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NEW TAX LAWS TO BE ADDRESSED IN SPECIAL ISSUE

Various tax bills were still pending before the Wisconsin Legislature at the time this Bulletin went to press. If any of these bills become law, a special issue of the *Wisconsin Tax Bulletin* will be published to provide information about the tax law changes.

DELINQUENT TAX COLLECTION FEE BEGINS JULY 1,1992

A new *Delinquent Tax Collection Fee* (DTC fee) becomes effective July 1, 1992. This fee, which was enacted into law by the Wisconsin Legislature, places the burden of delinquent tax collection on the delinquent taxpayer rather than all citizens of the state.

For each account that is delinquent on June 30, 1992, the DTC fee is the greater of $25 or 4 1/2% of the amount of tax, interest, penalty, or fee remaining unpaid on that date. The DTC fee will be added to existing fees.

For each account that becomes delinquent on or after July 1, 1992, the DTC fee is the greater of $25 or 4 1/2% of the amount of tax, interest, penalty, or fee remaining unpaid as of the due date of an assessment, notice of amount due, or notice of redetermination. An assessment, etc., becomes a delinquent account if it is not paid by the due date.

In This Issue

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, withholding, sales/use, gift, inheritance and estate, cigarette, tobacco products, beer, intoxicating liquor and wine, and motor fuel, special fuel, and general aviation 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 27 of this Bulletin. The order blank may also be used for subscribing to the Wisconsin Tax Bulletin and for ordering the Wisconsin Administrative Code.

TWO MORE COUNTIES ADOPT SALES TAX

On April 1, 1992, Juneau and Sauk Counties adopted the county sales and use tax, joining 40 other counties that had previously adopted the 1/2% county tax. The December 1991 Tax Report, a copy of which appeared in *Wisconsin Tax Bulletin* 75 (January 1992), explains how this county tax applies to retailers and other persons, and it includes a listing of all 42 counties with the county sales and use tax.

A review of the county sales and use tax and a listing of the counties with the tax can also be found in the March 1992 issue of the Tax Report. A copy appears on pages 24 and 25 of this Bulletin.

SPEAKERS BUREAU

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

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

1992 ESTIMATED TAX REQUIREMENTS FOR INDIVIDUALS, ESTATES, AND TRUSTS

Estimated income tax payments are tax deposits made during the year to prepay the income tax and minimum tax that will be due when an income tax return is filed. Every individual, married couple filing jointly, estate, or trust (except grantor trusts and trusts subject to tax on unrelated business income, as explained below), is required to pay 1992 Wisconsin estimated tax if they expect to owe $200 or more on a 1992 Wisconsin income tax return. Form 1-ES, "1992 Wisconsin Estimated Tax Voucher," is filed with each estimated tax payment.

For calendar year taxpayers, the first estimated tax payment is due on April 15, 1992. Installment payments are also due on June 15, 1992, September 15, 1992, and January 19, 1993. For fiscal year taxpayers, installment payments are due on the 15th day of the 4th, 6th, and 9th months of the fiscal year and the 1st month of the following fiscal year.

Full-year residents, part-year residents, estates, and trusts are subject to the estimated tax requirements for 1992. However, an estate is not required to pay estimated tax during the first two years of its existence.

Grantor trusts which are funded on account of a decedent's death are only required to make estimated tax payments for taxable years which end two or more years after the decedent's death. For example, an individual died on April 25, 1992. A grantor trust which was funded on account of the individual's death is not required to make estimated tax payments for any taxable year ending before April 25, 1994.

A trust which is subject to tax on unrelated business income is generally required to pay 1992 Wisconsin estimated tax if it expects to owe $500 or more on a 1992 Wisconsin income tax return (Form 4T). A 1992 Form 4-ES, "Wisconsin Corporation Estimated Tax Voucher," is filed with each estimated tax payment. Installment payments for such trusts are due on the 15th day of the 3rd, 6th, 9th, and 12th months of the taxable year.

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

EXTENSIONS OF TIME TO FILE FOR INDIVIDUALS

Any extension of time granted by the Internal Revenue Service (IRS) for filing a federal return also extends the time for filing the corresponding Wisconsin return, provided a copy of the federal extension or an explanatory statement is attached to the Wisconsin return at the time it is filed.

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

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

See the article titled "Extensions of Time to File 1991 Tax Returns" in *Wisconsin Tax Bulletin* 75 (page 5) for more information about extensions.

