

WISCONSIN TAX BULLETIN

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TWO MORE COUNTIES ADOPT SALES TAX

Effective April 1, 1992, Juneau and Sauk Counties have adopted the county sales tax. In addition, there are 40 other counties that have previously adopted the 1/2% county tax.

An explanation of the county sales tax can be found in the December 1991 issue of the Tax Report, which appears on pages 23 to 26 of this Bulletin.

CERTAIN TAXPAYERS MUST REPORT NEW TEMPORARY SURCHARGE

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A recycling fee that was to apply for taxable years ending after April 1, 1991, and before April 1, 1993, was repealed by 1991 Wisconsin Act 39 and replaced with a "temporary surcharge."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, or income as a statutory employee; 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, the net income of a tax-option (S) corporation, and the net business income of an individual, partnership, estate, or trust.

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When is the Temporary Surcharge Due?

For taxpayers not filing under an extension, the temporary surcharge must be paid by the due date of the taxpayer's Wisconsin franchise or income tax return.

For taxpayers who are filing under an extension:

- A. If the unextended due date of the Wisconsin franchise or income tax return is on or after December 1, 1991, the taxpayer must make an estimated surcharge payment by the unextended due date of the taxpayer's Wisconsin franchise or income tax return.
- B. If the unextended due date of the Wisconsin franchise or income tax return is before December 1, 1991, the taxpayer must pay the temporary surcharge by the extended due date of the taxpayer's Wisconsin franchise or income tax return.

Example 1: Corporation A has a fiscal year ending August 31, 1991. The due date of Corporation A's 1990 Wisconsin franchise or income tax return is November 15, 1991. Corporation A is granted a six-month extension of time to file its Wisconsin return.

Corporation A's temporary surcharge is due May 15, 1992 (the extended due date of its 1990 return). Corporation A is not required to make an estimated surcharge payment by November 15, 1991, because the unextended due date of its Wisconsin return is *before* December 1, 1991.

Example 2: Taxpayer B, an individual, is a calendar year taxpayer. Taxpayer B's 1991 Wisconsin individual income tax return is due April 15, 1992. Taxpayer B is granted a four-month extension of time to file his Wisconsin return.

Taxpayer B's temporary surcharge is due August 15, 1992 (the extended due date of his 1991 income tax return). However, Taxpayer B must make an estimated surcharge payment by April 15, 1992, because the unextended due date of his Wisconsin income tax return is *after* December 1, 1991.

Which Form is Used to Report the Temporary Surcharge?

The temporary surcharge will be reported as follows:

- A. For a taxable year that is a fiscal year which began in 1990 and ends during the period April 30, 1991, through November 30, 1991, all entities must report the temporary surcharge on a 1990 Form S.
- B. For the 1991 calendar taxable year or a fiscal taxable year which began in 1991, all entities, other than partnerships, must report the temporary surcharge on a line designated for that purpose on their regular Wisconsin franchise or income tax return.
- C. For the 1991 calendar taxable year or a fiscal taxable year which began in 1991, partnerships must report the temporary surcharge on a 1991 Form 3S (Wisconsin Partnership Temporary Surcharge).

More Information

An informational publication (Publication 400, entitled "Wisconsin's Temporary Surcharge") is being developed by the Department of Revenue to provide additional information concerning the temporary surcharge. A copy of this publication will be mailed to each *Wisconsin Tax Bulletin* subscriber in mid to late January.

FEDERAL TAX LAWS ENACTED IN 1991 DO NOT APPLY FOR WISCONSIN FOR 1991

Federal tax laws enacted during 1991 generally may not be used in determining Wisconsin taxable income for 1991. At the time this issue of the *Wisconsin Tax Bulletin* went to print (December 15, 1991) there were no new federal tax laws enacted during 1991, that create a difference between Wisconsin and federal income.

If any new federal tax laws are enacted in 1991, differences between Wisconsin and federal income as a result of such enactment should be reported on Wisconsin Schedule I.

CHANGES MADE TO FARMLAND PRESERVATION CREDIT PROGRAM

Several changes have taken place concerning the farmland preservation credit program, for 1991 claims as well as for certain 1988, 1989, and 1990 claims. A copy of an informational bulletin that was distributed to approximately 65,000 taxpayers who claimed the farmland preservation credit and/or the farmland tax relief credit on 1990 Wisconsin tax returns appears on pages 29 and 30 of this Bulletin.

Any questions regarding the informational bulletin may be directed to the Farmland Preservation Credit Unit of the Department of Revenue, at the address or telephone number shown in the informational bulletin.

REPORT SALES TAX DUE ON OUT-OF-STATE PURCHASES ON YOUR INCOME TAX RETURN

If you make purchases of tangible personal property or taxable services from an out-of-state seller without payment of the Wisconsin 5% sales tax (5 1/2% if located in a taxable county) you are subject to Wisconsin sales or use tax on these purchases.

For example, you owe Wisconsin tax if:

- You bought cameras, sporting goods, or clothes through an out-of-state catalog and no Wisconsin sales tax was charged, or
- You bought furniture or appliances from a store across the Wisconsin border and that other state's sales tax imposed was less than the Wisconsin sales tax, or
- You bought records, tapes, or books via toll-free telephone numbers advertised on television and no Wisconsin sales tax was charged, or
- You bought clothes, jewelry, or art works while traveling in another state, had it shipped home, and no Wisconsin sales tax was charged.

If you do not hold a Wisconsin seller's permit or use tax certificate, you may report Wisconsin sales and use tax on your Wisconsin individual income tax return (Form 1, 1A, WI-Z, or 1NPR) on the line titled "Sales tax due on out-of-state purchases."

Note: Persons holding a Wisconsin seller's permit or use tax certificate should report any Wisconsin sale or use tax on their sales and use tax return (Form ST-12).

For more information, refer to Wisconsin Publication 205, "Do You Owe Wisconsin Use Tax?". A copy of the publication appears on pages 33 to 36 of this Bulletin.

REMINDER: USE YOUR LABEL

Computers do a great job preparing Wisconsin tax returns. However, there's one thing that a computer cannot do and that's to apply the preprinted address label to the completed return.

Taxpayers who use the preprinted label get their Wisconsin refund checks faster than those taxpayers who do not use the label. Corrections to information on the label may be made directly on the label.

Preparers should remember to use these address labels, even if they are preparing and filing computerized returns for clients.

REMINDER: QUICK REFUNDS AVAILABLE FOR INDIVIDUALS

The Department of Revenue will continue its Quick Refund Program for 1991 individual income tax returns processed in 1992. The objective of the Quick Refund Program is to issue individual income tax refunds to qualifying taxpayers in as little as two weeks after the return is received by the department. The return is checked for computation and other errors at a later date and, if necessary, an adjustment notice is mailed at that time.

The following requirements must be met for an individual to qualify for a quick refund:

- File a signed and completed 1991 Form WI-Z, Form 1A, or Form 1, including all attachments, on or before April 1, 1992.
- Use the department-printed mailing label on which none of the information is changed.
- Have a Wisconsin address on the department-printed mailing label.
- Have a refund due and enter that refund amount, less any amount carried over to 1992 estimated taxes, in the quick refund box which appears at the top of the return. Be sure to enter both dollars and cents.
- Claim no homestead credit or farmland preservation credit, and owe no delinquent taxes or delinquent debts to other state agencies.
- Mail the return to: Quick Refund, P.O. Box 38, Madison, WI 53787.

Approximately 1.7 million refunds were issued in 1991, and over 470,000 of those were quick refunds. This is an increase of 7% over the 439,000 quick refunds issued in 1990.

TIPS TO SPEED REFUND PROCESSING

You can avoid delays in the processing of your Wisconsin income tax return by following these tips:

1. Use the department-printed name and address label. If the information on the label is wrong, correct the label by drawing a line through the incorrect information and printing the correct information clearly on the label.
2. Make sure entries are made on the correct lines.
3. Print words and numbers legibly.
4. Attach the correct withholding statement(s) to the return.
5. Claim only Wisconsin taxes withheld from the withholding statement(s). Many taxpayers mistakenly use the federal tax withheld, the social security tax withheld, or state tax withheld for another state.
6. Attach the necessary supporting schedules.
7. Fill in all requested information when claiming the school property tax credit. Many taxpayers claim a credit but don't fill in the rent paid or property taxes paid.
8. Attach a complete copy of the federal income tax return and schedules to the Wisconsin Forms 1 and 1NPR.
9. Check your math.
10. Sign and date the return. If you are filing a joint return, both spouses must sign the return.
11. If tax is due with the return, attach a check to the return (using a paper clip).
12. Attach any extensions of time to file to the back of the return. An extension of time for filing a federal return automatically gives a Wisconsin extension, provided a copy of the federal extension is attached to the Wisconsin return when it is filed.

TOPICAL/COURT CASE INDEX AVAILABLE

The Wisconsin Department of Revenue's Topical and Court Case Index is designed to help you find reference material for use in researching Wisconsin tax questions. 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.

If you need an easy way to research Wisconsin tax questions, you should consider subscribing to the Topical/Court Case Index. The annual cost is \$14, plus sales tax. To order your copy, complete the order blank that appears on page 39 of this Bulletin. The order blank may also be used for subscribing to the Wisconsin Tax Bulletin and for ordering the Wisconsin Administrative Code.

WHAT IS "THE LOTTERY CREDIT"?

The lottery credit is a completely new type of property tax relief for taxpayers who own their primary residence. The lottery credit was enacted by the Wisconsin Legislature in 1991. The credit is financed from the state lottery and is shown as a reduction in property taxes on 1991 property tax bills (due in 1992). The credit is based on the first \$8,200 of a qualifying home's value, times the school tax rate; the average lottery credit is between \$125 and \$150.

1991 property tax bills for residential and agricultural parcels with "improvements" (i.e., with buildings) show the potential lottery credit. However, the fact that the lottery credit is shown on the tax bill does not automatically mean the taxpayer qualifies for the credit. The lottery credit may be claimed only if the taxpayer is the owner of the home described on the tax bill, and the home is used as his or her primary residence (each taxpayer can have only one primary residence). Claims will be audited by the Department of Revenue.

The right-hand portion of the tax bill has two columns, one showing the property taxes due if the lottery credit is claimed, and the other column showing the property taxes due if the lottery credit is not claimed for that parcel. The credit can be claimed by signing the statement on the right-hand portion of the tax bill and paying the amount shown in the "LOTTERY CREDIT CLAIMED" column. The signed statement must accompany the property tax payment. The statement should not be signed nor should the credit be claimed if the tax bill is not for the taxpayer's primary residence. In that case, the taxpayer must pay the amount shown in the "NO LOTTERY CREDIT" column.

Not all lottery credits will be claimed by signing the property tax bill. The lottery credit for homeowners whose taxes are paid directly by mortgage lenders, who fail to claim the credit at the time their taxes are paid, or whose lottery credit is not shown on the property tax bill, may be claimed by completing and signing one of the special lottery credit claim forms. These special forms and the circumstances under which they should be used are explained below.

1. *Escrowed Taxes.* Taxpayers who have a home loan may have the mortgage lender pay the property taxes directly from an escrow account. The lender may send a form for the taxpayer to sign and return to the lender, authorizing the lender to claim the lottery credit and pay the net taxes after the lottery credit.
2. *Late Claim.* A late claim form may be used by an owner whose credit was shown on the tax bill, but who failed to claim the credit or sign the statement on the tax bill. The late claim form can also

be used by owners whose mortgage lender paid the property taxes but did not claim the lottery credit for them.

