help protect and care for Wisconsin's endangered species, nongame wildlife, and rare plant and animal habitats.

On 1990 Wisconsin income tax returns filed, 66,473 taxpayers contributed \$679,489 to the Endangered Resources Fund. This compares with 1989 income tax returns, where 62,494 taxpayers contributed \$630,521.

**□ TAXPAYERS DESIGNATE \$431,478 TO STATE ELECTION CAMPAIGN FUND**

The 1990 Wisconsin income tax returns, Forms WI-Z, 1A, 1, and 1NPR, included a box for taxpayers to designate \$1 to the State Election Campaign Fund. If the election box was checked, there was no increase in tax liability or reduction in refund for making the designation.

During the period July 1, 1990, to June 30, 1991, taxpayers designated \$431,478 to the election campaign fund on their Wisconsin tax returns. This compares to \$426,309 for the prior 12 months ending June 30, 1990.

**□ 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

**□ NEW ISI&E DIVISION RULES AND RULE AMENDMENTS IN PROCESS**

Listed below, under Parts A and B, 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 October 1, 1991. For the period from July 2, 1991 to October 1, 1991, Part C lists new rules and amendments which became effective, Part D lists rules withdrawn from promulgation, and Part E lists emergency rules which expired. ("A" means amendment, "NR" means new rule, "R" means repealed, and "R&R" means repealed and recreated.)

**A. Rules at or Reviewed by Legislative Council Rules Clearinghouse**

- 11.05 Governmental units-A
- 11.33 Occasional sales-general-A
- 11.34 Sales of 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 Legislative Standing Committee**

- 11.01 Sales and use tax return forms-A
- 11.47 Commercial photographers and photographic services-A

**C. Rules Adopted in Period From July 2, 1991 to October 1, 1991 (including effective date)**

- 4.05 Taxicabs-NR (10/1/91)
- 4.54 Security requirements-NR (10/1/91)
- 4.55 Ownership and name changes-NR (10/1/91)
- 9.68 Ownership and name changes-NR (10/1/91)
- 11.03 Elementary and secondary schools and related organizations-A (10/1/91)

**D. Rules Withdrawn From Promulgation**

- 3.11 Member of a reserve component of the armed forces serving in the Desert Shield or Desert Storm theater of operations-NR (withdrawn 9/18/91)

**E. Emergency Rules Expired**

- 3.11 Member of a reserve component of the armed forces serving in the Desert Shield or Desert Storm theater of operations-NR (expired 9/26/91)

**□ 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**

John A. Anderson (p. 12)  
Indians -- other

Edward J. and Eleanor L. Blakely, et al. (p. 13)  
Minimum tax -- 1986

A. Yale Gerol (p. 13)  
Compensation for services

Gary Lotzer (p. 14)  
Refunds, claims for -- statute of limitations

Roger R. and Laverne A. Zerbel (p. 15)  
Refunds, claims for -- statute of limitations

#### **Corporation Franchise or Income Taxes**

Chilstrom Erecting Corp. (p. 16)  
Unitary business

#### **Sales/Use Taxes**

Morton Buildings, Inc. (p. 17)  
Use -- does not include

#### **Other**

Mayfair Chrysler-Plymouth, Inc. (p. 18)  
Open records law

#### **INDIVIDUAL INCOME TAXES**

**Indians -- other.** *John A. Anderson vs. Wisconsin Department of Revenue* (Court of Appeals, District III, July 2, 1991). This is an appeal from a judgment of the Circuit Court for Sawyer County, which affirmed the Wisconsin Tax Appeals Commission determination that the taxpayer's income is subject to state income tax. The issues in this case are:

- A. Whether the taxpayer, although he resides off-reservation in Wisconsin, is immune from state income tax for his on-reservation employment, based on *McClanahan v. State Tax Comm'n*, 411 U.S. 164 (1973).
- B. Alternatively, whether state income tax on Indian income from reservation employment is an unreasonable interference with tribal sovereignty and has been preempted by federal law.

The taxpayer is an enrolled member of the Lac Courte Oreilles Band of the Lake Superior Chippewa Indians. The tribe employed him to work on the reservation in various educational activities. He is a resident of Wisconsin, living in Hayward, and is not domiciled on the reservation.

The taxpayer did not file Wisconsin income tax returns for the calendar years 1980 through 1983. He subsequently filed returns showing his income from off-reservation activities but exempting his on-reservation educational activities.

The Court of Appeals concluded as follows:

- A. *McClanahan* is irrelevant to the issue in this case. In *McClanahan*, the individual lived and worked on the reservation. The Court specifically limited its holding, stating, "this case involves the narrow question whether the State may tax a reservation Indian for income earned exclusively on the reservation." The Court used the term "reservation Indian" to refer to an Indian living on the reservation. Because the taxpayer lives off-reservation, *McClanahan* does not preclude Wisconsin from taxing his on-reservation income.
- B. Wisconsin's authority to tax income derived from on-reservation employment of a tribal member who resides off-reservation is neither an unreasonable interference with tribal sovereignty nor preempted by federal law.

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

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**Minimum tax — 1986.** *Wisconsin Department of Revenue vs. Edward J. and Eleanor L. Blakely, and Richard N. and Marlene O. Mastenbrook* (Court of Appeals, District IV, August 1, 1991). The department appeals from an order of the Circuit Court for Dane County, which affirmed an order of the Wisconsin Tax Appeals Commission. The issue in the case is whether the taxpayers owe Wisconsin minimum tax for 1986, under sec. 71.60(1), Wis. Stats. (1985-86). See *Wisconsin Tax Bulletin* 70, page 10, for a summary of the Circuit Court decision.

The Circuit Court held that the Commission correctly interpreted Wisconsin law to permit an alternative calculation of federal tax liability without requiring an amended federal tax return. It based its conclusion on the Commission's interpreting sec. 71.60(1), Wis. Stats. (1985-86), to apply Internal Revenue Code sec. 55, as it was amended to December 31, 1986 ("old sec. 55"). The Commission held that the taxpayers did not owe Wisconsin minimum tax for 1986 despite their federal returns showing a federal alternative minimum tax, as long as the total federal income tax liability remains the same as that indicated on the federal income tax forms.

The Court of Appeals concluded that the Circuit Court's opinion correctly states the law.

The department has not appealed this decision.

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**Compensation for services.** *A. Yale Gerol vs. Wisconsin Department of Revenue* (Court of Appeals, District II, May 22, 1991). This is an appeal from an order of the Circuit Court for Racine County, which upheld a Wisconsin Tax Appeals Commission ruling that the department's reallocation of income was proper. The issue on this appeal is whether the department properly reallocated certain income reported by the taxpayer's service corporation to the taxpayer personally.

The taxpayer is a neurosurgeon and neurologist. In 1975, he organized a professional service corporation. The taxpayer entered into an employment contract with the clinic, which provided that he accepted employment with the clinic as its president and principal executive officer. The agreement also obligated him to practice medicine only for the clinic unless otherwise authorized by the clinic's board of directors, and it gave the clinic full supervisory authority over the conditions of his employment. Pursuant to the agreement, all fees engendered by the taxpayer's medical services belonged to the clinic.