Reminders

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

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

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

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

TAX KIT SENT TO WISCONSIN HIGH SCHOOLS

Wisconsin high schools were sent a tax kit in December 1991, to help teachers explain Wisconsin taxes to students.

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

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

PROGRAMS HELP FARMERS AND PROTECT WISCONSIN'S FARMLAND

Nearly $42 million in direct benefits were distributed to Wisconsin farmers in 1991 through two state programs, the farmland preservation credit program and the farmland tax relief credit program. About 25,200 Wisconsin farmers claimed farmland preservation credits amounting to $28 million in the fiscal year ending June 30, 1991, and more than 60,000 individual farmers received farmland tax relief credits totalling $13.8 million for 1990.

In addition to providing benefits averaging $1,116 per claimant, the farmland preservation credit program is helping to protect 8.1 million acres of farmland through local land use planning and soil conservation practices. To qualify for a benefit under this program, farmland must be zoned for exclusive agricultural use or be subject to a preservation agreement between the farmer and the state. About 78% of the claims for the fiscal year ending June 30, 1991, were for land under zoning and 22% were for land covered by agreements.

Participation in the farmland preservation credit program grew by 669 claimants (to 25,211), in part due to adoption of exclusive agricultural zoning in seven towns. The estimated statewide ratio of participation in the program was 39.3%, and farmland preservation credits for the year were equivalent to 8.2% of the total agricultural property taxes paid by farmland owners.

Farmland tax relief credits averaging $229 were paid to individual farmers statewide for 1990 income tax returns. These credits equal 10% of the first $10,000 of property taxes on qualifying farmland, exclusive of improvements. This program, which is in addition to the farmland preservation credit, provides direct benefits to virtually all farmers in the state. It responds to the heavy property tax burden that they bear.

In addition to the farmland tax relief credits claimed by farmers on their individual income tax returns, corporate farms claimed approximately $400,000 in credits statewide for 1990. The credit is available to both individuals and corporations

GIFT TAX REPORTS DUE APRIL 15

For gifts occurring on or before December 31, 1991, a Wisconsin gift tax is imposed upon all taxable gifts from a donor who is a Wisconsin resident (regardless of the donee's residence) and gifts of Wisconsin real estate or tangible personal property located in Wisconsin (regardless of where the donor or donee resides).

Wisconsin 1991 gift tax reports must be filed if the total value of taxable gifts given in 1991 by one donor (person giving the gift) to one donee (person receiving the gift) exceeds $10,000. Gift tax reports of the donee and donor for 1991 must be filed by April 15, 1992. A report does not have to be filed if the value of the gift is $10,000 or less.

The donor reports gifts made on Wisconsin Form 7. On this form, the donor enters the description and value of the gifts made to each donee.

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

The gift tax due is figured on Wisconsin Form 6. In determining the 1991 gift tax due, an annual exemption of $10,000 is allowed for all gifts made during a calendar year by one donor to one donee. Gifts to a spouse are completely exempt from Wisconsin gift tax. A lifetime personal exemption of $50,000 is allowed for gifts to lineal issue (children, grandchildren), lineal ancestors (parents, grandparents), the wife or widow of a son, the husband or widower of a daughter, an adopted or mutually acknowledged child, and a mutually acknowledged parent. There is no lifetime exemption allowed to other donees.

CRIMINAL ENFORCEMENT ACTIVITIES

Sales/Use Taxes

A Marinette businesswoman faces a $300 fine for operating without a seller's permit.

Kym Pogrant, 37, owner of Kym's Jewelry, 1702 Main St., pled no contest in Marinette Circuit Court, admitting that she had sold jewelry after she was ordered to close her business.

According to the criminal complaint against her, she sold a silver ring to a person acting on behalf of the Department of Revenue despite the fact that she had not obtained a valid seller's permit.

Her permit had been revoked for failing to pay taxes to the Wisconsin Department of Revenue, and her shop was ordered closed after she was found guilty of operating without a permit at a hearing in October 1991. She was fined $300 and ordered to close her business until she obtained a new permit and made restitution to the Department of Revenue.

A letter attached to the complaint stated that she had applied for a new permit, but on October 1 she was not issued that permit because of outstanding sales tax obligations. Since that time, she has paid the money she owed and was allowed to reopen her business.