3. *Class B.* This form may be used by an owner whose lottery credit was not shown on the tax bill because the primary residence was on property not classed as "improved" residential or agricultural. This would apply because the residence was taxed as personal property, because the parcel did not have a residence as of January 1, 1991, or because the parcel has more than one owner and more than one primary residence.
4. *Mobile Home Parking Fee.* This form may be used by mobile home owners subject to the monthly parking permit fee. The lottery credit computed by the treasurer is then prorated over the monthly fees for 1992.

A sample 1991 real estate tax bill appears on page 22 of this Bulletin. The lottery credit, the statement for the owner to sign, and the amounts payable with or without the lottery credit are highlighted on the copy, as #'s 1, 2, 3, and 4, respectively.

If you have more questions or want additional information about the lottery credit, you should contact your local or county treasurer.

FORMS 1099-G AND 1099-INT MAILED TO TAXPAYERS

Federal law requires that the Department of Revenue provide 1991 information returns (Forms 1099-G) to persons who received a Wisconsin income tax refund in 1991 and claimed state income tax payments as an itemized deduction on the federal tax return for the year to which the refund applies. Federal law also requires that information returns (Forms 1099-INT) be provided to persons who received \$600 or more of interest on refunds issued by the Department of Revenue.

The department will mail approximately 250 Forms 1099-INT and 650,000 Forms 1099-G during January 1992.

Regardless of whether a taxpayer is sent a Form 1099-INT, the taxpayer must report all interest received in 1991 as income on his or her 1991 federal and Wisconsin tax returns.

All or a portion of a state income tax refund from Form 1099-G may also be includible in federal taxable income. However, the state income tax refund should not be included in Wisconsin taxable income.

The Form 1099-G has an explanation area on the right side showing how the refund reported to the IRS was determined. The first line shows the amount of the refund, and subsequent lines show plus or minus adjustments for amounts applied to next year's estimated taxes; endangered resources donations; late filing penalties and interest; homestead, farmland preservation, farmland tax relief, and earned income credits; retirement plan penalties; and any other adjustments. The last line shows the amount of refund reported to the IRS.

HOW TO OBTAIN WISCONSIN TAX FORMS

During the filing season, small supplies of forms can be obtained from any Department of Revenue office. However, requests will be generally limited to 6 copies of any single form. This is necessary to prevent the supply of forms at any office from being quickly depleted and unavailable to other persons.

In addition, Wisconsin libraries have a copy of Wisconsin Package WI-X which contains copies of most Wisconsin tax forms. Reproductions may be made from Package WI-X, except in the case of items marked "Do Not Photocopy."

Practitioners or other persons requiring larger supplies should write to Shipping and Mailing Section, Wisconsin Department of Revenue, P.O. Box 8903, Madison, WI 53708-8903.

ENDANGERED SPECIES COUNT ON YOUR HELP

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

Contributions made to the Endangered Resources Fund Checkoff on the 1991 state income tax form are the primary support to the Bureau of Endangered Resources. The donations help to manage and protect endangered species in Wisconsin.

Your help as Tax Practitioners is vital in reaching the largest portion of taxpayers. Please support our efforts by informing your clients of an opportunity to save the endangered species.

Thank you for doing your part to protect the endangered species of Wisconsin.

If you would like more information on the Endangered Resources Fund Checkoff, contact:

Carol Muller
Bureau of Endangered Resources
P.O. Box 7921
Madison, WI 53707
608/264-6040

PACKAGE WI-X AVAILABLE FOR 1991

Package WI-X contains actual size copies of most 1991 Wisconsin individual, fiduciary, and corporation income tax, gift tax, inheritance tax, estate tax, motor fuel tax, sales tax, and withholding tax forms. If you have not yet ordered your 1991 Package WI-X, send your request and \$7 per copy to: Wisconsin Department of Revenue, Shipping and Mailing Section, P.O. Box 8903, Madison, WI 53708.

WISCONSIN INHERITANCE, ESTATE, AND GIFT TAXES

Inheritance Tax

For deaths occurring on or after January 1, 1992, there is no longer an inheritance tax. No "Certificate Determining Inheritance Tax" will be issued for deaths on or after January 1, 1992.

Estate Tax

Effective for deaths occurring on or after January 1, 1992, Wisconsin imposes an es-

tate tax. The Wisconsin estate tax is equal to the credit for state death taxes allowable on the federal estate tax return (Form 706). The only estates required to file a Wisconsin estate tax return will be those which are required to file a federal estate tax return. The current filing requirement for a federal estate tax return is a gross estate of \$600,000.

Those estates required to file a Wisconsin estate tax return must file a Wisconsin Form W706 (see copy of Form W706 and instructions, appearing on pages 31 and 32 of this Bulletin) and include a complete copy of the federal estate tax return and attachments. The due date is the same as the due date of the federal estate tax return, which is 9 months after the date of death or the date the federal estate tax return is required to be filed, as extended, whichever is later. Regardless of when the Wisconsin estate tax return is filed, however, the tax is due 9 months after the date of death.

Upon receipt of the return and payment of the liability, and after audit, the Department of Revenue will issue a dated certificate showing the amount of estate tax, interest, and penalty. For estates not required to file a federal estate tax return, the department will not issue a certificate determining estate tax.

The Department of Revenue must be notified within 30 days if the federal estate tax return is amended or adjusted by any means, including a federal estate tax audit, refund claim, or amendment.

(NOTE: Estates that are not required to file a Wisconsin estate tax return may still be required to obtain a "Closing Certificate for Fiduciaries" for income tax purposes.)

Consent To Transfer Property and Release of Inheritance Tax Lien

For deaths occurring on or after January 1, 1992, there is no authority for the department to issue a "Consent to Transfer Property" or "Release of Inheritance Tax Lien." Therefore, the department will not issue a "Consent to Transfer Property" or "Release of Inheritance Tax Lien" when death is on or after January 1, 1992.

Gift Tax

For gifts made on or after January 1, 1992, there is no Wisconsin gift tax.

Forms and Information

Forms and information may be obtained by writing to Wisconsin Department of Revenue, P.O. Box 8904, Madison, WI 53708-8904, or by telephoning (608) 266-2772.

SPEAKERS BUREAU

The department's Speakers Bureau provides speakers to business, community, and other organizations throughout Wisconsin. The department has developed Publication 700 (Speakers Bureau presenting ...). The publication includes a listing of topics speakers are available to cover, the address and telephone number for requesting a speaker, etc.

A copy of Publication 700 appears on pages 37 and 38 of this Bulletin.

EXTENSIONS OF TIME TO FILE 1991 TAX RETURNS

Extensions Allowed for Some Wisconsin Returns

Due dates for filing various Wisconsin tax returns and reports are determined by Wisconsin Statute and by administrative rule. The Wisconsin Statutes also authorize extensions of time for filing certain (but not all) Wisconsin returns and reports. The time for filing some Wisconsin tax returns and reports cannot be extended, as no extension is authorized by the Wisconsin Statutes.

Extensions To File Do Not Extend Time To Pay

An extension of time to file a Wisconsin tax return or report does not extend the time to pay any tax or temporary surcharge due. Income, franchise, or sales/use taxes not paid by the original due date are subject to interest at the rate of 12% per year during the extension period and 18% per year from the end of the extension period until paid. For

corporations, however, the amount of any required estimated tax not paid by the original due date is subject to interest at the rate of 18% during the extension period, rather than 12%.

Temporary surcharge not paid by the original due date of a 1991 return is subject to interest at the rate of 18% per year, unless the required estimated surcharge payment has been made by the original due date of the return.

Any additional withholding tax paid with an employer's annual reconciliation return is subject to delinquent interest of 18% per year from the original due date of the tax until paid, regardless of whether an extension of time to file the return has been granted.

Tax Payments With Extensions

A taxpayer who wishes to make an income tax, franchise tax, or temporary surcharge payment with an extension request should submit the payment with an estimated tax payment voucher, Form 1-ES for individuals or Form 4-ES for corporations, or Form 3S-ES for partnerships subject to the temporary surcharge. A taxpayer wishing to make a sales/use or withholding tax payment with an extension request may do so. The letter requesting the extension should include the taxpayer's real name, address, seller's permit or use tax number or withholding account number, and the reporting period to which the payment should be applied.

Obtaining Extensions

A one-month extension of time for filing a Wisconsin tax return or report may be obtained by timely filing either the proper Wisconsin Extension Form (Form I-101 or Form IC-830) or a written request with the Wisconsin Department of Revenue, and receiving written approval from the department. The extension form or written request must be filed by the original due date of the Wisconsin tax return.

Requests for Wisconsin extensions must be in writing; telephone or oral requests cannot be approved.

An extension is also allowed if a taxpayer receives in writing an approved extension from the Internal Revenue Service (IRS) for filing the corresponding federal return, or if a taxpayer qualifies for an automatic federal extension, as explained below.

An automatic federal extension of 4 months for individuals or 6 months for corporations is allowed for individuals who file federal Form 4868 or for corporations that file federal Form 7004 by the original due date of their federal tax returns. A copy of the application for an automatic federal extension should not be sent to the Department of Revenue at the time the application is made.

A U.S. citizen or resident whose abode and main place of business or post of duty are outside the United States and Puerto Rico on the due date of a tax return is allowed an automatic 2-month extension of time to file the federal return.

To avoid late filing fees or delinquent interest, a taxpayer must attach a copy of the federal automatic extension or the federal or Wisconsin approved extension to the Wisconsin tax return when it is filed (except a sales/use tax return). A taxpayer located outside the United States and Puerto Rico, or a military person assigned to Operation Desert Storm, who qualifies for an automatic federal extension, must attach an explanatory statement to the Wisconsin tax return.

Where to Apply for Wisconsin Extensions

Applications for extensions and related correspondence should be mailed to Wisconsin Department of Revenue, Madison, WI 53708, at the following post office box numbers:

- individual, partnership, and fiduciary returns - P.O. Box 8903;
- corporate and information returns - P.O. Box 8908;
- sales/use and withholding returns - P.O. Box 8902.

HOW TO OBTAIN COPIES OF YOUR TAX RETURNS

What is Available

Upon request, the Department of Revenue will provide copies of taxpayers' previously filed tax returns. This includes individual income tax returns, homestead credit claims, corporation or insurance franchise or income tax returns, sales and use tax returns, withholding tax returns and statements, partnership tax returns, fiduciary tax returns, and gift tax reports.

All requests for copies of returns must be made in writing, in person, or by FAX. Requests made by telephone will not be honored. The department's response cannot be made by FAX.

Individual income tax returns and homestead credit claims are available for at least the 4 prior tax years. Form 1 and 1NPR income tax returns ordinarily include a copy of the federal tax return, which will be provided when a Form 1 or 1NPR copy is requested.

Copies of Forms 1A and WI-Z generally do not include copies of the federal tax return because federal copies are not required when filing those forms. Wage statement copies are not always available with Forms 1A and WI-Z.

Partnership tax returns and closed files of fiduciary returns filed by trusts are available for at least the 4 prior tax years. Gift tax reports and withholding statements are available for at least the 5 prior tax years. Corporation or insurance franchise or income tax returns are available for at least the 6 prior tax years. Microfilmed copies of sales, use, and withholding tax returns are available for at least the 10 prior tax years.

For most years prior to the retention periods indicated, limited information is available from department tax rolls, even though copies of complete tax returns are not available.

Copies of tax returns are generally not available until several months after they are filed. For example, an individual income tax return or homestead credit claim filed by April 15 of any year is normally not available for copying until November of that year.