In 1984, the taxpayer suffered an arm injury, and as a result, he decided to discontinue his neurosurgery and neurology practice. On August 27, 1984, St. Catherine's Hospital and Medical Center (St. Catherine's) offered to hire him, as an independent contractor, to serve as the hospital's "half-time" medical director. The taxpayer signed his acceptance of this offer on August 31, 1984. On its face, the taxpayer's signature does not indicate that he signed this agreement in any representative capacity. A contemporaneous addendum to this agreement also carried his signature without any such qualification. On April 3, 1985, the parties signed a modification to this agreement, changing the medical director's position from part-time to full-time. Again, the taxpayer did not sign in any representative capacity. Although the agreement did not so provide, St. Catherine's made all payments called for under the agreement to the clinic. The clinic, in turn, reported this income on its 1984-85 corporate income tax returns.

In October 1987, the department issued an assessment to the taxpayer, part of which represented the department's reallocation of the St. Catherine's payments from the clinic to the taxpayer. He appealed to the Commission, which determined that the department correctly reallocated the disputed income to the taxpayer, based upon the following facts: (1) St. Catherine's solicited and hired the taxpayer, not his service corporation clinic; (2) St. Catherine's contracted with the taxpayer, not his service corporation clinic; (3) the taxpayer contracted with St. Catherine's personally, not on behalf of his service corporation clinic; and (4) the clinic had no meaningful control or supervision over the taxpayer's duties as St. Catherine's medical director. Upon the taxpayer's petition for judicial review, the Circuit Court upheld the Commission's decision and order.

The Court of Appeals concluded that the facts, as found by the Commission, well support the Commission's legal conclusion that the taxpayer -- not his personal service corporation -- earned the income paid by St. Catherine's, and that the Commission correctly concluded that the taxpayer failed in his burden to demonstrate error in the department's assessment.

The taxpayer has not appealed this decision.

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**Refunds, claims for — statute of limitations.** *Gary Lotzer vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, July 25, 1991). The issue in this case is whether the refund claimed by the taxpayer on his 1983 income tax return should be allowed as an offset to the department's assessment which covered the period of 1983-1985. The 1983 return was filed after the statutory deadline.

On April 18, 1989, the taxpayer and his wife mailed their 1983 and 1984 Wisconsin income tax returns to the Wisconsin Department of Revenue. The taxpayer claimed a refund of \$1,427 on the 1983 return, to be applied to the taxpayer's 1984 estimated tax payments. The taxpayer's 1984 return showed a net tax due of \$901, which the taxpayer offset with the \$1,427 claimed refund from 1983, thus claiming a refund of \$526 for 1984. On July 15, 1989, the taxpayer and his wife mailed their 1985 Wisconsin income tax return to the Wisconsin Department of Revenue. The 1985 return showed a net tax due of \$377. The 1985 return was not accompanied by a payment of any tax or interest.

The department made an adjustment to the taxpayer's 1984 Wisconsin income tax return by disallowing the \$1,427 claimed refund on the 1983 Wisconsin income tax return, because it determined the 1983 claimed refund was filed beyond the four year statute of limitations. Thus, the department issued an assessment for \$901 tax, plus interest and late filing fee.

The department adjusted the taxpayer's 1985 Wisconsin income tax return by calculating the gross tax to be \$1,486 rather than the \$1,395 calculated by the taxpayer. Thus, the net tax due for 1985 was increased from the \$377 reported by the taxpayer to the \$468 assessed by the department.

The Commission concluded that the taxpayer's 1983 refund claim should be allowed by the department since it relates to the tax period upon which the department's timely assessment was based. This result, allowing the taxpayer's refund claim filed after the statutory deadline had expired, is necessitated by the holding in *American Motors Corp. vs. Department of Revenue*, 64 Wis. 2d 337, 351-3, 219 N.W. 2d 300 (1974).

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

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**Refunds, claims for — statute of limitations.** *Roger R. Zerbel and Laverne A. Zerbel vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, July 16, 1991, modified July 25, 1991). The issues in this case are:

- A. Whether the taxpayer was entitled to a refund for 1983 or disqualified because of having filed the return for that year more than four years after its due date.
- B. With the taxpayer having conceded that certain unreported pension income in the years 1984-87 was taxable and that the department's assessment of taxes against the taxpayer attributable to that income was correct, whether the department otherwise properly computed the taxpayer's tax liability for those years, or whether it omitted certain credits that would serve as offsets to that liability.

This case involves assessments for the years 1983-87. There were two assessments, the first covering 1983-85, and the second covering 1986-87.

The 1983 portion of the first assessment showed \$0 tax liability, notwithstanding the fact that the auditor's supporting workpapers showed the taxpayer being entitled to a refund of \$322. However, in the assessment, the refund was disallowed because the taxpayer had not filed any return claiming the refund within four years of the due date of the return. The 1984 and 1985 portions of the first assessment showed taxes, interest, and late fees assessed against unreported pension income, income that the taxpayer has conceded was taxable. The 1986-87 assessment was also attributable to unreported pension income.

At a hearing, the taxpayer complained that the department had failed to allow him credits against the tax, and as a result, the taxpayers were granted leave to file new returns for all the years involved, for the purpose of determining the validity of these claimed offsets. These returns were filed, but the department reviewed them and found that the credits claimed in excess of those allowed by the auditor were unsubstantiated. Subsequently, the taxpayer was directed to file with the Commission a statement particularizing the offsets to which he felt he was entitled. In a letter, the taxpayer protested only the department's denial of the dependent credit he claimed for a nephew but conceded that he had no way of proving the nephew's dependency.

The Commission concluded as follows:

- A. Because the taxpayer did not file a 1983 refund claim within four years, the refund to which he is otherwise clearly entitled for 1983 is extinguished by lapse of time, and this is not a case of equitable recoupment because there is no 1983 tax liability to be absorbed by unused 1983 tax credits. The Commission subsequently reversed this conclusion and held that the taxpayer is entitled to receive credit for his unused 1983 refund claim of \$322, against the amounts assessed for the other years covered by the 1983-85 assessment.
- B. There is no evidence to support any credits beyond what the auditor allowed in the assessments.

Neither the department nor the taxpayer have appealed this decision.

CAUTION: This is a small claims decision of the Wisconsin Tax Appeals Commission and may not be used as a precedent. This decision is provided for informational purposes only.

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#### **CORPORATION FRANCHISE OR INCOME TAXES**

**Unitary business.** *Chilstrom Erecting Corp. vs. Wisconsin Department of Revenue* (Circuit Court for Milwaukee County, June 11, 1991). This is a judicial review of a decision by the Wisconsin Tax Appeals Commission (Commission). The issue in this case is whether the taxpayer's 1981-1985 out-of-state joint ventures constituted an integral part of a unitary business pursuant to sec. 71.07(2), Wis. Stats. (1985-86), and whether the resulting income was therefore subject to apportionment under the statutory formula. See *Wisconsin Tax Bulletin* 70, page 12, for a summary of the prior decision.