Excise Taxes

In August 1991, agents of the Department of Revenue obtained evidence that Herbert J. Cavadini of Monroe County was operating a business without a seller's permit or liquor license. Agents seized 629 bottles of wine and liquor, 1,746 cans of beer, 109 bottles of beer, and 40 malt coolers.

In January 1992, Judge Michael J. Rosborough found Cavadini guilty of two counts of sale of beer without a license, one count of sale of an intoxicating liquor, and one count of operating as a seller without a permit.

In addition to the loss of the seized inventory, Cavadini was placed on probation for 18 months, fined $1,000, and ordered to

pay fees of $350. For operating without a seller's permit, Cavadini was sentenced to 10 days in jail.

DO YOU HAVE SUGGESTIONS FOR 1992 TAX FORMS?

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

INFORMATION OR INQUIRIES?

Madison - Main Office
Area Code (608)

Beverage, 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
Motor Fuel	266-3223
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 are proposed new administrative rules and amendments to existing rules that are currently in the rule adoption process. The rules are shown at their state in the process as of April 1, 1992. Part A lists rules which are being or have been reviewed by the Legislative Council Rules Clearinghouse. For the period from January 2, 1992 to April 1, 1992, Part B lists new rules and amendments which became effective, Part C lists emergency rules which became effective, and Part D lists rules which were withdrawn from promulgation. ("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

2.475 Apportionment of net business incomes of interstate railroads, sleeping car companies and car line companies-NR
11.08 Medical applicances, prosthetic devices and aids-A
11.17 Hospitals, clinics and medical professions-A
11.18 Dentists and their suppliers-A
11.45 Sales by pharmacies and drug stores-A
11.86 Utility transmission and distribution lines -A

B. Rules Adopted (including effective date)

11.01 Sales and use tax return forms-A (2/1/92)
11.47 Commercial photographers and photographic services-A (2/1/92)

C. Emergency Rules Adopted (including effective date)

2.475 Apportionment of net business incomes of interstate railroads, sleeping car companies and car line companies-NR (2/17/92)

D. Rules Withdrawn From Promulgation (including date withdrawn)

11.05 Governmental units-A (2/20/92)
11.33 Occasional sales-A (2/20/92)
11.34 Occasional sales exemption for sale of a business or business assets-A (2/20/92)
11.50 Auctions-A (2/20/92)
11.69 Financial institutions-A (2/20/92)
11.83 Motor vehicles-A (2/20/92)
11.84 Aircraft-A (2/20/92)
11.85 Boats, vessels and barges-A (2/20/92)
11.88 Mobile homes-A (2/20/92)

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:

Corporation Franchise or Income Taxes

Consolidated Freightways Corporation of Delaware (p.5)
Apportionment - motor carriers

NCR Corporation (p. 5)
Apportionment - factors
Dividends - deductible dividends
Foreign source income

Sales/Use Taxes

American Vending, Inc. (p.6)
Occasional sales - business assets

B. I. Moyle Associates, Inc. (p. 6)
Computer software - tangible vs. intangible
Nexus

Ebner Construciton, Inc. (p. 7)
Use tax - lability of user

John Lynch Chevrolet-Pontiac Sales, Inc. (p. 7)
Motor vehicle dealers - use tax

Morton Buildings, Inc. (p. 8)
Use - does not include

Prairie du Chien Car Wash Partnership, et. al. (p. 8)
Sale of a business or business assets

CORPORATION FRANCHISE OR INCOME TAXES

Apportionment - motor carriers. *Consolidated Freightways Corporation of Delaware vs. Wisconsin Department of Revenue* (Wisconsin Supreme Court, November 14, 1991).

A summary of the Wisconsin Supreme Court decision appeared in *Wisconsin Tax Bulletin* 75, page 11. The summary stated that it was not known whether the taxpayer would appeal the decision to the United States Supreme Court. The taxpayer did not appeal the decision.

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Apportionment - factors; Dividends - deductible dividends; Foreign source income. *NCR Corporation vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, February 10, 1992). The issues in this case are:

A. Whether Wisconsin's inclusion in the taxpayer's 1975-79 apportionable income of all of the dividends, interest, and royalties ("foreign source income") taxpayer-parent-corporation received from its overseas subsidiaries, all of which were unitary with the taxpayer, and its inclusion in the taxpayer's 1980 apportionable income of 50 percent of almost all of the foreign source dividends and all of the interest and royalties received from those subsidiaries, interfered with the federal uniformity interest in regulating foreign trade and subjected that foreign source income to inevitable multiple international taxation, in violation of the foreign commerce clause of the U.S. Constitution.