Who May Request Copies

Taxpayers or corporation officers may request copies of their own tax returns.

Persons other than the taxpayer or corporation officer may also request copies of tax returns. However, a power of attorney form or other written authorization, signed by the taxpayer or corporation officer, is required as part of the request.

Requests for copies of a deceased taxpayer's tax returns must include a certified domiciliary letter and be signed by the personal representative of the estate. If there is no estate, a certified copy of the death certificate and a statement of the reason for the request is required.

Fees

The fee for obtaining copies of tax returns is \$4.50 for each return requested. There is an additional fee of 50¢ per return for a certified copy. Requests received without payment will be processed, and a bill will be included with the copy mailed to the requester.

How to Request

Written or FAX requests for copies must include the following:

1. Name(s) on the requested tax return.
2. Social security number or other identification number of the taxpayer, including spouse's name and social security number, if applicable.
3. Type of return and year(s) or period(s) of the tax return being requested.
4. Name and address to which the copies are to be mailed.
5. Signature of the taxpayer, partner, or corporation officer.

Where to Direct Requests

Written Requests: Mail your request to Wisconsin Department of Revenue, Central Files Section, P.O. Box 8903, Madison, WI 53708.

IS&E DIVISION OFFERS TAXPAYER ASSISTANCE

During the filing season of January through April 15, 1992, department personnel will be available to answer questions.

In the department's larger offices, assistance is provided on a daily basis (Monday through Friday). Assistance in other offices generally is available on Mondays only, although there are exceptions as noted below.

Offices Providing Daily Assistance

Location	Address	Telephone No.	Hours
*Appleton	265 W. Northland Ave.	(414) 832-2727	7:45-4:30
*Eau Claire	718 W. Clairemont Ave.	(715) 836-2811	7:45-4:30
*Green Bay	200 N. Jefferson St.	(414) 448-5179	7:45-4:30
*Kenosha	5906 10th Ave., Rm 106	(414) 653-7100	7:45-4:30
*Madison	4638 University Ave.	(608) 266-2772	7:45-4:30
Madison	212 E. Washington Ave.	NONE	8:00-4:15
*Milwaukee	819 N. Sixth St., Rm 408	(414) 227-4000	7:45-4:30
*Racine	616 Lake Ave.	(414) 636-3711	7:45-4:30
*Waukesha	141 N.W. Barstow St.	(414) 521-5310	7:45-4:30

Offices Providing Assistance on Mondays Only (unless otherwise noted)

Ashland	Courthouse	NONE	10:00-2:00(a)
Baraboo	1007 Washington	(608) 356-8973	7:45-4:30
Beaver Dam	211 S. Spring St.	(414) 887-8108	7:45-4:30
Elkhorn	300 S. Lincoln St.	(414) 723-4098	7:45-4:30
Fond du Lac	160 S. Macy St.	(414) 929-3985	7:45-4:30
Grafton	220 Oak St.	(414) 377-6700	7:45-4:30
Hayward	221 Kansas Ave.	(715) 634-8478	7:45-11:45
Hudson	1810 Crestview Dr. Ste.1B	(715) 386-8224	7:45-4:30
Janesville	101 E. Milwaukee	(608) 755-2750	7:45-4:30(b)
*La Crosse	620 Main St.	(608) 785-9720	7:45-4:30(b)
Lancaster	130 W. Elm St.	(608) 723-2641	7:45-4:30
Manitowoc	1314 Memorial Dr.	(414) 683-4152	7:45-4:30
Marinette	Courthouse, 1926 Hall Ave.	(715) 732-7565	9:00-12:00
Marshfield	300 S. Peach Ave., Ste. 4	(715) 387-6346	7:45-4:30
Monroe	1518 11th St.	(608) 325-3013	7:45-4:30
Oshkosh	404 N. Main St.	(414) 424-2100	7:45-4:30
Rhineland	203 Schiek Plaza	(715) 362-6749	7:45-4:30
Rice Lake	101 N. Wilson Ave.	(715) 234-7889	7:45-4:30
Shawano	420 E. Green Bay St.	(715) 526-5647	7:45-4:30
Sheboygan	504 S. 14th St.	(414) 459-3101	7:45-4:30
Superior	1418 Tower Ave., Ste. 5	(715) 392-7985	8:00-4:30
Tomah	1200 McLean Ave.	(608) 372-3256	8:00-12:00
Watertown	600 E. Main St.	(414) 261-7700	7:45-4:30
Waupaca	201 1/2 S. Main St.	(715) 258-9564	7:45-11:45
Wausau	710 Third St.	(715) 842-8665	7:45-4:30
West Bend	120 N. Main St.	(414) 335-5380	7:45-4:30
Wisconsin Rapids	2811 8th St. S.	(715) 421-0500	7:45-4:30

* Open during noon hour

(a) Open Tuesday only, January only

(b) Open Monday, Tuesday, and Wednesday

continued on next page

In-Person Requests: Make your request at the Department of Revenue, Audit Bureau, 4638 University Avenue, Room 132, Madison, Wisconsin. Office hours are 7:45 a.m. to 4:30 p.m. Proper identification (for example, a driver's license) is required.

FAX Requests: The Department of Revenue's telephone number in Madison for FAX requests is (608) 267-0834. The department's response, however, cannot be made by FAX.

Questions

If you have questions about obtaining copies of tax returns, you may call the Department of Revenue in Madison, at (608) 267-1266.

DEPARTMENT PUBLICATIONS AVAILABLE

The Department of Revenue publishes a wide variety of publications that are available to taxpayers upon request. The following is a list of publications regarding taxes administered by the Income, Sales, and Excise Tax Division of the department. To order any of these publications, write or call: Wisconsin Department of Revenue, P.O. Box 8903, Madison, WI 53708 (telephone (608) 266-1961).

Number Title

- 102 Wisconsin Tax Treatment of Tax-Option (S) Corporations and Their Shareholders
- 103 Reporting Capital Gains and Losses for Wisconsin by Individuals, Estates, Trusts
- 104 Wisconsin Taxation of Military Personnel
- 109 Tax Information for Married Persons Filing Separate Returns and Persons Divorced
- 111 How to Get a Private Letter Ruling From the Wisconsin Department of Revenue
- 112 Wisconsin's Individual Estimated Tax and Corporation Estimated Tax Programs
- 113 Federal and Wisconsin Income Tax Reporting Under the Marital Property Act

- 114 Wisconsin Taxpayer Bill of Rights
- 200 Sales and Use Tax Information for Electrical Contractors
- 201 Wisconsin State and County Sales and Use Tax Information
- 202 Sales and Use Tax Information: Motor Vehicle Sales, Leases and Repairs
- 203 Sales and Use Tax Information for Manufacturers
- 205 Do You Owe Wisconsin Use Tax?
- 206 Sales Tax Exemption for Non-profit Organizations
- 207 Sales and Use Tax Information for Contractors
- 211 Sales and Use Tax Information for Cemetery Monument Dealers
- 400 Wisconsin's Temporary Surcharge
- 500 Tax Guide for Wisconsin Political Organizations and Candidates
- 501 Field Audit of Wisconsin Tax Returns
- 502 Directory of Free Publications
- 503 Wisconsin Farmland Preservation Credit
- 504 Directory for Wisconsin Department of Revenue
- 505 A Taxpayer's Appeal Rights of an Office Audit Adjustment
- 506 Taxpayers' Appeal Rights of Field Audit Adjustments
- 507 How to Appeal to the Tax Appeals Commission
- 508 Wisconsin Tax Requirements Relating to Nonresident Entertainers
- 509 Filing Wage Statements and Information Returns on Magnetic Media
- 600 Wisconsin Taxation of Lottery Winnings
- 601 Wisconsin Taxation of Pari-Mutuel Wager Winnings
- 700 Speakers Bureau Presenting ...
- W-166 Wisconsin Employer's Withholding Tax Guide

TAX REPORT AND WITHHOLDING UPDATE SENT TO BUSINESSES

The December 1991 issue of the Tax Report, reporting on sales and use tax issues, was

sent in December to monthly and quarterly sales and use tax filers. The annual Withholding Tax Update was also sent in December, along with Forms WT-7 (Employer's Annual Reconciliation of Wisconsin Income Tax Withheld from Wages), to employers registered to withhold Wisconsin taxes.

Copies of the December Tax Report and the Withholding Tax Update are found on pages 23 to 28 of this Bulletin.

CRIMINAL ENFORCEMENT ACTIVITIES

Income Taxes

Two men have been ordered to serve jail time for failing to file state income tax returns on time.

William W. Fugate, 38 County Highway N, Edgerton, was sentenced in Dane County Circuit Court, Branch V, Madison, by Judge Robert R. Pekowsky, after he pled no contest to one count of failing to file his 1989 income tax return at the time required by law. Judge Pekowsky ordered Fugate to serve 60 days in the Dane County jail and suspended the sentence except for eight days, with the balance to be served on electronic monitor. He was also fined \$500, ordered to pay \$160 in court costs and must make restitution to the Wisconsin Department of Revenue in an amount to be determined within 45 days.

Fugate had been charged with failing to timely file state income tax returns for 1988 and 1989. The charge for 1988 was dismissed after Fugate pled no contest to the violation for 1989.

Alvord J. Ellingboe, Jr., 1130 Edgehill Drive, Madison, was sentenced by Judge George Northrup in Dane County Circuit Court, Branch XIV, Madison, after he pled no contest to two counts of failing to file Wisconsin state income tax returns for 1988 and 1989, at the time required by law. Judge Northrup ordered Ellingboe to serve four months jail time, fourteen days in the Dane County jail, with the balance to be served on electronic monitor on the first count and ordered two years probation on the second count. Under the conditions of probation, Ellingboe must make restitution to the Wis-

consin Department of Revenue in an amount to be determined within 45 days and pay court costs.

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.

Motor Fuel Taxes

Ajit Walia, 31, a former motor fuel distributor who operated in the Milwaukee area, has been sentenced to 5 years in prison for state motor fuel tax theft by Judge George Northrup in Dane County Circuit Court, Branch XIV. Walia was also ordered to pay over \$230,000 in restitution to the state for unpaid taxes and serve 7 years probation. In addition, he was ordered to concurrently serve one year in prison for filing false articles of incorporation and 3 30-day prison terms for failing to file motor fuel tax reports.

The case stems from the fact that during 1988 Walia, operating through various Wisconsin corporations, sold motor fuel on which he collected in excess of \$80,000 of state motor fuel taxes, which he failed to turn over to the state. In addition, the complaint alleges that Walia filed false motor fuel reports and failed to report motor fuel sales, and that he participated in the fraudulent incorporation of B7 Petroleum, Inc. He did this in order to obtain the motor fuel license that was necessary to enable him to continue operating as a motor fuel wholesaler, after the license of another corporation he operated, S.K. Oil, Inc., was revoked as a result of his failure to pay motor fuel taxes.

Walia was extradited from federal prison in Duluth, Minnesota, where he is serving a three-year sentence for federal tax evasion, to appear in Dane County Circuit Court.

M&E PROPERTY TAX EXEMPTION LAW REVISED

Caution: This article pertains to the property tax exemption for manufacturing; it does not apply to sales and use tax.

The property tax exemption for manufacturers' machinery and equipment (M&E) had been expanded by court decisions since the law was enacted in 1974. As a result, the Legislature chose to clarify the scope and meaning of the M&E exemption. Provisions were inserted in the 1991-93 biennial Budget Act to specifically define terms pertaining to the exemption. It is anticipated that the effect of these changes, which are summarized below, will be to curb the expansion of the M&E exemption by the courts.