The taxpayer is a Wisconsin corporation whose principal place of business is in Milwaukee, and which is engaged in the construction industry by placing reinforcing steel (rebar) in concrete. The taxpayer's three part-time directors operate the business, whose staff also includes a full-time manager, two supervisors, and a part-time bid preparer. An accountant hired by the taxpayer reviews reports from both in-state and out-of-state projects and advises management of possible cost overruns. In Wisconsin the taxpayer usually acts as a subcontractor in projects involving rebar work. Its out-of-state joint ventures involve the placement of rebar in much larger construction projects. These joint ventures have project managers that are hired by the taxpayer and its joint venture partner, and the project managers hire all the needed laborers and equipment and take care of day-to-day management of the joint venture.

During 1981-1985 the taxpayer engaged in approximately seven out-of-state joint ventures. While these joint venture agreements were virtually identical, each was financially independent. The taxpayer and its joint venture partner contributed an equal amount of working capital to the ventures. The funds were kept separate by the joint venture and it obtained its own insurance. Title or registration of any equipment/vehicles was placed in the name of the joint venture, and each joint venture was responsible for its own day-to-day accounting functions. Thus, any pro rata share of any income/loss associated with these joint ventures was only reported by the taxpayer in the state where the project was located.

For the income tax years 1981-1985, the taxpayer filed its Wisconsin income tax returns on the basis of separate accounting, whereby only the income earned and losses suffered on the Wisconsin construction projects were included. The taxpayer did not apportion any of the income/losses from the joint ventures on its Wisconsin income tax returns.

The Circuit Court concluded that a rational basis did exist for the Commission's finding that the taxpayer's joint ventures constituted an integral part of a unitary business pursuant to sec. 71.07(2), Wis. Stats. (1985-86). Further, the Court concluded that the taxpayer failed to meet its burden of proof to overcome the presumption of correctness inherent in the department's assessment, and that by applying the apportionment formula to the taxpayer's joint venture income, Wisconsin is not in violation of either the Commerce Clause or the Due Process Clause of the U.S. Constitution.

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

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### **SALES/USE TAXES**

**Use — does not include.** *Morton Buildings, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, July 26, 1991). The issue in this case is whether the taxpayer's bulk purchases of raw materials used in their manufacture of building components were subject to Wisconsin use tax whenever such building components were used by the taxpayer in Wisconsin real property construction activities. The taxpayer's purchases and manufacturing took place outside Wisconsin.

The taxpayer is an Illinois corporation, having its principal offices in Morton, Illinois. The taxpayer is engaged in the business of manufacturing building components for prefabricated buildings for use by farm and industry, and assembling the components at customer locations in many states throughout the United States, including Wisconsin. All of the building components involved were used by the taxpayer to assemble buildings that became permanent improvements to real property in Wisconsin.

The taxpayer purchases all of the raw materials used to manufacture the building components in bulk outside of Wisconsin, and stores them in its own warehouses outside of Wisconsin. The taxpayer does not purchase raw materials for application to any particular contract.

At its several factories outside Wisconsin, the taxpayer's employees manufacture the building components and some of the hardware used in assembling the buildings from raw materials previously purchased in bulk. The taxpayer does not maintain or operate any manufacturing plants in Wisconsin. A small amount of raw materials, building components, and certain construction equipment used to assemble the buildings may be stored at four Wisconsin sales offices.

When an order for a building is received, the necessary raw materials and hardware are withdrawn from inventory and are consumed and transformed by the taxpayer in the manufacture of finished building components in accordance with the customer's specifications. The manufacture of the building components takes place entirely outside of Wisconsin prior to the transport of the finished building components into Wisconsin for installation at customer sites.

The taxpayer's employees assemble the building components into the finished building at the customer's site. On occasion, certain concrete work, plumbing, and other utility work may be subcontracted out by the taxpayer. On other occasions, the building owners may independently perform or contract for their own concrete, plumbing, and other utility work following the taxpayer's completion of the building.

The Commission concluded that the taxpayer's purchases outside of Wisconsin of raw materials transformed by the taxpayer's out-of-state manufacturing operations into new items of tangible personal property were not subject to the use tax imposed under sec. 77.53(1), Wis. Stats., by virtue of the taxpayer's use of such manufactured tangible personal property as building components in Wisconsin real property construction activities.

The department has appealed this decision to the Circuit Court.

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**OTHER**

**Open records law.** *Mayfair Chrysler-Plymouth, Inc., vs. Nick Baldarotta, Legal Custodian of Records of the Wisconsin Department of Revenue, and Wisconsin Department of Revenue* (Wisconsin Supreme Court, May 23, 1991). This is a review of a decision of the Court of Appeals, affirming a judgment of the Circuit Court for Dane County. The Circuit Court judgment compelled the department to permit the taxpayer to inspect certain records in the department's custody relating to the department's audit of the taxpayer's tax returns.

This case presents two issues, as follows:

- A. The first issue is whether the department's denial of access to portions of its records, on the ground that the information would reveal the identity of a confidential informant who provided information to the department under a pledge of confidentiality, satisfies the standards of legal specificity required by Wisconsin's Open Records Law, secs. 19.31-19.39, Wis. Stats., and the Wisconsin Supreme Court's prior decisions.
- B. The second issue, which arises only if the department's denial was legally specific, is whether the existence of the department's pledge of confidentiality to the informant was a legally sufficient reason for denying access to records that overcomes the public policy presumption in favor of access to public records.

On January 13, 1988, the taxpayer submitted a written request to the department pursuant to sec. 19.35, Wis. Stats., to inspect and copy certain records in the department's possession. These records, which had been provided by a former employe of the taxpayer, consisted of checks and business records which related to alleged accounting procedures and practices of the taxpayer. The department denied the request on the ground that the information was not a "record" as defined in sec. 19.32(2), Wis. Stats. In response, the taxpayer initiated an action for mandamus relief, seeking release of the records pursuant to sec. 19.37(1)(a), Wis. Stats.

The Circuit Court held a telephone conference between the parties on June 15, 1988, in which the department agreed to provide the taxpayer redacted copies of documents it held relating to the taxpayer's business practices. These copies were edited to delete any references which would suggest the identity of the ex-employe informant who provided the information to the department. This sanitization erased all numeric figures from the documents creating, in effect, blank forms. At this time, the department also provided the Circuit Court with unredacted copies of the documents for *in camera* review.

The taxpayer then sent a supplemental request to the department seeking all records, including check stubs, cancelled checks, timecards, and other business records which were received from any source other than the taxpayer. The department denied this request, stating that it could provide no additional information because it had given a "pledge of confidentiality ... to the informant, [and] the department must continue to deny access to portions of records which may identify the informant."