B. Whether Wisconsin's apportionment formula which, as applied in this case, treated all of the taxpayer's 1975-80 foreign source income as though it were produced solely by the efforts of the taxpayer, and which calculated Wisconsin's share of that income with reference only to the taxpayer's own apportionment factors, giving no credit for, or recognition to, the factors of the subsidiaries that paid the taxpayer the income, lacks the kind of coherence and consistency required by the due process and foreign commerce clauses of the U.S. Constitution and the Wisconsin apportionment statute.

C. Whether a Wisconsin "concentration" statute, which exempts certain dividends received by a corporation when the dividend-paying corporation has a sufficient Wisconsin "presence," a presence large enough to result in 50 percent of the payor's net income being used to compute taxable income in Wisconsin, but taxes such dividends received when the payor has less than this 50 percent presence, operates as a discrimination in favor of Wisconsin-concentrated businesses and their shareholder-corporations and against businesses not concentrated in Wisconsin and their shareholder-corporations (such as the taxpayer), in violation of the interstate commerce, foreign commerce, and equal protection clauses of the U.S. Constitution.

For the tax years 1975-80, the taxpayer, a U.S.-based, Ohio-headquartered corporation, and a manufacturer and seller of business machines with operations in Wisconsin, other states, and overseas, received payments reported as dividends, interest, and royalties ("foreign source income") from some 75 overseas-based subsidiaries, all of which were, with one exception, wholly-owned by the taxpayer. (The Japanese subsidiary was owned 70 percent.) The parties agreed that the overseas operations were unitary with the U.S. operations.

For the years 1975-79, the department included all of the foreign source income in the taxpayer's apportionable income, but none of the overseas subsidiaries' property, payroll, or sales in the property, payroll and sales factor of the taxpayer's apportionment formula.

In 1980, the department included all the foreign source interest and royalties, but excluded 50 percent of foreign source dividends received from subsidiaries in which the taxpayer owned 80 percent or more of the total combined voting stock, per sec. 71.04(4)(b), Wis. Stats. (1979-80).

The taxpayer argued that Wisconsin's apportionment formula, as applied in this case, led to unlawful multiple international taxation in violation of the foreign commerce clause. The taxpayer contended that the foreign source income should have been excluded altogether from apportionable income, or barring that, some portion, if not all, of the foreign subsidiaries' property, payroll, and sales should have been included in the property, payroll and sales factor of the taxpayer.

The taxpayer in 1975-80 also received other dividends, along with the foreign source dividends. These other dividends were paid by unrelated corporations which had less than 50 percent of their net incomes used in computing Wisconsin taxable income and were, therefore, not eligible for the dividends received deduction under sec. 71.04(4)(a), Wis. Stats. (1979-80). The taxpayer argued that the "50 percent-concentration" exemption unconstitutionally discriminated against the owners of nonconcentrated businesses, such as itself, in favor of the owners of Wisconsin-concentrated businesses.

The Commission concluded the following for Issues A, B, and C:

A. All of the taxpayer's foreign source income, being from a unitary source, is therefore apportionable business income, and there is nothing about counting that income as apportionable that causes inevitable double taxation in violation of the foreign commerce clause.

B. The California world-wide combined reporting method (as modified by the Commission to include a subsidiary's property, payroll, and sales in the apportionment factors based on the stock ownership percentage of the parent) measures the maximum amount of apportionable income a state can include in its formula and also derives the constitutional maximum amount

of apportioned income on which a state can levy its tax.
If whatever method Wisconsin has used results in more income apportioned than what the California method would apportion, the California results will prevail. If Wisconsin's method results in less income apportioned than the California method, the Wisconsin results will stand, because the state is always free to tax at less than the constitutional maximum.

C. Section 71.04(4)(a), Wis. Stats. (1979-80), which allows a deduction for dividends received from corporations if 50 percent or more of the net income or loss of the payor was used in computing Wisconsin taxable income, violates the equal protection clause.

Inside source dividends (dividends received from its subsidiaries) are not true dividends for years 1975-79.