1. A very restrictive definition of "exclusive use" has been established. Case law used the terms "principally" and "primarily" to define "exclusive use" and allowed up to 50% nonmanufacturing use. The new standard is that the M&E is used to the exclusion of all other uses except for other use not exceeding 5% of total use.
2. "Transformers" are now expressly excluded from the definition of "power wiring" and therefore are taxable.
3. "Storage" is expressly excluded from the exemption but is defined to exclude the "holding for 3 days or less of work in process."
4. The definition of "production process" expressly excludes "plant engineering." By this exclusion, engineering equipment performing the computer-assisted design of manufactured products will continue to remain taxable. Therefore, the potential extension of the M&E tax exemption to this kind of equipment is precluded.
5. The phrase "used directly" is now defined in the statutes without reference to the integrated plant test. Moreover, the statute governing the M&E exemption was amended in 1989 by the addition of the strict construction amendment which provides: "The exemption under this paragraph shall be strictly construed."

The combination of the revised definition of the phrase "used directly" and the application of the strict construction amendment would suggest that the process of contributing to or being integrated in the manufacturing process would not necessarily constitute direct use in manufacturing for purposes of the M&E property tax exemption.

PROPERTY TAX CLASSIFICATION LAW FOR MANUFACTURING REVISED

Caution: This article pertains to property tax; it does not apply to sales and use tax.

The statute that defines which businesses and which property qualifies to be classified as manufacturing for property tax purposes has been revised to be more restrictive. The more restrictive statute will prevent expansion of the manufacturers' machinery and equipment (M&E) property tax exemption.

Prior to this change, the statute listed 26 types of businesses that were specifically identified as non-manufacturers. That listing has been replaced with the following sentence: "Except for the activities under sub. (2), activities not classified as manufacturing in the standard industrial classification manual, 1987 edition, published by the U.S. office of management and budget are not manufacturing for this section." Because the Standard Industrial Classification (SIC) Manual lists hundreds of businesses that do not qualify as manufacturing, this change should result in reduction of litigation and therefore expansion of the M&E property tax exemption to nonmanufacturing businesses.

INFORMATION OR INQUIRIES?

Madison - Main Office
Area Code (608)

Beverage, Motor Fuel,
Cigarette, Tobacco Products ... 266-6701
Corporation Franchise/Income 266-1143
Estimated Taxes 266-9940
Fiduciary, Inheritance, Gift,
Estate 266-2772

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 IS&E DIVISION RULES AND RULE AMENDMENTS IN PROCESS

Listed below, under Part A, 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 January 1, 1992. Part B lists Rules adopted in 1991 but not yet effective. ("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-A
11.34	Occasional sales exemption for sale of a business or business assets-A
11.50	Auctions-A
11.69	Financial institutions-A
11.83	Motor vehicles-A
11.84	Aircraft-A
11.85	Boats, vessels and barges-A
11.86	Utility transmission and distribu- tion lines-A
11.88	Mobile homes-A

B. Rules Adopted in 1991 But Not Yet Effective

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

Summarized below are recent significant Wisconsin Tax Appeals Commission (WTAC) 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 WTAC's decision).

The following decisions are included:

Individual Income Taxes

George J. and Pauline T. Edler (p. 10)	Itemized deductions—credit - invest- ment interest limitation
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Corporation Franchise or Income Taxes

Consolidated Freightways Corporation of Delaware (p. 11)	Apportionment—motor carriers
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Fort Howard Corporation (p. 12)	Pollution abatement equipment—1986 and prior
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Ins. Serv. Liquidating, Inc. et al. (p. 12)	Liquidating corporations
---	--------------------------

Sales/Use Taxes

Grant, Iowa, Lafayette Shopping News, Inc. (p. 12)	Use tax—sale, destined for
Luetzow Industries (p. 13)	Parking and storage—aircraft Containers, packaging and shipping ma- terials—plastic garment bags

MRC Industries, Inc. (p. 14)	Use tax—collection by retailers
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Wisconsin Bell, Inc. et al. (p. 14)	Telecommunication services—billing and collection services
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Other

J. Gerard Hogan, et al. (p. 15)	Administrative remedies—declaratory and injunctive relief
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INDIVIDUAL INCOME TAXES

**Itemized deductions — credit — invest-
ment interest limitation.** *George J. and
Pauline T. Edler vs. Wisconsin Department
of Revenue* (Wisconsin Tax Appeals Com-
mission, July 25, 1991). The issue in this
case is whether interest paid by the taxpayer
during the years 1986, 1987, and 1988 is
deductible in full or subject to the \$1,200 in-
vestment interest limitation.

In 1971, the taxpayers purchased commer-
cial real estate property in Lake Delton, Wis-
consin. The taxpayers operated the property
themselves and leased them out to other op-
erators prior to 1984. The taxpayers sold por-
tions of their commercial real estate on land
contract in 1983 and 1984, reporting certain
gains from these transactions on their tax re-
turns for the relevant periods. Subsequent to
the sale by land contract in 1984, the taxpay-
ers did not operate any business on the sub-
ject property.

The interest payments in question were paid
on notices to purchase and improve the re-
alty which was sold on land contract in the
years 1983 and 1984. The interest expenses
involved were not paid on a loan to purchase
or refinance a residence and were not paid on
a land contract.

On October 23, 1989, the department issued
an income tax assessment against the tax-
payers, disallowing the claimed interest ex-
penses for three years based on its allegation
that interest expense on investment income
is limited to \$1,200 for purposes of the Wis-
consin itemized deduction credit for 1986,
1987, and 1988.

The Commission concluded that the interest
incurred and paid by the taxpayers consti-
tuted investment, not business, expense, and
the department properly applied the \$1,200
interest limitation.

The taxpayers have not appealed this decision.



CORPORATION FRANCHISE OR INCOME TAXES

Apportionment — motor carriers. *Consolidated Freightways Corporation of Delaware vs. Wisconsin Department of Revenue* (Wisconsin Supreme Court, November 14, 1991). This is a review of a decision of the Court of Appeals. The department assessed additional franchise taxes against Consolidated Freightways Corporation of Delaware (Consolidated) for years 1974-77. The Wisconsin Tax Appeals Commission and the Dane County Circuit Court upheld the tax assessment. The Court of Appeals reversed the Circuit Court. See *Wisconsin Tax Bulletin* 69, page 9, *Wisconsin Tax Bulletin* 65, page 13, and *Wisconsin Tax Bulletin* 46, page 13, for summaries of the prior decisions.

There are three issues in this case:

- A. As applied to Consolidated, whether the formula provided in sec. Tax 2.47, Wis. Adm. Code, violates sec. 71.07(2)(e), Wis. Stats., (1985-86), which limits the taxable income to income derived from business transacted within this state.
- B. As applied to Consolidated, whether the formula violates the Commerce Clause of the United States Constitution.
- C. As applied to Consolidated, whether the formula violates the Due Process Clause of the United States Constitution.

Consolidated is incorporated in Delaware with its main offices in California. It is a general commodity common motor carrier operating in interstate commerce typically hauling small shipments - less than truckload size. It consolidates numerous small loads into fewer large loads and transports the consolidated loads through a system of terminals and established routes. Consolidated owns 14,000 trailers and 2,400 tractors. It maintains 410 terminals nationwide with thirteen terminals in Wisconsin, including one regional consolidation center.

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

During the years 1974 through 1977, Consolidated apportioned its Wisconsin income using a different formula than the two factor formula in sec. Tax 2.47, Wis. Adm. Code.

In 1979, the department audited Consolidated and assessed an additional franchise tax and interest against Consolidated for the 4-year period in the amount of \$115,002.98. The department used the formula provided in sec. Tax 2.47, Wis. Adm. Code, to arrive at the assessment.

Several steps are involved when analyzing interstate motor carrier tax cases. The first question is: were the operations of the interstate motor carrier such as to subject it to taxation under sec. 71.07(2)(e), Wis. Stats.? That is answered by inquiring whether the interstate motor carrier is being taxed on its income for transacting business within this state. If so, the statute applies and the question becomes: does Wisconsin's tax upon such income violate either the Commerce or Due Process Clauses?

The Wisconsin Supreme Court concluded as follows:

- A. The statute applies. The income taxed by the formula provided in sec. Tax 2.47, Wis. Adm. Code, is income "derived from" Consolidated's business transactions within Wisconsin and thus is subject to taxation under sec. 71.07(2)(e), Wis. Stats. Consolidated's activities in Wisconsin produce income for Consolidated which is derived from its business transactions in this state.

- B. The tax assessment upon Consolidated's Wisconsin income does not violate the limits of the Commerce Clause. Under recent Commerce Clause cases, a state tax does not offend the Commerce Clause if the tax:

1. is applied to an activity with a substantial nexus with the taxing state,
2. is fairly apportioned,
3. does not discriminate against interstate commerce, and
4. is fairly related to services provided by the state.

Commonwealth Edison Co. vs. Montana, 453 U.S. 609, 617 (1981) (citing *Complete Auto Transit, Inc. vs. Brady*, 430 U.S. 274 (1977)).

First, both parties agree that there is a sufficient nexus between Consolidated's activities and Wisconsin to meet the nexus factor.

Second, the tax assessment against Consolidated is fairly apportioned. The parties agree the formula provided in sec. Tax 2.47 Wis. Adm. Code taxes approximately an additional 1.1% of Consolidated's income averaged for the years 1974 through 1977.

A 1.1% variance during a select time span does not clearly and cogently show that the apportionment under the formula provided in sec. Tax 2.47 Wis. Adm. Code was out of all proportions to business transacted within this state, nor that it has led to a grossly distorted result.

Third, the formula provided in sec. Tax 2.47, Wis. Adm. Code, is not discriminatory. Consolidated argues that the formula has the effect of taxing non-Wisconsin transportation companies more heavily than Wisconsin companies.

The formula provided in sec. Tax 2.47, Wis. Adm. Code, contains no exemptions, credits, or provisions that treat in-state carriers differently than out-of-state

carriers. The distinction between intra-state and interstate business is the issue.

Complete Auto Transit's fourth element, that the tax be fairly related to services provided by the state, was also satisfied. The income earned by Consolidated through its transportation of goods to, from, and through Wisconsin, and through its thirteen terminals in Wisconsin, reasonably and fairly relates to Wisconsin for taxation purposes under the Commerce Clause.

- C. Because the Commerce Clause is not violated, the Due Process Clause also is not violated.

As of December 15, 1991, it was not known whether the taxpayer will appeal this decision to the United States Supreme Court.



Pollution abatement equipment — 1986 and prior. *Fort Howard Corporation vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, September 18, 1991). The issue in this case is whether the taxpayer, which on its original 1981 return had written off part of the cost of certain waste treatment facilities, could by a timely amended return revoke that treatment and fully deduct those costs, or whether the original 1981 treatment was irrevocable.

In 1981, the taxpayer incurred expenses for pollution abatement equipment that later qualified as "waste treatment property" under Wisconsin law. A portion of that property was put in service in 1981, and the balance was put in service in 1982.

In January 1982, the taxpayer applied to the department to have the expenses for the waste treatment property qualified for property tax exemption. On March 4, 1982, the taxpayer signed its 1981 Wisconsin franchise tax return showing depreciation on the property put in service in 1981. This treatment was repeated on the 1982 returns for the property put in service in 1982. On March 11, 1982, the taxpayer received the department's approval for the property tax exemption. On March 15, 1982, the depart-

ment received the taxpayer's 1981 franchise tax return.