The taxpayer then moved for summary judgment, seeking release of the records on the ground that the department's reasons for denying the request were not legally sufficient. The Circuit Court granted the request. The Court of Appeals affirmed, concluding that "the reasons asserted by the department were insufficient as a matter of law to support the denial of access to the records. ..."

The Wisconsin Supreme Court concluded that the department's denial of the taxpayer's record request satisfied the requirements of Wisconsin's Open Records Law because it was legally specific and legally sufficient. By informing the taxpayer that their request was being denied because a pledge of confidentiality had been given to a confidential informant who had provided the records, the department adequately communicated that the denial was based on the obvious and well-known law enforcement

interests served by confidential informants. The denial was legally sufficient because the harm to the public interest in effective law enforcement from disclosing portions of records that could reveal the identity of a confidential informant outweighs the public interest in inspection of those records. The Supreme Court also concluded it is in the public interest to permit the department to provide pledges of confidentiality to citizens who may not otherwise step forward to assist law enforcement efforts.

The taxpayer has not appealed this decision.

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#### □ TAX RELEASES

*"Tax Releases" are designed to provide answers to the specific tax questions covered, based on the facts indicated. In situations where the facts vary from those given herein, the answers may not apply. Unless otherwise indicated, tax releases apply for all periods open to adjustment. All references to section numbers are to the Wisconsin Statutes unless otherwise noted.*

The following tax releases are included:

#### Individual Income Taxes

1. Farm Loss Carryover (p. 19)

#### Individual and Corporation Franchise or Income Taxes

1. Statute of Limitations -- When Is a Return Considered Filed? (p. 21)

#### Sales/Use Taxes

1. Entry Fees for Runs and Races (p. 22)
2. Purchases of Building Materials by Exempt Entities for Use by Contractor in Real Property Construction (p. 22)
3. Snowplowing, Sanding, and Salting (p. 30)
4. Water Removal and Cleaning Services After a Flood (p. 31)

#### INDIVIDUAL INCOME TAXES

1. Farm Loss Carryover

Statutes: Section 71.05(6)(a)10 and (b)10, Wis. Stats. (1987-88)

Note: This tax release applies only with respect to taxable year 1988 and thereafter.

Background: Effective for taxable year 1986 and thereafter, sec. 71.05(6)(a)10, Wis. Stats. (1987-88), limits the amount of farm loss that may be deducted each year. The limitations are based on the amount of the taxpayer's nonfarm Wisconsin adjusted gross income.

Section 71.05(6)(b)10, Wis. Stats. (1987-88), effective for taxable year 1988 and thereafter, provides that farm losses added back to income in taxable year 1986 and thereafter may be carried forward for up to 15 years and subtracted to the extent that they are not offset against farm income of any year between the loss year and the taxable year for which the subtraction is claimed. The farm losses may be subtracted only to the extent that they do not exceed the net profits or net gains from the sale or exchange of capital or business assets in the current taxable year from the same farming business or portion of that business to which the limits on deductible farm losses applied in the loss year.

Facts: The taxpayer operates a large farm which is comprised of many parcels of farmland. For purposes of Wisconsin's farm loss limitation, the operation is considered one farm.

Question 1: For 1986, the taxpayer had a \$6,000 farm loss which was not allowed because of the Wisconsin farm loss limitation. For 1988, the taxpayer reports a \$3,000 long-term capital gain from the sale of a parcel of the farmland. Can the gain realized from the sale of the farmland be offset by the farm loss carryover from 1986?

Answer 1: Yes. Income from the sale of the farmland is considered income from the farm which can be offset by carryover losses from the same farm. The taxpayer can claim a \$3,000 subtraction modification on the 1988 Form 1 for the farm loss carryover. (Assuming there are no additional capital gains or losses, the taxpayer may also claim a \$1,800 subtraction on Form 1 for the long-term capital gain exclusion.) The farm loss carryover to 1989 is computed as follows:

	\$6,000	farm loss carryover to 1988
less	<u>3,000</u>	subtraction on 1988 Form 1 to offset income
	\$3,000	farm loss carryover to 1989

Question 2: During 1989, the taxpayer sells a second parcel of farmland to a real estate developer for residential housing development. This parcel is sold on the installment basis, and for 1989 the taxpayer reports \$900 interest income from the installment sale and \$2,000 long-term capital gain. Can the long-term capital gain and the interest income be offset by the \$3,000 remaining farm loss carryover?

Answer 2: The \$2,000 capital gain from the installment sale may be offset by the farm loss carryover. However, the interest income produced by the installment sale cannot be offset by the farm loss carryover. The interest income is considered to be nonfarm income. There was no farm business purpose in regard to the installment sale. The farm loss carryover to 1990 is computed as follows:

	\$3,000	farm loss carryover to 1989
less	<u>2,000</u>	subtraction on 1989 Form 1 to offset income
	\$1,000	farm loss carryover to 1990

Question 3: During 1990, the taxpayer reports \$7,500 of farm income on Schedule F. The taxpayer claims a \$1,000 subtraction on Form 1 for the remaining farm loss carryover. During 1991, the taxpayer reports gain from the 1989 installment sale and also incurs a farm loss. The farm loss is not allowed because of the Wisconsin farm loss limitation. Can any income which will be reported in 1992 from the installment sale be offset by the farm loss carryover from 1991?

Answer 3: Yes. Farm losses not allowed under sec. 71.05(6)(a)10, Wis. Stats. (1987-88), in years after the installment sale takes place can be used to offset gain reportable from the installment sale. The interest income reportable from the installment sale could not be offset by the farm loss carryover from 1991 for the reason set forth in the answer to question 2.

**INDIVIDUAL AND CORPORATION FRANCHISE OR INCOME TAXES****1. Statute of Limitations – When Is a Return Considered Filed?**

Statutes: Section 71.77(2) and (8), Wis. Stats. (1989-90)

Background: Section 71.77(2), Wis. Stats. (1989-90), provides that the department may issue an additional assessment against a taxpayer if notice is given to the taxpayer within four years of the date the income or franchise tax return was "filed." Section 71.77(8), Wis. Stats. (1989-90) provides that "For purposes of this section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day".

Question 1: If a taxpayer files a return before the unextended due date, is the return considered filed when the taxpayer actually files the return or on the due date of the return?

Answer 1: If a taxpayer files a return before the unextended due date, the return is considered filed on the unextended due date.

Example: A calendar year taxpayer files his or her 1990 Wisconsin individual income tax return on February 11, 1991. The department has until April 15, 1995, (which is four years after April 15, 1991, the due date of the 1990 return), to issue a notice of additional assessment to the taxpayer for the 1990 tax return under sec. 71.77(2) and (8), Wis. Stats. (1989-90).

Question 2: If a taxpayer receives an extension of time to file, is the return considered filed on the

- a. unextended due date,
- b. date mailed by the taxpayer,
- c. date received by the department, or
- d. extended due date?

Answer 2: If a taxpayer requests an extension of time to file under sec. 71.03(7), 71.24(7), or 71.44(3), and files within the extension period, the return is considered filed on the date it is received by the department.