Consequently, the state must exclude from apportionable income the amount of outside source dividends (dividends from unrelated corporations) for 1975-80 and the 1980 inside source dividends.

The department has appealed this decision to the Circuit Court.

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SALES/USE TAXES

Occasional sales - business assets. *American Vending, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, February 13, 1992). The issue in this case is whether the sale of the taxpayer's vending machine business occurred on September 1, 1988, qualifying as an exempt "occasional sale," or on August 18, 1988, or some earlier date, disqualifying it for exemption because the seller's permit was not surrendered within 10 days after the sale.

The taxpayer was incorporated in 1975 and, until September 1988, was engaged in the vending machine business, owning and servicing machines at various locations throughout Milwaukee. At all times relevant here, Anthony Keller ("Keller") was its owner, president, and sole employe.

On or about August 8, 1988, Stanley M. Kass ("Kass"), president of Skylark Automatic Vending, Inc. ("Skylark"), agreed that Skylark would purchase American Vending, Inc. ("American") for $75,000 plus inventory.
Keller and Kass agreed to payment of $5,550 for inventory on August 16, another $10,000 on August 18, and $35,000 on September 1, at which time a bill of sale was to be delivered transferring the business to Skylark. These payments were made as agreed, and the bill of sale was held by Keller undated until August 31, when it was dated, and then turned over to Kass either on August 31 or September 1, 1988, to transfer the business to Skylark and receive the final agreed initial payment of $35,000. That check was dated September 1, apparently to coincide with the availability of funds.

Because he would not be receiving the entire initial payment until September 1, Keller did not surrender American's seller's permit to the department until September 2, 1988, since to have done so earlier could have left him both without a permit and without a completed sale had the $35,000 payment not been made as promised on September 1.

At the time of the payment for inventory on August 16, Skylark began conditionally "operating" the business in anticipation of completion of its purchase on September 1, although Keller continued to service the machines. On the books of Skylark, however, American's vending business was purchased on September 1, 1988, following delivery of the bill of sale transferring the ownership of assets to Skylark. The final $30,000 of the purchase price was paid to American in January 1989.

The Commission concluded that the payment of $35,000 on September 1, 1988, was a condition precedent to the sale, which would not have been consummated without it, and the sale therefore could not and did not occur until that date. The permit surrender by the taxpayer on September 2 was therefore timely, and the sale qualified for exemption.

The department has not appealed this decision.

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Computer software - tangible vs. intangible; Nexus. *Wisconsin Department of Revenue vs. B.J. Moyle Associates, Inc.* (Dane County Circuit Court, November 12, 1991). This is a review of a decision by the Wisconsin Tax Appeals Commission which reversed the department's tax assessment against the taxpayer. For a summary of that decision, see *Wisconsin Tax Bulletin* 71, page 11. The issues in this case are:

A. Whether the computer programs leased by the taxpayer are tangible personal property subject to Wisconsin use tax, or are intangibles not subject to tax.

B. Whether Wisconsin had jurisdiction or nexus to impose use tax collection duties on the taxpayer.

The taxpayer is a Minnesota corporation. The taxpayer developed and marketed computer software for users of computers that improved operating system performance and user productivity. The taxpayer mailed information and/or software or a combination of printed manuals and computer tape on a regular basis to customers in this state.

The taxpayer did not sell computer software but rather granted the customers a license to use the product in accordance with the lease agreement on a monthly, yearly, or permanent basis. The taxpayer did not engage in pre-sale consultation and analysis of a customer's requirements and systems. The exact programs or modules of the taxpayer's product existed at the time that the customer placed an order. The taxpayer did not change the preexisting programs or modules based upon the customer's data or specific hardware or software environment.

When a customer calls the taxpayer to place an order, the customer typically describes its operating system environment to the salesperson who determines which program is appropriate for the customer. The taxpayer transmits a systems program to the customer in machine readable form by transferring a copy of the program from the master magnetic tape to a blank magnetic tape and then sending the tape to the customer by the U.S. Mails or common carrier. The blank magnetic tapes purchased by the taxpayer typically cost between $3.00 and

$6.00, a minimal cost in comparison to the license charge.

It would have been possible for the taxpayer to transmit its systems programs to its customers by means other than magnetic tape. For example, the taxpayer's systems programs could have been communicated over a telephone line without the tapes themselves ever being physically present in Wisconsin.