In 1986, by a timely amended return, the taxpayer claimed a deduction for all the property purchased in 1981, seeking a refund that the department denied. The department argued that, by its original reporting, the taxpayer made an irrevocable election to depreciate the property. Without conceding that it took depreciation on its original 1981 return, the taxpayer argued that Wisconsin law explicitly allowed it to change the original treatment from depreciation to deduction by timely amendment.

The Commission concluded that the original 1981 return was mailed or sent after the approval notice was received, in the absence of proof showing otherwise. With the post-approval 1981 and 1982 returns, the taxpayer made irreversible elections to depreciate the property, and was precluded from deducting the costs of the property on the amended return for 1981.

The taxpayer has not appealed this decision.



Liquidating corporations. *Wisconsin Department of Revenue vs. Ins. Serv. Liquidating, Inc. and Insurance Services, Inc.* (Circuit Court for Dane County, July 23, 1991). The issue in this case is whether sec. 71.337(1), Wis. Stats. (1983-84), requires a corporation to recognize any gain on the liquidating sale of its assets, when such gain was participated in by a Wisconsin resident shareholder who received an installment note at the time of distribution and who subsequently moved out of state before the note was completely paid off. This dispute focuses on the correct interpretation of the phrase, "to the extent that such gain or loss is participated in by Wisconsin resident shareholders."

The Commission held that because all the shareholders of the taxpayer were Wisconsin residents at the time of liquidation and distribution of corporate assets, the requirements of the statute had been met, and the corporation need not recognize any gain or loss from the sale of its assets pursuant to a liquidation plan. The department requests a reversal of

the Commission's decision because one of the shareholders moved out of Wisconsin before the distribution was complete and was not subject to Wisconsin taxation on distributions made to him after he moved. See *Wisconsin Tax Bulletin* 71, page 9, for a summary of the prior decision.

Both the department and the taxpayer rely on the same definition of the word "participate". The taxpayer argues that participation in gain or loss occurs on the date of first distribution only, while the department suggests that participation occurs each time payment is made over a period of time.

The Court concluded that the statute itself simply does not address the question of what point in time is to be used to measure participation in gain or loss. Because the statute can be understood by reasonable people in more than one way, it is unclear and ambiguous. In construing ambiguous statutes, it is the duty of the Court to search for the true legislative purpose and identify the wrong that the statutory amendment was meant to remedy; the "literal meaning" approach to statutory construction cannot be used to avoid obvious legislative purpose. Ambiguity in revenue laws is generally resolved against the taxing authority, but statutes conferring tax privilege on the taxpayer are strictly construed against the taxpayer. Section 71.337(1), Wis. Stats., is a revenue law that invokes a privilege against taxation; it allows that if, and only if, a corporation meets all the conditions set forth in the statute, the corporation need not recognize gain or loss as it normally is required to do under other tax statutes. Therefore, because the statute on which the taxpayer relies in asserting that no tax is owed is a tax *exemption* statute, the statute must be strictly construed in favor of the department.

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



SALES/USE TAXES

Use tax — sale, destined for. *Grant, Iowa, Lafayette Shopping News, Inc. vs. Wisconsin Department of Revenue, Mark Bugher, and Kurt Kaspar* (Circuit Court for Dane

County, July 25, 1991). The issues in this case are:

- A. Whether the taxpayer's action, alleging that the department's finalized computation of use tax owing was contrary to a Circuit Court order, is barred by prior proceedings under the doctrine of *res judicata*.
- B. Whether fees and costs should be awarded to the department.

In August 1974, the department assessed additional sales tax on the taxpayer's gross receipts for providing printing services to other publishers. Additional use tax was assessed on supplies and materials the taxpayer used in the printing of its own publication, the Shopping News.

The taxpayer's petition for redetermination was denied by the department, and the taxpayer appealed the sales and use tax assessments to the Wisconsin Tax Appeals Commission. The Commission held that 1) the gross receipts the taxpayer received for printing services it provided other publishers were not for the printing of "newspapers" within the meaning of sec. 77.54(15), Wis. Stats. (1973); 2) the taxpayer's use of supplies and materials to print its own publication, the Shopping News, was not in the manufacture of an article "destined for sale" within the meaning of sec. 77.54(2), Wis. Stats. (1973); and 3) the Commission did not have the authority or jurisdiction to rule on any constitutional questions.

The taxpayer petitioned the Circuit Court for review of the Commission's determination. The Circuit Court reversed and held that 1) the publications the taxpayer printed for other publishers were "newspapers" within the meaning of sec. 77.54(15), Wis. Stats. (1973); and 2) the taxpayer's publication, the Shopping News, was "destined for sale" within the meaning of sec. 77.54(2), Wis. Stats. (1973).

The department appealed that decision to the Court of Appeals, which reversed the Circuit Court on the "destined for sale" issue and affirmed the Circuit Court insofar as it reversed the Commission's decision that the publications were not newspapers but remanded the issue back to the Commission to

explain the reasoning behind its conclusion that the publications were not newspapers. The Court of Appeals decision was dated December 22, 1988. The "destined for sale" determination was not appealed by either party.

The Commission, on remand, issued a second decision, explaining that the publications at issue were shoppers guides, that shoppers guides were not newspapers, and therefore, the publications at issue were not newspapers.

The taxpayer petitioned the Circuit Court for review of this second Commission determination. The Circuit Court decision, dated May 21, 1990, reversed the Commission's determination that the publications at issue were not "newspapers" within the meaning of sec. 77.54(15), Wis. Stats. (1973). That decision was not appealed by either party.

On November 7, 1990, the department issued a finalized computation of tax it alleged the taxpayer still owed. The computation showed no sales tax owing but did show use tax owing. On January 8, 1991, the taxpayer commenced an action alleging that the use tax assessment was contrary to the May 21, 1990, Circuit Court order. The department filed a motion to dismiss on February 26, 1991, alleging that the taxpayer's action was barred by *res judicata*.

The Circuit Court concluded as follows:

- A. The decision dated May 21, 1990, was a final determination on the merits of the "newspaper" issue, and the Court of Appeals decision dated December 22, 1988, was a final determination on the merits of the "destined for sale" issue. The taxpayer's action is barred by *res judicata*.
- B. Because there has been no showing that this suit was brought in bad faith or that the taxpayer or the taxpayer's attorney knew or should have known that such claim was without reasonable basis in law or equity, fees and costs will not be awarded.

The taxpayer has not appealed this decision.



Parking and storage — aircraft. Containers, packaging and shipping materials — plastic garment bags. *Luetzow Industries vs. Wisconsin Department of Revenue* (Circuit Court for Milwaukee County, May 15, 1991). This is a petition for review of a Wisconsin Tax Appeals Commission (Commission) decision, which affirmed the department's denial of the taxpayer's request for redetermination of a sales tax assessment. See *Wisconsin Tax Bulletin* 71, page 11, for a summary of the prior decision.

The issues in this case are:

- A. Whether the taxpayer, the owner of an aircraft hangar it leased to an entity the taxpayer claims was a federally-certified air carrier of persons and property in interstate commerce, was liable for sales taxes on the hangar rental receipts it received in 1984-1986 under a statute that taxes gross receipts derived from "providing parking space for ... aircraft for a consideration" (sec. 77.52(2)(a), Wis. Stats. (1983-84)), or exempt under a statute that exempts "gross receipts from the sale of and the storage, use or other consumption of [a]ircraft ... sold to persons using such aircraft as certified ... carriers of persons or property in interstate ... commerce" (sec. 77.54(5), Wis. Stats. (1983-84)).
- B. Whether the taxpayer, also in the business of manufacturing plastic garment bags, was liable for sales taxes on the gross receipts from its 1984-1987 sales of the bags to dry cleaning establishments which used the bags to return clean laundry to their customers, or exempt under a statute that exempts "gross receipts from the sale of ... bags ... used by the purchaser to transfer merchandise to customers" (sec. 77.54(6), Wis. Stats. (1983-84)).

The Circuit Court affirmed the Commission's decision with respect to the hangar rental receipts. It held that sec. 77.54(5)(a), Wis. Stats. (1983-84), and sec. Tax 11.84 (3)(a), Wis. Adm. Code, do not exempt the taxpayer from the sales tax for the lease of an airplane hangar.

The Circuit Court reversed the Commission's decision with respect to the plastic

garment bags. It found that the common usage of the words "customer" and "merchandise," as used in sec. 77.54(6)(b), Wis. Stats., applies to the taxpayer's sale of the plastic garment bags and brings the taxpayer within the exemption.

This decision has been appealed to the Court of Appeals.



Use tax — collection by retailers. *MRC Industries, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, September 9, 1991). The issue in this case is whether the taxpayer is entitled to a refund of what it characterized as Wisconsin sales tax which the taxpayer collected, reported, and paid during the period January 1985 through September 1986.

The taxpayer is a corporation incorporated in Illinois in 1975, with main offices located in Elk Grove, Illinois. The taxpayer operated a branch office in Wauwatosa, Wisconsin during the period 1979-84 for the purpose of selling and repairing computer equipment and obtained its initial Wisconsin seller's permit in 1979. It was not established that such permit was ever surrendered.

The basis for the taxpayer's refund claim is its contention that it had withdrawn from doing business in Wisconsin during the period in question, and that sales and use tax returns and payments for that period were filed in error.

After closing its Wauwatosa branch office in 1984 the taxpayer had no office, agency, warehouse or other place of business in Wisconsin. No employees were stationed here thereafter. Most of the equipment sold by the taxpayer to Wisconsin customers was shipped in by UPS or other common carriers. The taxpayer, in one or two situations, may have repaired its products in Wisconsin. The taxpayer's service department generally utilized company vehicles in traveling and would have done so in traveling to Wisconsin in those instances where repairs or pickup of equipment was made.

The department denied the claim on the grounds the taxpayer would be liable for use

tax, if not sales tax, on its Wisconsin sales, and also because the taxpayer had voluntarily registered and paid the Wisconsin sales and use tax under sec. 77.53(9m), Wis. Stats. While the taxpayer charged and reported the tax as a sales tax on its Wisconsin sales and use tax returns, it was in effect collecting and reporting a Wisconsin use tax.

The Commission affirmed the department's denial of the refund claim. No allegation was presented that the underlying transactions generating the tax were *not* taxable under use tax provisions, or that they were sales or use tax exempt. The taxpayer offered nothing to prove that the taxes paid were not substantively due and owing as "use" taxes, as contended by the department. The taxes presumably having been collected from purchasers as sales tax, the department has a valid basis for keeping them as use taxes even if the department could not have properly imposed use tax collection duties on the taxpayer in the first place for lack of jurisdictional nexus, an issue which the Commission found no need to address.

The taxpayer has not appealed this decision.



Telecommunication services — billing and collection services. *Wisconsin Bell, Inc., American Telephone & Telegraph Co., and AT&T Communications of Wisconsin, Inc. vs. Wisconsin Department of Revenue, and Mark D. Bugher* (Court of Appeals, District IV, July 25, 1991). The taxpayers (Bell) appeal from an order of the Circuit Court for Dane County, dismissing their action for declaratory judgment. They had sought a judgment declaring that certain billing and collection services provided by Bell to the AT&T companies were not subject to the Wisconsin sales tax. The Court dismissed the action in deference to the administrative remedy available to the taxpayers before the department under sec. 227.41(1), Wis. Stats., which provides the department with declaratory ruling authority.