Example: XYZ Corporation, a calendar year taxpayer, receives a 6-month automatic extension to September 15, 1991, from the IRS. The department received XYZ's 1990 Wisconsin franchise tax return on August 5, 1991. The Wisconsin return was accompanied by a copy of the federal extension, therefore the federal extended due date of September 15, 1991, also applies to Wisconsin. The return was postmarked August 3, 1991.

The department has until August 5, 1995, (which is four years after the date the return was received by the department) to issue a notice of additional assessment for the 1990 tax year under sec. 71.77(2), Wis. Stats. (1989-90). The return is considered filed on the date received by the department.

Question 3: If a taxpayer files a late return, for purposes of sec. 71.77(2), Wis. Stats. (1989-90), is the return considered filed on the

- a. due date of the return,
- b. date mailed by the taxpayer, or
- c. date received by the department?

Answer 3: If a taxpayer files a late return, the return is considered filed on the date it is received by the department.

**SALES/USE TAXES****1. Entry Fees for Runs and Races**

Statutes: Section 77.52(2)(a)2 and (2m)(a), Wis. Stats. (1989-90)

Background: Section 77.52(2)(a)2, Wis. Stats. (1989-90), provides that taxable services include sales of admissions to amusement, athletic, entertainment or recreational events or places. Section 77.52(2m)(a) provides that no part of the charge for a service may be deemed a sale of tangible personal property if the property transferred is incidental to the selling, performing or furnishing of the service.

Facts: For an entry fee of \$10.00, runners may participate in a 10k run. Each participant receives a T-shirt.

Question 1: Is the \$10.00 fee subject to Wisconsin sales tax?

Answer 1: Yes. The entry fee is taxable as an admission to an athletic or recreational event under sec. 77.52(2)(a)2, Wis. Stats. (1989-90).

Question 2: May the organizer of the event purchase the T-shirts exempt from sales tax, as a purchase for resale?

Answer 2: No. The T-shirts provided to the participants are incidental to the service provided and are not considered to be resold under sec. 77.52(2m)(a), Wis. Stats. (1989-90). Tax applies to the organizer's purchases of the T-shirts.

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**2. Purchases of Building Materials by Exempt Entities for Use by Contractor in Real Property Construction**

Statutes: Sections 77.51(2), (14), and (14r), 77.54(9a), and 77.55(1), Wis. Stats. (1989-90)

Wis. Adm. Code: Section Tax 11.04, January 1979 Register

Background: "Exempt entity" for purposes of this tax release means any one of the following entities listed in sec. 77.54(9a), Wis. Stats. (1989-90).

- A. State of Wisconsin or any agency thereof.
- B. Any county, city, village, town, or school district in Wisconsin.
- C. A county-city hospital established under sec. 66.47, Wis. Stats. (1989-90).
- D. A sewerage commission organized under sec. 144.07(4), Wis. Stats. (1989-90), or a metropolitan sewerage district organized under secs. 66.20 to 66.26 or 66.88 to 66.918, Wis. Stats. (1989-90).
- E. Any other unit of government in Wisconsin or any agency or instrumentality of one or more units of government in Wisconsin.
- F. Any corporation, community chest fund, foundation, or association organized and operated exclusively for religious, charitable, scientific, or educational purposes, or for the prevention of cruelty to children or animals, except hospital service corporations under sec. 613.80(2), Wis. Stats. (1989-90), no part of the net income of which inures to the benefit of any private stockholder, shareholder, member, or corporation.

A contractor is a consumer of tangible personal property when engaged in real property construction activities, such as improving, altering, installing, repairing, or otherwise servicing real property and Wisconsin sales or use tax applies to the sale of tangible personal property to the contractor.

When a contractor is a consumer, its gross receipts from labor and material related to real property construction activities are not subject to sales tax. In most instances, the contractor will pay a sales or use tax on its purchases of property consumed in real property construction activities.

Section Tax 11.04(3), Wis. Adm. Code, provides that when a contractor and an exempt entity enter into a construction contract to improve real property, which provides that the contractor is to furnish the building materials and equipment, it is presumed until the contrary is established, that deliveries of building materials and equipment to the contractor are made pursuant to purchases made by the contractor.

A supplier's sales of building materials and equipment made directly to an exempt entity are not subject to Wisconsin sales or use tax, even though such tangible personal property is later used by a contractor in the erection of a building or structure, or in the alteration, repair, or improvement of real property for the exempt entity. Suppliers of building materials and equipment may presume that a sale is made directly to an exempt entity if the supplier receives a purchase order from the exempt entity, and payment for the building materials and equipment is received from the exempt entity.

Facts and Question 1: Contractor A enters into a contract to construct a building for Exempt Entity B. The contract states in part as follows [emphasis added]:

"Contractor A hereby proposes to furnish all labor and materials and perform all work for the New Building, in strict accordance with the specifications and drawings mentioned therein, as prepared by the Architect, for the following amount."

"Exempt Entity B reserves the right to purchase or rent directly any equipment and materials for the work of construction, where the total cost of an item or of any aggregation of items to be ordered from one supplier is two thousand dollars (\$2,000) or more. At the end of this section is set forth a list of items or materials and equipment which are identified for consideration by Exempt Entity B for direct purchase or rent. For any item (or aggregate of items from one supplier) purchased or rented by Exempt Entity B, the gross price of such item (as computed by Contractor A hereinafter), plus sales or use tax that would have been applicable to such item if not purchased or rented by Exempt Entity B, shall be deducted from the contract sum to be paid to Contractor A pursuant to its agreement with Exempt Entity B."

"The contract sum constitutes the maximum cost to Exempt Entity B of the work performed for the work of construction and includes all labor and services and the total cost, including applicable taxes, of all materials and equipment to be purchased and/or for the completion of the work of construction. Contractor A is required to list its suppliers/vendors or recommended suppliers/vendors and value or cost of the item(s) set forth at the end of this section. Contractor A shall provide all services necessary to Exempt Entity B for Exempt Entity B to purchase the materials and equipment, including preparation of proposed purchase orders, recommendations of vendors and suppliers, and receipt, storage, and protection of materials and equipment. Exempt Entity B will purchase from the vendors and suppliers listed and/or recommended by Contractor A, unless Exempt Entity B is able to secure more advantageous prices. Any discounts, savings, and rebates from the costs and values given by Contractor A of the items identified at the end of this section will belong to Exempt Entity B. Contractor A will furnish any materials and equipment not provided in its listing or which Exempt Entity B is not able to obtain within the maximum cost provided to Exempt Entity B."