The taxpayer does not separately charge its customers for the magnetic tape it uses to transmit its systems programs to customers. The taxpayer instructs its customers to return the magnetic tapes as soon as the copies of the programs contained on the tapes have been read into its customers' computer systems and the customers, at the customers' option, have made backup copies of the program. Customers make their own backup copies of the program on their own tape or other media. The taxpayer then reuses the returned tapes to transmit the same or other programs to other customers.

The taxpayer typically licenses one of its system programs to between one and 500 different users. A typical sequence of events for utilizing a new program is that the program arrives in the customer's location on magnetic tape or diskettes, it is placed on the customer's magnetic tape drive or disk drive, the new program is transferred from the tape or diskette, and a copy is placed on the drive from which it can be used later. A copy of the tape or diskette is often retained by the customer for "archive" or backup purposes.

The taxpayer did not load the program into the customer's computer and did not visit the customer's site either before or after the licensing. The taxpayer provided maintenance and improvements of the programs to the vast majority of its customers. The monthly and yearly license fees included future improvement and maintenance. The permanent license fee included improvements and maintenance for the first year of the license. Thereafter, at the customer's option, improvements and maintenance may have been obtained annually.

The taxpayer responded by telephone when the customers, during installation of their software or post installation, had difficulties with the software or questions about the software.

During the period under review, the taxpayer did not register with the department to collect the use tax, and did not collect, report, or remit a sales or use tax to the department.

On August 22, 1985, the department issued a sales and use tax determination pursuant to sec. 77.59(9), Wis. Stats., for the period of January 1, 1981 through June 30, 1985, because the taxpayer did not file sales and use tax returns or register with the department.

The Circuit Court concluded as follows:

A. The taxpayer's lease of computer programs is the lease of an intangible, not subject to taxation pursuant to sec. 77.52 or 77.53, Wis. Stats. The taxpayer's gross receipts are not derived from the storage, use, or other consumption of tangible personal property or taxable services as described in sec. 77.52 or 77.53, Wis. Stats., and, thus, are not taxable pursuant to those sections.

B. Because the Circuit Court found that the computer programs leased by the taxpayer are intangibles, and thus not taxable pursuant to sec. 77.52 or 77.53, Wis. Stats., it found it unnecessary to decide the issue of whether Wisconsin has jurisdiction or nexus for assessing such a tax.

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

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Use tax - liability of user. *Ebner Construction, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, December 5, 1991). The issue in this case is whether the taxpayer, although found not to be liable for the sales tax imposed by sec. 77.52, Wis. Stats. (1987-88), is liable for the use tax imposed by sec. 77.53, Wis. Stats. (1987-88).

The taxpayer contracted with a retailer, Harter and Sons, for landscaping services. The taxpayer believed the contract price included 5% Wisconsin sales tax; however, no sales or use tax was paid to the state by either the retailer or the taxpayer. The taxpayer did not, and presumably could not, produce at the hearing a receipt from the retailer with the tax separately stated. The Commission found that the taxpayer, although not the retailer, was the consumer of the landscaping services purchased from the retailer, and was liable for use tax based on the price paid to the retailer for the landscaping services.

The taxpayer has not appealed this decision.

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Motor vehicle dealers - use tax. *John Lynch Chevrolet-Pontiac Sales, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, December 4, 1991). The issue in this case is whether the taxpayer, by its use of vehicles in its parts or service departments, is subject to a use tax measured by its purchase price (dealer cost) with no trade-in allowance or other reduction in the measure of tax.

During the period under review, the taxpayer was a Wisconsin corporation engaged in the business of selling new and used automobiles, repairing automobiles, and selling automobile parts. The taxpayer took a number of motor vehicles out of inventory to be used in the service and parts departments. The vehicles had been purchased for resale without tax. After approximately 6 months use, the vehicles were returned to inventory and sold to retail customers. The taxpayer reported use tax on these vehicles based on the measure of tax used for motor vehicles licensed in the name of the retail dealer.

The department assessed a use tax on the invoice price (sales price to dealership) of the vehicles taken from inventory and used in the parts or service departments of the taxpayer, allowing a credit for use tax previously reported by the taxpayer on these vehicles.

The taxpayer alleges the correct measure of use tax is the difference between its dealer cost (invoice amount) and the appraised

value of the vehicle at the time of its transfer to its used car division.