The dispositive issue is whether the Court abused its discretion when it dismissed Bell's action "in deference" to the department's declaratory ruling authority.

AT&T provides interstate and long-distance telephone service to residents of Wisconsin. Bell is the "local" telephone company providing intrastate service in many areas of the state. Pursuant to an agreement with AT&T, Bell bills and collects the charges due AT&T for the long distance services AT&T provides to Wisconsin customers.

In 1988, the department published a statement in a tax "newsletter" indicating its belief that fees Bell charges AT&T for providing the long-distance billing and collection services were subject to the Wisconsin sales tax as "telephone services" under sec. 77.52(2)(a)4, Wis. Stats. The statement was not fact-specific.

Despite the newsletter statement, the department has not assessed Bell for sales tax on the gross receipts from its billing and collection services, nor has Bell paid any such taxes.

In 1990, the taxpayers brought the declaratory judgment action in Circuit Court, seeking a declaration that Bell's billing and collection activities were not "telephone (or telecommunications) services" within the meaning of the statute. The department moved to dismiss on grounds that the Court cannot acquire subject matter jurisdiction until the Wisconsin Tax Appeals Commission (Commission) first rules on the matter, and that the controversy was not ripe for adjudication. Alternatively, the department argued that the Court should defer to the Commission under the primary jurisdiction doctrine.

The Circuit Court granted the motion. It concluded that although the Commission did not have "initial jurisdiction" in the matter - that it could not rule on the controversy until the case had gone through the department - the taxpayers could seek a declaratory ruling from the department under sec. 227.41(1), Wis. Stats. The Court then stated that it would "in its discretion defer to the [department's] expertise" and dismissed the action, leaving the taxpayers to their declaratory relief remedies before the department and the Commission.

The taxpayer complains that because sec. 227.41(1), Wis. Stats., says that the agency "may" issue a declaratory ruling upon peti-

tion, there is no guarantee that the department will actually rule on the issue.

The taxpayer's assertion that the Circuit Court erred in not asserting its jurisdiction because the procedures for seeking and appealing an agency declaratory ruling under sec. 227.41, Wis. Stats., are "poorly defined" is similarly unavailing. The statute outlines the form a petition for a ruling should take and states where and how it should be filed. It also requires the agency to act upon the petition within a reasonable time after receipt and specifically provides that the agency's ruling "shall be subject to review in the Circuit Court in the manner provided for the review of administrative decisions."

The taxpayer's final reason for judicial intervention is that the case does not involve "complex factual issues" but only a simple question of "statutory interpretation," which, presumably, it feels the Court is equally, if not more, able to resolve.

The Court of Appeals affirmed the Circuit Court's judgment, concluding that whether the factual issues are complex or simple, the agency has a role in the formation of tax policy and the application and administration of the tax laws that deserves deference in a case such as this.

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



OTHER

Administrative remedies — declaratory and injunctive relief. *J. Gerard Hogan, Dolores M. Hogan, Jerome S. Poker, Margaret H. Poker, on behalf of themselves and all residents of the State of Wisconsin who were paid retirement benefits by the United States government in any one or all of the years 1982 through 1988, similarly situated, vs. Wisconsin Department of Revenue* (Wisconsin Supreme Court, June 26, 1991). This is a review of a decision of the Court of Appeals affirming an order of the Circuit Court for Dane County. The primary issue presented is whether these plaintiffs (retirees) must exhaust their state administrative remedies before filing an action in a state court under 42 U.S.C. section 1983 (a provision of

federal law which deals, in part, with civil actions for deprivation of rights). This case does not involve the question of whether these retirees are entitled to a tax refund. Nor does it involve the question of the amount of such refund. It involves only the question of what route these retirees must take in pursuing their claim for refund.

The retirees brought this action in state court under 42 U.S.C. sec. 1983 alleging that the department had violated, and was continuing to violate, their federal statutory and constitutional rights by exacting taxes that discriminate against retired federal employees. The named retirees, J. Gerard Hogan, Dolores M. Hogan, Jerome S. Poker, and Margaret H. Poker, have been Wisconsin residents from at least 1982 through the present. Mr. Poker and Mr. Hogan are former federal employees. As a result of their federal employment, Poker and Hogan received federal retirement benefits that were taxed by the State of Wisconsin.

The retirees commenced this sec. 1983 action on April 17, 1989, in the wake of the United States Supreme Court's decision in *Davis v. Michigan Dept. of Treasury*. The Michigan tax statutes exempted from taxation all retirement benefits paid by Michigan and its political subdivisions, while levying an income tax on federal retirement benefits. The Court held that Davis was entitled to a refund of taxes paid because the Michigan tax scheme was contrary to sec. 111 and violated principles of intergovernmental tax immunity.

The retirees allege that the Wisconsin tax system has similarly discriminated against federal retirees. From 1963 until 1988, Wisconsin exempted the benefits of many retired employees of only certain state and local governments from income taxation. During this same period, federal retirement benefits were not exempt from income taxation.

The retirees sought declaratory and injunctive relief against the department pursuant to 42 U.S.C. sec. 1983, in the Circuit Court for Dane County. They also sought damages under a pendent state law claim of money had and received.

The Department filed a motion to dismiss, asserting numerous defenses including the

defense that the retirees had not exhausted their state administrative remedies. On May 19, 1989, the retirees moved for a declaration that sec. 71.05(1)(a), Stats., is unconstitutional, for certification of the class of federal retirees, and for injunctive relief precluding the enforcement of sec. 71.05(1)(a), Stats., and establishing a constructive trust.

The Circuit Court enjoined the department "from collecting, asserting, imposing or otherwise attempting to collect, assert, or impose any tax or liability upon or against any [Plaintiff] ... from June 13, 1989 forward pending the resolution of this action on the merits," because the continuation of these activities would cause irreparable injury to the retirees. In addition, the Court ordered the department to hold any money collected from the retirees in a constructive trust and certified the class of federal retirees. The Court did not hear or decide the issue of whether funds already collected by the department should be returned to the retirees.

On August 9, 1989, 1989 Wisconsin Act 31, section 1817m, went into effect exempting for 1989 and subsequent tax years the pension income of the federal retirees in the certified class. This provision of sec. 71.05, Stats. (1989-90), does not affect the liability of federal retirees for pre-1989 tax years.

The Court of Appeals affirmed the Circuit Court's order. In addition, the Court held that the action had not been rendered moot by 1989 Wisconsin Act 31, section 1817m.

The Wisconsin Supreme Court concluded that:

1. Because sec. 111 protects federal retirees from discriminatory taxation, violations of sec. 111 regarding intergovernmental immunity claims are actionable under 42 U.S.C. sec. 1983.
2. Federal law does not require state courts to entertain sec. 1983 actions in tax matters where the plaintiff has not exhausted established state administrative remedies if such remedies are plain, adequate, and complete.
3. Wisconsin's administrative remedies are plain, adequate, and complete.

4. Wisconsin law requires these retirees to exhaust available state administrative remedies before commencing a sec. 1983 action in the Wisconsin courts.

The Wisconsin Supreme Court, therefore, reversed the Court of Appeals' decision which affirmed the Circuit Court's order granting injunctive relief to the plaintiffs and denying the department's motion to dismiss.

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

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TAX RELEASES

"Tax Releases" are designed to provide answers to the specific tax questions covered, based on the facts indicated. 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:

Corporation Franchise or Income Taxes

1. Authority to Audit Federal Tax Return Information (p. 16)
2. Wisconsin Treatment of Alaska Native Corporation Losses (p. 16)

Sales/Use Taxes

1. Credit for Sales Tax Paid in Minnesota (p. 17)
2. Payment for Medical Equipment Under Medicare Program (p. 18)
3. Real Property Leases Involving Tangible Personal Property (p. 19)

return or for the purpose of making a determination of the taxable income of any corporation, may examine any books, papers, records or memoranda bearing on the income of the corporation. It also provides that upon such information as it may discover, the department shall determine the true amount of income received during the year or years under investigation. Therefore, the department has authority to examine all supporting documentation regarding the computation of federal net income before net operating losses and special deductions as reported on federal Form 1120 or 1120-A.

In addition, sec. 71.74(6), Wis. Stats. (1989-90), provides that whenever a corporation which is required to file a franchise or income tax return with Wisconsin is affiliated with or related to any other corporation through stock ownership by the same interests or as parent or subsidiary corporations, or whose income is regulated through contract or other arrangement, the department may require such consolidated statements as in its opinion are necessary in order to determine the taxable income received by any one of the affiliated or related corporations.

Note: Prior to the 1987 taxable year, the department had the same authority to audit and examine such return information (sec. 71.11(7)(b) and (20), Wis. Stats. (1985-86)).

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CORPORATION FRANCHISE OR INCOME TAXES

1. Authority to Audit Federal Tax Return Information

Statutes: Sections 71.26(2) and (3) and 71.74, Wis. Stats. (1989-90), and 71.11(7)(b) and (20), Wis. Stats. (1985-86)

Background: For the 1987 taxable year and thereafter, the computation of Wisconsin net income of a corporation is determined under the Internal Revenue Code, with certain modifications (sec. 71.26(2) and (3), Wis. Stats. (1989-90)). The Wisconsin corporation franchise and income tax returns (Forms 4 and 5) utilize federal taxable income before net operating losses and special deductions, which has been reported on federal Form 1120 or 1120-A, as the starting point for the determination of Wisconsin net income.

Question: Does the Wisconsin Department of Revenue have the authority to audit the information on the federal Form 1120 or 1120-A which has been utilized in determining the federal net income reported on the Wisconsin Form 4 or 5?

Answer: Yes. Section 71.74(2), Wis. Stats. (1989-90), provides that the department, for the purpose of ascertaining the correctness of any

2. Wisconsin Treatment of Alaska Native Corporation Losses

Statutes: Section 71.26(3)(x), Wis. Stats. (1989-90), and sec. 71.04, Wis. Stats. (1985-86).

Background: Section 1501 of the Internal Revenue Code (IRC) provides that an affiliated group of corporations, as defined in sec. 1504(a), may file consolidated federal income tax returns. Under the consolidated return rules, the losses and tax credits generated by one corporation may be offset against income earned by another member of the affiliated group.

Section 60(b)(5) of the Deficit Reduction Act of 1984 (P.L. 98-369) amended IRC sec. 1504(a) to alter the general requirements for affiliation and add an 80 percent equity ownership test. Thus, two corporations are not eligible to file a consolidated return for a taxable year unless, at the beginning of the taxable year, one owns stock possessing at least 80 percent of the voting power of all classes of stock and at least 80 percent of the fair market value of all outstanding stock of the other. Under the prior federal rules, one corporation could possess 80 percent of the voting power of all classes of stock but a much smaller percentage of the value of another corporation and still file a consolidated return.

The change in the definition of an affiliated group generally became effective for taxable years beginning after December 31, 1984. However, in the case of the affiliation of a corporation with an Alaska Native Corporation (ANC), the effective date of this change was delayed until taxable years beginning in 1992. ANCs are corporations established under the Alaska Native Claims Settlement Act of 1971 (43 U.S.C. secs. 1601 et seq.) to hold the cash and land given to the Alaskan natives in settlement of their aboriginal land claims. Shares in the ANCs are held by the Alaskan natives.