"For any materials and equipment purchased by Exempt Entity B so as to utilize its tax exempt status, Exempt Entity B is and shall be responsible to ensure and arrange that all such materials and equipment are delivered to the job site or such other place as may be designated by Contractor A. Until such equipment and materials are delivered to the job site or such other place as designated by Contractor A, Exempt Entity B has sole and complete responsibility for such materials and equipment, including without limitation any loss or damage thereto. Upon delivery to the job site or such place as designated by Contractor A, Contractor A shall be responsible for examining or inspecting such materials and equipment to assure Exempt Entity B that they are acceptable and in conformance with the contract documents. Any defect or deficiency shall be called to the attention of Exempt Entity B immediately upon delivery in order that Exempt Entity B may obtain any necessary adjustment or replacement of such materials and equipment. If any defect or deficiency is not called to Exempt Entity B's attention immediately, and as a result Exempt Entity B is not able to obtain a proper adjustment and/or replacement of such materials, such defect or deficiency shall be the responsibility of Contractor A to remedy. Upon acceptance of such equipment and materials, Contractor A is responsible for the installation and incorporation of such equipment and materials into the work of construction in accordance with its agreement with Exempt Entity B and the contract documents generally."

- A. Is the sale of materials and equipment to Exempt Entity B by suppliers subject to Wisconsin sales and use taxes?
- B. Is there any Wisconsin sales or use tax due as a result of Exempt Entity B's transfer to Contractor A of materials and equipment used by Contractor A in the construction of the New Building, in accordance with the above contract?

Answer 1:

- A. No. Sales of materials and equipment to Exempt Entity B by suppliers, other than Contractor A, are exempt from Wisconsin sales or use tax under sec. 77.54(9a), Wis. Stats., provided the purchase orders to suppliers indicate that Exempt Entity B is the purchaser and Exempt Entity B pays for the materials and equipment with its own funds.
- B. Yes. Based on the information contained in the above contract, the transfer of materials and equipment by Exempt Entity B to Contractor A is deemed to be a taxable sale.

A sale is defined in sec. 77.51(14), Wis. Stats. (1989-90), to include the transfer of tangible personal property for a consideration.

Since the contract states that the contractor provides all construction materials, a transfer of tangible personal property from Exempt Entity B to Contractor A occurs.

Consideration is the reduction in the contract price (e.g., change order) by the contractor for the materials purchased by Exempt Entity B.

Therefore, Contractor A is the consumer of the materials and equipment under sec. 77.51(2), Wis. Stats. (1989-90), and the sale of the materials and equipment to Contractor A is subject to Wisconsin sales or use tax.

Note: The sale of materials and equipment by Exempt Entity B to Contractor A may qualify for exemption from sales and use tax as an exempt occasional sale if it meets the requirements of sec. 77.54(7m), Wis. Stats. (1989-90). See Wisconsin Publication 206, "Occasional Sales Exemption for Nonprofit Organizations", for more information.

Facts and Question 2: Contractor C enters into a contract to construct a building for Exempt Entity D. The contract provides in part as follows [emphasis added]:

"Contractor C hereby proposes to furnish all labor and materials and perform all work for the New Building, in strict accordance with the specification and drawings mentioned therein, as prepared by the Architect, for the following amount."

"Exempt Entity D reserves the right to purchase or rent directly any equipment and material for all construction where the total cost of an item or of any aggregation of items to be ordered from one supplier, is two thousand dollars (\$2,000) or more."

"Each contract and each subcontract shall state a maximum cost to Exempt Entity D which maximum cost shall include all labor and services and the total cost of all materials and equipment to be purchased by Exempt Entity D and/or Contractor C and/or the subcontractor. Contractor C and each subcontractor shall provide all services necessary to Exempt Entity D for Exempt Entity D to purchase the materials and equipment, including preparation of proposed purchase orders, recommendations of vendors and suppliers, receipt, storage, and protection of materials and equipment. Contractor C or subcontractor shall provide Exempt Entity D with a list of all items to be furnished by Exempt Entity D, and the maximum cost to Exempt Entity D of all of such materials. Exempt Entity D will purchase from the vendors and suppliers recommended by Contractor C or subcontractor, unless Exempt Entity D is able to secure more advantageous prices. Any discounts, savings and rebates will belong to Exempt Entity D. Contractor C or subcontractor will furnish any materials and equipment not provided in the listing or which Exempt Entity D is not able to obtain within the maximum costs provided to Exempt Entity D."

"Exempt Entity D shall cause all materials and equipment purchased by Exempt Entity D to be delivered to Contractor C or subcontractor. Contractor C or subcontractor shall be responsible to examine or inspect such material and equipment to assure Exempt Entity D that they are acceptable and in conformance with the contract documents. Any defect or deficiency shall be called to the attention of Exempt Entity D immediately upon delivery in order that Exempt Entity D may obtain any necessary adjustment. If any defect or deficiency is not called to Exempt Entity D's attention immediately, and as a result Exempt Entity D is not able to obtain a proper adjustment, such defect or deficiency shall be the responsibility of Contractor C and of subcontractor."

"Contractor C and subcontractor shall have the same responsibilities for the provision and the installation of materials and equipment provided by Exempt Entity D as he would have if purchased by Contractor C or subcontractor except as specifically amended by this Article."

- A. Is the sale of materials and equipment to Exempt Entity D by suppliers subject to Wisconsin sales and use taxes?
- B. Is there any Wisconsin sales or use tax due as a result of Exempt Entity D's transfer to Contractor C of materials and equipment used by Contractor C in the construction of the New Building, in accordance with the above contract?

Answer 2:

- A. No. Sales of materials and equipment to Exempt Entity D by suppliers, other than Contractor C, are exempt from Wisconsin sales or use tax under sec. 77.54(9a), Wis. Stats., provided the purchase orders to suppliers indicate that Exempt Entity D is the purchaser and Exempt Entity D pays for the materials and equipment with its own funds.

- B. Yes. Based on the information contained in the above contract, the transfer of materials and equipment by Exempt Entity D to Contractor C is deemed to be a taxable sale.

A sale is defined in sec. 77.51(14), Wis. Stats. (1989-90), to include the transfer of tangible personal property for a consideration.

Since the contract states that the contractor provides all construction materials, a transfer of tangible personal property from Exempt Entity D to Contractor C occurs.

Consideration is the reduction in the contract price by the contractor (e.g., change order) for the materials purchased by Exempt Entity D.

Therefore, Contractor C is the consumer of the materials and equipment under sec. 77.51(2), Wis. Stats. (1989-90), and the sale of the materials and equipment to Contractor C is subject to Wisconsin sales or use tax.

Note: The sale of materials and equipment by Exempt Entity D to Contractor C may qualify for exemption from sales and use tax as an exempt occasional sale if it meets the requirements of sec. 77.54(7m), Wis. Stats. (1989-90). See Wisconsin Publication 206, "Occasional Sales Exemption for Nonprofit Organizations", for more information.

Facts and Question 3: Contractor E enters into a contract to construct a building for Exempt Entity F. The contract includes a rider which states in part as follows:

"Exempt Entity F will make direct purchases and rentals in accordance with Exhibit I and II to this Rider. The rights and duties of the parties under these exhibits are incorporated by this reference."