Section 1804(e)(4) of the Tax Reform Act of 1986 (P.L. 99-514) amended sec. 60(b)(5) of the 1984 Act to liberalize the requirements for affiliation with an ANC or with a wholly owned subsidiary of an ANC for any taxable year beginning after 1984 and before 1992. Additionally, 1986 Act sec. 1804(e)(4) exempted ANCs from other provisions of the Internal Revenue Code, including secs. 269 and 482, and other principles of law, thus permitting them in effect to sell their losses and tax credits to a profitable corporation for a fee. The use of an ANC's tax benefits is accomplished through the affiliation of a profitable corporation with the ANC or a wholly owned ANC subsidiary, subject to the consolidated return regulations.

The Technical and Miscellaneous Revenue Act of 1988 (P.L. 100-647) eliminated the special consolidation rules applicable to ANCs, generally effective for losses and tax credits arising after April 26, 1988.

Example: In order to utilize an ANC's losses and tax credits, an ANC and a profitable corporation ("P") form a new corporation ("N"), which is capitalized with preferred stock and common stock. ANC acquires the preferred stock of N for a nominal amount of cash. P acquires the common stock in exchange for an assignment of income to N in an amount sufficient to utilize ANC's tax benefits. For federal income tax purposes, the income assigned by P to N is included in N's taxable income and excluded from P's taxable income.

Since N is affiliated with ANC, ANC includes the assigned income in the ANC group consolidated federal income tax return, offsetting that income with its own losses and tax credits. N agrees to make "tax-sharing" payments to ANC to compensate ANC for the losses and tax credits used as a result of including N in the ANC affiliated group. These payments will come from cash payments made by P to N for a portion of the income assigned. Federally, these cash payments are not taxable income to ANC and are not deductible by N or P.

When ANC's tax benefits are fully utilized, ANC's interest in N will terminate and N will be liquidated.

Question 1: May P assign income to N for Wisconsin franchise or income tax purposes?

Answer 1: No. P may not reduce the amount of income subject to Wisconsin taxation by assigning a portion of that income to N. The mechanism for assigning income to N is found in the federal consolidated return provisions, and these provisions do not apply for Wisconsin purposes.

For 1986 and prior taxable years, Wisconsin net income was not determined under the Internal Revenue Code and Wisconsin law did not contain any provision that would allow consolidated reporting or the assignment of income. Beginning with the 1987 taxable year, the Wisconsin corporation franchise and income tax law is federalized. However, secs. 1501 to 1505, 1551, 1552, 1563, and 1564, relating to consolidated returns, are specifically excluded from the Internal Revenue Code in effect for Wisconsin purposes. Sec. 71.26(3)(x), Wis. Stats. (1989-90). Therefore, a profitable corporation may not assign income to an ANC or claim losses incurred by an ANC.

Question 2: May P claim a deduction for payments actually made to N pursuant to the assignment of income agreement?

Answer 2: No. Neither the Wisconsin law in effect for 1986 and prior taxable years nor that applicable for 1987 and subsequent years contains any provision which would permit P to deduct payments made under the assignment of income agreement. Payments made in exchange for the stock in N are contributions to capital and are considered basis in the stock of N. At such time that N is liquidated, P will recognize gain or loss in accordance with that basis.

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SALES/USE TAXES

1. Credit for Sales Tax Paid in Minnesota

Statutes: Sections 77.53(16) and 77.71(2), (3), and (4), Wis. Stats. (1989-90)

Background: Section 77.53(16), Wis. Stats. (1989-90), provides a credit against Wisconsin sales or use tax for sales tax paid to another state on the sale of tangible personal property or services that is also subject to Wisconsin sales or use tax. The credit for sales tax paid to the other state cannot exceed the amount of the Wisconsin sales or use tax on the same item.

Section 77.71(2), (3), and (4), Wis. Stats. (1989-90), provides a credit against the Wisconsin county tax for any similar local tax paid in another state on the sale of tangible personal property and services that are also subject to the Wisconsin county tax. The credit for local tax paid to the other state cannot exceed the amount of the Wisconsin county tax on the same item.

Facts and Question: For all taxable sales made during the period of July 1, 1991, through December 31, 1991, the Minnesota general sales and use tax and motor vehicle excise tax rates are increased by 0.5% to 6.5%. The special tax rates for farm machinery, logging equipment, aquaculture equipment, special tooling, and liquor sales are also increased by 0.5%.

Beginning January 1, 1992, counties in Minnesota may impose a 0.5% sales and use tax on retail sales. County sales and use tax will apply to the same items subject to the 6% general sales and use tax, and to vehicles subject to the motor vehicle excise tax. This local

option tax will replace the temporary increase in the Minnesota state sales and use tax rate and will be in addition to any existing local sales taxes.

May the 0.5% additional Minnesota tax paid on sales made during the period of July 1, 1991, through December 31, 1991, be claimed as credit against the Wisconsin county sales and use tax if the sale was also subject to the Wisconsin county tax?

Answer: No. The additional 0.5% sales tax paid to Minnesota on sales made during the period of July 1, 1991, through December 31, 1991, is a state sales tax, even though it will be replaced by a county sales tax. Therefore, prior to January 1, 1992, the additional 0.5% Minnesota sales tax paid on the sale of tangible personal property or taxable services that is also subject to the Wisconsin sales and use tax may not be claimed as a credit against Wisconsin county tax. Effective January 1, 1992, the 0.5% local option tax may be claimed as a credit against the Wisconsin county tax.

Note: The additional 0.5% Minnesota general state sales tax paid on sales made during the period of July 1, 1991 through December 31, 1991, may not be claimed as a credit against the Wisconsin state sales and use tax because the Minnesota sales tax rate of 6% already exceeds the 5% Wisconsin rate.



2. Payment for Medical Equipment Under Medicare Program

Statutes: Sections 77.51(4)(b)4, 77.52(1), 77.53(1) and 77.54(1) and (22), Wis. Stats. (1989-90)

Wis. Adm. Code: Section Tax 11.45(4), March 1991 Register

Background: The Medicare program is a federal health insurance program for persons age 65 or older and certain disabled persons. One part of the Medicare program, "Medical Insurance," helps these persons pay for certain durable medical equipment.

Under the Medicare program, a person requiring medical equipment may purchase medical equipment, pay the supplier directly, and file a claim with the administrator of Medicare claims for reimbursement of an amount paid for medical equipment. Otherwise, a person requiring medical equipment may purchase medical equipment from a supplier, and the supplier will file a claim with the administrator of Medicare claims for payment of the medical equipment. The amount not paid by Medicare may be billed to the customer, with some limitations.

Medicare sets limits on the amount it will pay towards the purchase of medical equipment. Generally, Medicare will pay 80% of that limit. Suppliers of medical equipment under the Medicare program can file claims for payment by Medicare under one of two methods:

A. *Assigned.* Suppliers enter into agreements with Medicare where they agree in advance to accept assignment on all Medicare

claims. Under this agreement, the supplier accepts as total payment the amount (limit) approved by Medicare. The supplier will file a claim with the administrator of Medicare claims for 80% of the approved amount and will bill the customer for the remaining 20% of the approved amount. The Medicare program prohibits suppliers under this agreement from charging customers more than 20% of the Medicare approved amount.

Example: An item of medical equipment sells for \$1,000. The Medicare approved amount is \$900. The supplier can file a claim with the administrator of Medicare claims for \$720 (\$900 approved amount X 80%). The supplier may bill the customer for \$180 (\$900 approved amount X 20%).

B. *Unassigned.* The supplier files a claim with the administrator of Medicare claims for 80% of the approved Medicare amount. The difference between the selling price of the medical equipment and the amount paid by Medicare may be billed to the customer.

Example: An item of medical equipment sells for \$1,000. The Medicare approved amount is \$900. The supplier can file a claim with the administrator of Medicare claims for \$720 (\$900 approved amount X 80%). The supplier may bill the customer for \$280 (\$1,000 selling price less the \$720 paid by Medicare).

Facts and Question 1: Customer A purchases a hospital bed from Company B. Customer A pays Company B \$1000 for the hospital bed. Customer A files a claim with the administrator of Medicare claims for 80% of the Medicare approved amount for the hospital bed.

What are the Wisconsin sales or use tax implications of this transaction?

Answer 1: Company B's charge of \$1,000 to Customer A is subject to Wisconsin sales or use tax. The sale of tangible personal property is subject to Wisconsin sales or use tax unless a specific exemption applies. No exemption from Wisconsin sales or use tax applies to the sale of the hospital bed. Section Tax 11.45(4), Wis. Adm. Code, further provides that if a provider of a taxable item bills an individual for the taxable item and the individual then seeks reimbursement from Medicare, the entire amount billed to the individual is subject to Wisconsin sales or use tax.

Facts and Question 2: Customer A purchases a hospital bed from Company B which sells for \$1,000. The approved Medicare amount for the hospital bed is \$900. Company B does not accept assignment on Medicare claims. Company B files a claim with the administrator of Medicare claims for \$720 (\$900 X 80%) and bills Customer A \$280 (\$1,000 - \$720).

What are the Wisconsin sales and use tax implication of this transaction?

Answer 2: The charge to the administrator of Medicare claims for \$720 is not subject to Wisconsin sales or use tax. Section Tax 11.45(4), Wis. Adm. Code, provides that if the provider of a taxable

item bills the administrator of Medicare claims for a taxable item, the portion billed to Medicare is not subject to Wisconsin sales or use tax.

The charge to Customer A of \$280 is subject to Wisconsin sales or use tax.

Facts and Question 3: Customer A purchases a hospital bed from Company B which sells for \$1,000. The approved Medicare amount for the hospital bed is \$900. Company B has signed an agreement to accept assignment on all Medicare claims. Company B files a claim with the administrator of Medicare claims for \$720 (\$900 X 80%) and bills Customer A \$180 (\$900 X 20%).

What are the Wisconsin sales and use tax implications of this transaction?

Answer 3: The charge to the administrator of Medicare claims for \$720 is not subject to Wisconsin sales or use tax.

The charge to Customer A for \$180 is subject to Wisconsin sales or use tax. This is true even though Company B may not collect the tax from Customer A because the Medicare program prohibits Company B from charging more than \$180 to Customer A.

Facts and Question 4: Assume the same facts as in Facts and Question 3. Can Company B reduce its gross receipts as a result of being prohibited from collecting the Wisconsin sales or use tax on the amount billed to Customer A thereby getting a credit for the sales tax that is uncollectable?

Answer 4: No. Sections 77.52(1) and 77.53(1), Wis. Stats. (1989-90), impose a sales or use tax on the retailer for tangible personal property sold, stored, used, or consumed in Wisconsin. Under sec. 77.52(3), Wis. Stats. (1989-90), a retailer may collect the tax from the consumer or user. There is no provision that allows the retailer to reduce its gross receipts for amounts it is unable to collect from the customer.

Section 77.51(4)(b)4, Wis. Stats. (1989-90), does provide for the reduction of gross receipts for accounts found to be worthless. If the customer pays the amount billed to him or her as provided under the assigned method, the account is not worthless even though the tax may not be collected from the customer. Therefore, the reduction under sec. 77.51(4)(b)4, Wis. Stats. (1989-90), does not apply.



3. Real Property Leases Involving Tangible Personal Property

Statutes: Sections 77.51(13)(n) and 77.52(1), Wis. Stats. (1989-90)

Wis. Adm. Code: Sections Tax 11.29, June 1991 Register, and 11.48, March 1991 Register

Background: Section 77.52(1), Wis. Stats. (1989-90), imposes a sales tax on receipts from leasing or renting tangible personal prop-

erty at retail in Wisconsin. Special rules may apply when tangible personal property is included in a lease of real property.

Section 77.51(13)(n), Wis. Stats. (1989-90), provides that "retailer" includes a person selling household furniture, furnishings, equipment, appliances, or other items of tangible personal property to a landlord for use by tenants in leased or rented living quarters.

Facts and Question 1: A landlord rents furnished apartments for \$600 a month and unfurnished apartments for \$550 a month. In addition to a stove and refrigerator, which are provided in all apartments, living room and bedroom furniture are provided in furnished apartments. Is any portion of the landlord's rental receipts subject to sales tax?

Answer 1: No. The landlord's rental receipts are not subject to sales tax, even though a different amount is charged for furnished apartments. Section Tax 11.48(1)(a), Wis. Adm. Code, provides that the landlord is considered the consumer of the appliances and furniture and is subject to sales or use tax when purchasing these items.

Facts and Question 2: ABC Co. rents furniture, appliances, and other household items to persons who own their homes or live in apartments, and to landlords who use the items in residential rental property. Are ABC Co.'s rental receipts subject to sales tax?

Answer 2: Yes. ABC's receipts from the rental of furniture, appliances, and other household items are subject to sales tax.

Facts and Question 3: Restaurant Operator A decides to discontinue her business. She owns the building and trade fixtures (tangible personal property such as cooking equipment, coolers, and furniture). She will lease the entire business, including real property and tangible personal property, to Restaurant Operator B. Is any portion of Restaurant Operator A's lease receipts subject to sales tax?

Answer 3: Yes. The portion of the lease receipts attributable to the tangible personal property is subject to sales tax.

Note: Restaurant Operator A must hold a seller's permit for the collection and payment of sales tax on the taxable portion of the lease receipts.



PRIVATE LETTER RULINGS

"Private letter rulings" are written statements issued to a taxpayer by the department that interpret Wisconsin tax laws to the taxpayer's specific set of facts. Any taxpayer may rely upon the ruling to the same extent as the requestor, provided the facts are the same as those set forth in the ruling.

The number assigned to each ruling is interpreted as follows: The "W" is for "Wisconsin," the first two digits are the year the ruling

becomes available for publication (80 days after the ruling is issued to the taxpayer), the next two digits are the week of the year, and the last three digits are the number in the series of rulings issued that year. The date following the 7-digit number is the date the ruling was mailed to the requestor.

Certain information contained in the ruling that could identify the taxpayer requesting the ruling has been deleted. Wisconsin Publication 111, "How to get a Private Letter Ruling From the Wisconsin Department of Revenue," contains additional information about private letter rulings.

W9146007, August 23, 1991

Type Tax: Individual Income

Statutes: Section 71.05(6)(a)1, Wis. Stats. (1989-90)

Issue: Interest Income — Federal Bonds — Stripped Certificates

This letter responds to your request for a Private Letter Ruling on behalf of Company A in regard to the tax status of income received by individuals and fiduciaries from Company A's stripped general obligation bond certificates ("ABC Certificates").

Facts

Company A wishes to sell ABC Certificates to certain individuals and fiduciaries residing in the State of Wisconsin. Company A wishes to represent to potential individual and fiduciary purchasers that the income received by them that is attributable to the ABC Certificates is exempt from Wisconsin state income taxation to the same extent that such income is excluded from gross income for federal income tax purposes.

ABC Certificates represent direct ownership interests in specific interest payments and principal payments attributable to certain District of Columbia general obligation bonds issued on or prior to January 28, 1987 (the "Bonds"). The Bonds have been issued by the District of Columbia pursuant to Section 661(a) of the District of Columbia Self-Government and Governmental Reorganization Act (the "Act"), as codified in D.C. Code Ann. §47-321(a). The interest income received by the holders of the Bonds is excluded from gross income for federal income tax purposes pursuant to Section 685 of the Act, as codified in D.C. Code Ann. §47-332.

An ABC Certificate is created when Company A purchases a District of Columbia general obligation bond issued on or prior to January 28, 1987, separates the interest and principal portions of the bond, and issues certificates representing the interest and principal portions of the bond. The Bonds, the interests in which the ABC Certificates represent, are held in the custody of Company A on behalf and for the benefit of the owners of the ABC Certificates.

ABC Certificates will be offered at discounts from their face amounts. Payments to the holders of the ABC Certificates will be made by Company A when the corresponding interest or principal payments on the Bonds are made. No payment will be made with respect to an ABC Certificate prior to the stated due date of the corresponding interest or principal payment on the Bonds (except in the case of certain

extraordinary events, such as a redemption of the Bonds), and no payment will be made with respect to an ABC Certificate from any sources other than those for which provision is made in the terms of the Bonds. The amount and nature of the income received by a holder of an ABC Certificate will be governed, for federal income tax purposes, by Section 685 of the Act and Section 1286 of the Internal Revenue Code of 1986, as amended.

Ruling Requested

You ask whether the income received by the individual and fiduciary holders of the ABC Certificates will be exempt from Wisconsin state income taxation to the same extent that such income is excluded from gross income for federal tax purposes.

Ruling

Income attributable to ABC Certificates received by any individual or fiduciary holders thereof is exempt from Wisconsin state income taxation.

Analysis

Wisconsin Administrative Code sec. Tax 3.095(4)(a) provides that interest payable on District of Columbia general obligation bonds issued on or prior to January 28, 1987, is exempt from the Wisconsin state income tax on individuals and fiduciaries (i.e., is not subject to the "add back" provisions of sec. 71.05(6)(a)1, Wis. Stats. (1989-90)), provided that the interest from such bonds qualifies for exemption from federal income taxation for a reason other than or in addition to Section 103 of the Internal Revenue Code.

As described above, any interest income on general obligation bonds issued by the District of Columbia under Section 661(a) of the Act is excluded from gross income for federal income tax purposes pursuant to Section 685 of the Act (D.C. Code Ann. §47-332). Therefore, such interest income is excluded from gross income for federal income tax purposes for a reason other than or in addition to Section 103 of the Internal Revenue Code. Any such interest income that is received by an individual or fiduciary on District of Columbia bonds issued on or before January 28, 1987 is thus exempt from Wisconsin state income taxation.

The question then becomes one of whether the tax-exempt status of the interest flows through the ABC Certificates. In *Capital Preservation Fund, Inc. et al. vs. Wisconsin Department of Revenue*, 145 Wis. 2d 841, 429 N.W. 2d 551 (1988), the Court of Appeals held that if a mutual fund invested solely in federal obligations, the dividends received by the individual investors in the mutual fund would be exempt from state taxation to the extent the dividends were attributable to interest from federal obligations. Thus, an individual did not need to own a federal obligation to receive the benefits of state tax exemption. An ownership interest in a mutual fund which invested in a federal obligation was enough to receive the benefits of state tax exemption.

In a situation analogous to the present case, the department took the position that the tax-exempt status of interest income attributable to United States Government obligations flowed through certain "proprietary zero-coupon certificates" issued with respect to "stripped"

United States Treasury notes and bonds. *Wisconsin Tax Bulletin*, No. 66, p. 12, Wisconsin Department of Revenue, April 1990. The "proprietary zero-coupon certificates" that were the focus of the above Wisconsin Tax Release (the "Tax Release") were described as certificates of ownership in United States Treasury obligation cash flows, which were created when a brokerage firm purchased a United States Treasury note or bond, "stripped" the note or bond (i.e., separated the interest and coupon portions of the obligation) and then issued certificates giving rights to the coupon and principal cash flows. The Tax Release stated that the investors purchasing such certificates were purchasing the right to receive an interest or principal payment from the Treasury obligation, but were not purchasing the actual Treasury obligation. The Tax Release held that "[t]he tax-exempt status of interest from U.S. Government obligations flows through the proprietary zero-coupon certificate."

ABC Certificates provide a situation analogous to that of the mutual funds and the "proprietary zero-coupon certificates". Because an ABC Certificate is a pass-through certificate, any income attributable to an ABC Certificate that is received by an individual or fiduciary is exempt from Wisconsin state income taxation to the extent that such income is excluded from gross income for federal income tax purposes for a reason other than or in addition to Section 103 of the Internal Revenue Code.



W9148008, September 5, 1991

Type Tax: Individual Income

Statutes: Section 71.05(1)(a), Wis. Stats. (1989-90)

Issue: Federal Retirement Benefits

This letter is in response to your request for a private letter ruling regarding the initial date of the taxpayer's ("Taxpayer X") membership in the United States Civil Service Retirement System for purposes of taxability of retirement benefits attributable to such membership.

Facts

Taxpayer X had numerous periods of active military service between November 1943 and November 1965 and from July 17, 1970, through August 29, 1970. He was employed by the federal government in a civil service position from April 1966 until a reduction-in-force on July 16, 1970, at which time he did not withdraw his Civil Service Retirement contributions but left them on deposit with the Civil Service Retirement System. Taxpayer X was re-employed by the federal government in a civil service position from February 1971 through his retirement on July 31, 1990.

Taxpayer X made deposits in the Civil Service Retirement System for post-1956 periods of military service. Therefore, all periods of military service were considered "creditable service" under the Civil Service Retirement System.

Although Taxpayer X first became a federal civil service employee in April 1966, his service computation date is November 29, 1959. (The federal Standard Form 50-B submitted describes "service computation date" as the date when federal service began unless there is prior

creditable service. If this is the case, the date is constructed and reflects the total years, months and days of prior creditable civilian and military service.)

Ruling Request

You have requested a ruling that Taxpayer X's membership in the federal Civil Service Retirement System began on November 29, 1959, allowing Taxpayer X to exclude from Wisconsin taxable income payments received from the Civil Service Retirement System.

Ruling

Section 71.05(1)(a), Wis. Stats. (1989-90), excludes from Wisconsin taxation all payments received from the federal Civil Service Retirement System which are paid on the account of a person who was a member of the retirement system as of December 31, 1963. Based on the facts in this case, Taxpayer X was not a member of the Civil Service Retirement System as of December 31, 1963, and thus does not qualify for the exclusion provided by sec. 71.05(1)(a), Wis. Stats. (1989-90).

Analysis

The exclusion from income for payments received from certain retirement systems (including the federal Civil Service Retirement System) is provided in sec. 71.05(1)(a), Wis. Stats. (1989-90). To qualify for the exclusion, the payments must be made on the account of a person who was a member of, or retired from, one of the specified retirement systems as of December 31, 1963.

In this instance Taxpayer X is a member of the federal Civil Service Retirement System. He first became a federal civil service employee in April 1966, at which time amounts would have been withheld from his pay as a contribution to the Civil Service Retirement System. Thus membership in the retirement system was established at the time of employment.

Taxpayer X's pre-1964 active military service, however, does not grant him membership in the Civil Service Retirement System because such military service does not qualify him as an employee eligible to participate in this retirement system (5 USCS § 8331 (1)(A)).

Notwithstanding his failure to qualify as a member of the Civil Service Retirement System before 1964, Taxpayer X is using this pre-1964 (as well as post-1964) active military service as creditable service included in the computation of his annuity. The granting of creditable service alone does not establish membership in the Civil Service Retirement System during the period of service when the taxpayer and his employer were making no contributions to the system.

Furthermore, Taxpayer X's exercise of the right to make deposits to the Civil Service Retirement System for post-1956 periods of military service establishes creditable service to use toward calculating the annuity; its exercise does not establish membership in the retirement system.

Therefore, because Taxpayer X was not a member of the Civil Service Retirement System as of December 31, 1963, he does not qualify for the exclusion under sec. 71.05(1)(a), Wis. Stats. (1989-90).