Exhibit I of the rider, entitled "Procedures for Direct Owner Purchases", provides as follows:

"Exempt Entity F is exempt from Wisconsin Sales and Use Taxes on purchases made by it. To obtain such exemption, purchases must be made by Exempt Entity F directly, billed to Exempt Entity F directly, and paid by Exempt Entity F directly."

"Exempt Entity F intends to purchase or rent directly any equipment and/or material for general construction where the total cost of an item or any aggregation of items to be ordered from one supplier is One Thousand Dollars (\$1,000.00) or more, and where the other conditions of this procedure are satisfied."

"Contractor E shall separately state the total cost (excluding sales and use taxes) of all materials and equipment that may be purchased or rented directly by Exempt Entity F. In addition, Contractor E shall submit a schedule of all such purchases that may be made by Exempt Entity F including vendor's name, general description of item(s) to be purchased, and the price limit for each item."

"Contractor E shall provide all services necessary to Exempt Entity F for Exempt Entity F to purchase the materials and equipment including preparation of proposed purchase orders, recommendations of suppliers and vendors, receipt, storage and protection of materials and equipment. Exempt Entity F will purchase from the vendors and suppliers recommended by the contractor, unless Exempt Entity F is able to secure more advantageous prices. Any discounts, savings and rebates will belong to Exempt Entity F. If Exempt Entity F is not able to obtain any materials or equipment within the price limit provided, the excess shall be subtracted from the Contract Sum. All purchases by Exempt Entity F shall be used for the sole benefit of Exempt Entity F."

"Exempt Entity F shall cause all materials and equipment directly purchased by Exempt Entity F to be delivered to Contractor E, who shall accept delivery as Exempt Entity F's agent and promptly notify the Owner thereof. When the materials are delivered to the job site, Contractor E shall promptly inspect them and bring to the attention of Exempt Entity F and its Architect, any defects therein. Contractor E shall assist in contacting the supplier in an effort to correct or adjust any defect."

"Contractor E shall have the same responsibilities for installation of materials and equipment provided by Exempt Entity F as he would have if purchased by the Contractor E except as specifically amended by this Exhibit."

"For the purpose of this Exhibit the term "work" has the same meaning as set forth in the contract documents except for the furnishing of materials and equipment purchased directly by Exempt Entity F."

"Exempt Entity F shall indemnify and hold the Contractor E harmless from and against any and all claims asserted against the Contractor E relating to the liability for Sales or Use Tax (including interest and penalties and, in the event of litigation, all reasonable expenses, including attorney's fees and accountant's fees incurred by Contractor E in connection therewith) on any materials or equipment purchased or rented directly by Exempt Entity F, provided that (a) Contractor E promptly tenders to Exempt Entity F the defense, negotiation, or other handling of such claim, (b) Exempt Entity F shall have the right, at its own expense, to assume the defense of the claim, and (c) Contractor E shall cooperate fully with Exempt Entity F in providing any and all information which Exempt Entity F reasonably requests in connection with the defense of the claim."

"The procedures of this section shall not apply to any material or equipment manufactured or fabricated by Contractor E, nor to any materials or equipment as to which Contractor E itself would be the vendor, nor as to any materials and equipment which would be supplied and installed by the same entity."

"The supplier will invoice Exempt Entity F. The invoice shall name Exempt Entity F as the purchaser and reference the purchase order number."

"Contractor E shall review the invoice and recommend approval, partial approval or rejection. He shall also recommend to Exempt Entity F what retention, if any, should be withheld from the supplier. He shall then forward the invoice to the Architect."

"The Architect will then approve or disapprove Contractor E's recommendation. If approval is given, the Architect will forward the invoice to Exempt Entity F for direct payment."

"Exempt Entity F will write checks and remit directly to the supplier and transmit a copy of the payment form to the Architect."

The contract and contract price do not include any of the materials and equipment sold directly to Exempt Entity F by suppliers.

- A. Is the sale of materials and equipment to Exempt Entity F by suppliers subject to Wisconsin sales and use taxes?
- B. Is there any Wisconsin sales or use tax due as a result of Exempt Entity F's transfer to Contractor E of materials and equipment used by Contractor E in the construction of the New Building, in accordance with the above contract?

Answer 3:

- A. No. Sales of materials and equipment to Exempt Entity F directly by suppliers, other than Contractor E, in conformance with the above contract are exempt from Wisconsin sales or use tax under sec. 77.54(9a), Wis. Stats. (1989-90), provided the purchase orders to suppliers indicate Exempt Entity F is the purchaser and Exempt Entity F pays the supplier with its own funds.
- B. No. Based on the information contained in the above contract, the transfer of materials and equipment by Exempt Entity F to Contractor E is not deemed to be a taxable sale.

A sale is defined in sec. 77.51(14), Wis. Stats. (1989), to include the transfer of tangible personal property for a consideration.

Since no consideration was given (i.e., no reduction in the contract price for materials and equipment included in the contract and subsequently purchased by Exempt Entity F such as by change order), there is no sale.

Facts and Question 4: Contractor G enters into a contract to construct a building for Exempt Entity H. The contract states in part as follows:

"Exempt Entity H reserves the right to purchase directly any equipment and materials for the work of construction, where the total cost of an item or of any aggregation of items to be ordered from one supplier is \$2,000 or more."

"At the end of this section is set forth a list of items of materials and equipment which are identified for direct purchase by Exempt Entity H. For any item purchased by Exempt Entity H, the gross price of such item (as computed by Contractor G), plus sales or use tax that would have been applicable to such item if not purchased by Exempt Entity H, shall not be part of the contract sum to be paid to the contractor."

"Contractor G will furnish any materials and equipment not provided in its listing. Contractor G will also furnish any materials and equipment which Exempt Entity H is not able to obtain within the maximum cost provided to Exempt Entity H, or which Exempt Entity H desires Contractor G to purchase and the contract shall be increased by the amount for such items originally provided in Contractor G's bid."

"For any materials and equipment purchased by Exempt Entity H so as to utilize its tax exempt status, Exempt Entity H shall receive, store and protect all materials and equipment until provided to Contractor G at the job site or such place as designated by Contractor G. Until such equipment and materials are delivered to the job site, Exempt Entity H has sole and complete responsibility for such materials and equipment, including without limitation, any loss or damage thereto. Upon delivery to the job site or such place as designated by Contractor G, Contractor G shall be responsible for examining or inspecting such materials and equipment to assure Exempt Entity H that they are acceptable and in conformance with the contract. Any defect or deficiency shall be called to the attention of Exempt Entity H immediately upon delivery in order that Exempt Entity H may obtain any necessary adjustment or replacement of such materials and equipment. Upon acceptance of such equipment and materials, Contractor G is responsible for the installation and incorporation of such equipment and materials into the work of construction in accordance with its agreement with Exempt Entity H and the contract documents generally."

"Exempt Entity H shall at all times have and possess all incidents of ownership with respect to equipment and materials purchased by it. Exempt Entity H shall insure its interest in such equipment and materials or shall arrange with Contractor G to be added as an additional insured to any insurance policy covering equipment and materials located at the project site."

"As agent for Exempt Entity H, Contractor G shall, at the request of Exempt Entity H, negotiate and communicate with the suppliers of equipment and materials purchased by Exempt Entity H concerning scheduled deliveries, shortage, deficiencies, disputes and other such matters; provided, that Exempt Entity H shall remain responsible for any late delivery, shortage, deficiency dispute or other such manner, in order to permit Exempt Entity H to pursue and protect fully Exempt Entity H's rights against suppliers, manufacturer's and others."

"Any discounts, savings and rebates on purchase of materials and equipment shall belong to Exempt Entity H."

- A. Is the sale of materials and equipment to Exempt Entity H by suppliers subject to Wisconsin sales and use taxes?
- B. Is there any Wisconsin sales or use tax due as a result of Exempt Entity H's transfer to Contractor G of materials and equipment used by Contractor G in the construction of the New Building, in accordance with the above contract?

Answer 4:

- A. No. Sales of materials and equipment to Exempt Entity H directly by suppliers, other than Contractor G, in conformance with the above contract are exempt from Wisconsin sales or use tax under sec. 77.54(9a), Wis. Stats. (1989-90), provided the purchase orders to suppliers indicate Exempt Entity H is the purchaser and Exempt Entity H pays the suppliers with its own funds.
- B. No. Based on the information contained in the above contract, the transfer of materials and equipment by Exempt Entity H to Contractor G is not deemed to be a taxable sale.

A sale is defined in sec. 77.51(14), Wis. Stats. (1989-90), to include the transfer of tangible personal property for a consideration.

Since no consideration was given (i.e., no reduction in the contract price for materials and equipment included in the contract and subsequently purchased by Exempt Entity H such as by change order), there is no sale.

Facts and Question 5: Contractor I enters into a contract to construct a building for Exempt Entity J. The contract states in part as follows:

"Exempt Entity J will purchase certain materials and equipment directly, for receipt and incorporation into the work by Contractor I."

"Exempt Entity J will purchase directly property, as listed in the Contractor I bid form, for incorporation into the work by Contractor I."

"Contractor I shall solicit from suppliers or manufacturers competitive costs of items listed in the contract. Contractor I shall incorporate into the Exempt Entity J Purchase Listing, the tax exempt dollar amount of each item."

"The cost of materials and equipment purchased directly by Exempt Entity J as used in the bid form shall be excluded from the contract sum to be paid to Contractor I."

The contract and contract price do not include any materials and equipment sold directly to Exempt Entity J by suppliers.

- A. Is the sale of materials and equipment to Exempt Entity J by suppliers subject to Wisconsin sales and use taxes?
- B. Is there any Wisconsin sales or use tax due as a result of Exempt Entity J's transfer to Contractor I of materials and equipment used by Contractor I in the construction of the New Building, in accordance with the above contract?

Answer 5:

- A. No. Sale of materials and equipment to Exempt Entity J directly by suppliers, other than Contractor I, in conformance with the above contract are exempt from Wisconsin sales or use tax under sec. 77.54(9a), Wis. Stats. (1989-90), provided the purchase orders to suppliers indicate Exempt Entity J is the purchaser and Exempt Entity J pays the suppliers with its own funds.
- B. No. Based on the information contained in the above contract, the transfer of materials and equipment by Exempt Entity J to Contractor I is not deemed to be a taxable sale.

A sale is defined in sec. 77.51(14), Wis. Stats. (1989-90), to include the transfer of tangible personal property for a consideration.

Since no consideration was given (i.e., no reduction in the contract price for materials and equipment included in the contract and subsequently purchased by Exempt Entity J such as by change order), there is no sale.

Summary: This tax release includes examples of excerpts from contracts the department has reviewed for purposes of determining the Wisconsin sales and use tax implications of real property construction for exempt entities. Facts and Questions 1 and 2 result in the imposition of Wisconsin sales or use tax. This is because the contract provides that the contractor is to provide all materials and equipment; however, if an exempt entity purchases any of the materials and equipment directly, a reduction in the contract price is made (e.g., change order). Facts and Questions 3, 4, and 5 do not result in the imposition of Wisconsin sales or use tax. This is because the signed contract does not include those materials and equipment the exempt entity will purchase directly from suppliers, resulting in no need for a reduction in the contract price (e.g., change order).

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### 3. Snowplowing, Sanding, and Salting

Statutes: Section 77.52(2)(a), Wis. Stats. (1989-90)

Wis. Adm. Code: Sections Tax 11.05(3)(m), June 1990 Register and Tax 11.67(1) and (2)(a), April 1990 Register

Question 1: Is snowplowing subject to Wisconsin sales or use tax?

Answer 1: No. Snowplowing is not a service subject to tax under sec. 77.52(2)(a), Wis. Stats. (1989-90).

**Question 2:** Is the sanding and salting of roads, sidewalks, or parking lots subject to Wisconsin sales or use tax?

**Answer 2:** No. Sanding and salting of roads, sidewalks, or parking lots is not a service subject to tax under section 77.52(2)(a), Wis. Stats. (1989-90).

**Example 1:** A person contracts with Company A to have its driveways and parking lots sanded during the winter months. Company A charges the person by the hour. The charge by Company A is not subject to sales tax. Company A must pay Wisconsin sales or use tax on its purchase of sand used in providing the service.

**Example 2:** A person contracts with Company B to have its sidewalks and parking lots salted during the winter months. Company B charges the person based on the amount of salt used. The charge by Company B is not subject to sales tax. Company B must pay Wisconsin sales or use tax on its purchase of salt used in providing the service.

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#### 4. Water Removal and Cleaning Services After a Flood

**Statutes:** Section 77.52(2)(a)10, Wis. Stats. (1989-90)

**Background:** Section 77.52(2)(a)10, Wis. Stats. (1989-90), provides that the repair, service, cleaning, and maintenance of tangible personal property are taxable services unless the property would have been exempt to the customer when purchased. For purposes of repair, service, cleaning, and maintenance, carpeting is deemed to have retained its character as tangible personal property, regardless of the extent to which it is fastened to, connected with, or built into real property.

**Facts and Question 1:** A person's basement is flooded with a foot of water after a heavy rain. Company A agrees to remove the water from the person's basement for \$100.

Is the \$100 charge subject to Wisconsin sales tax?

**Answer 1:** No. Company A is performing a service to real property which is not subject to Wisconsin sales or use tax.

**Facts and Question 2:** A person's basement is flooded with a foot of water after a heavy rain. Company B agrees to remove the water from the person's basement and to clean the carpeting located in the basement for a fee of \$200.

Is the \$200 charge subject to Wisconsin sales tax?

**Answer 2:** Company B is providing a nontaxable service (removal of water) and a taxable service (cleaning of carpeting which is deemed to be tangible personal property). Company B must make an allocation of the \$200 charge for the taxable service and nontaxable service. Sales tax should be imposed on the portion of the \$200 charge that relates to the carpet cleaning.

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