The Commission concluded that the Wisconsin statutes do not provide for such a reduction in the measure of use tax due on the transfer of motor vehicles between divisions within a corporate dealership. The taxpayer has not met the burden of showing that the trade-in allowances provided by secs. 77.51(4)(b)3 and 77.51(15)(b)4, Wis. Stats. (1989-90) clearly apply.

The taxpayer has not appealed this decision.

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Use - does not include. *Wisconsin Department of Revenue vs. Morton Buildings, Inc.* (Circuit Court for Dane County, February 10, 1992). This is a judicial review of a decision by the Wisconsin Tax Appeals Commission (Commission). The issue in this case is whether the taxpayer's bulk purchases of raw materials used in their manufacture of building components were subject to Wisconsin use tax whenever such building components were used by the taxpayer in Wisconsin real property construction activities. The taxpayer's purchases and manufacturing took place outside Wisconsin. (See *Wisconsin Tax Bulletin* 74, page 17, for a summary of the prior decision.)

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

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

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

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

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

The Circuit Court concurred with the Commission's reasoning that the building components manufactured by the taxpayer constitute new items of tangible personal property, distinct from the raw materials it purchased. The Court therefore concluded that the taxpayer's purchases outside Wisconsin of raw materials were not subject to the use tax imposed under sec. 77.53(1), Wis. Stats., because 1) the raw materials the taxpayer purchased were used and consumed outside Wisconsin when they were produced into building components, and 2) the taxpayer did not purchase the building components from a retailer.

The department has not appealed this decision.

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Sale of a business or business assets. *Prairie du Chien Car Wash Partnership, et. al. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, January 16, 1992). The issues in this case are whether the department correctly determined that the February 28, 1990 sale of the taxpayer's carwash did not qualify as an "occasional" sale and whether, if taxable, the department correctly determined the taxable receipts to be $170,000 rather than the $104,000 claimed by the taxpayers.

In 1986 the taxpayers organized a partnership to build and develop a carwash business, which continued in operation until it was sold on February 28, 1990. By letter postmarked March 21 and received by the department on March 22 by ordinary mail, the taxpayers surrendered their seller's permit.

The sale contract specifically allocated $170,000 of the $528,000 sale price to "equipment." Following the assessment here at issue, the sale contract was revised to reduce the "equipment" allocation to $104,000 and correspondingly increase allocations to "land" and "building."

The Commission concluded that the sale of the carwash did not qualify for exemption from the sales tax as an occasional sale of tangible personal property under sec. 77.54 (7), Wis. Stats. (1989), because the taxpayers did not deliver their seller's permit to the department for cancellation within 10 days after the last sale at that location of that personal property. The taxpayers presented clear, satisfactory, and substantial evidence that the actual value of the tangible personal property subject to tax (the carwash equipment sold) was $104,000 rather than the $170,000 determined by the department.

The taxpayers and the department have not appealed this decision.

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TAX RELEASES

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

The following tax releases are included:

Individual Income Taxes

Homestead Credit

Sales/Use Taxes

Individual and Corporation Franchise or Income Taxes

Temporary Surcharge

INDIVIDUAL INCOME TAXES

1. Eligibility for the Wisconsin Income Tax Exemption for Members of the Wisconsin State Teachers Retirement System

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

Background: Section 71.05(1)(a), Wis. Stats. (1989-90), provides that all payments received from certain retirement systems are exempt from Wisconsin income tax if the payments are paid on the account of a person who was a member of, or who was retired from, one of the specified retirement systems as of December 31, 1963. One of the specified retirement systems is the Wisconsin State Teachers Retirement System which is administered by the Department of Employe Trust Funds.

Section 42.242(5), Wis. Stats. (1965-66), provides that a member of the State Teachers Retirement System who has ceased to be employed as a teacher may, under certain conditions, withdraw the member's deposits made while a member of the combined group based on teaching service performed after June 30, 1957. Members making such withdrawals forfeited the employer contributions.

The Department of Employe Trust Funds considered a withdrawal under sec. 42.242(5), Wis. Stats. (1965-66), to completely close the teacher's account.

However, in the case of *Schmidt v. Department of Employe Trust Funds*, 148 Wis. 2d 844 (Ct. App. 1989), aff'd. 153 Wis. 2d 35 (1990), the court decided that a teacher who returned to teaching after 1963 was eligible for creditable service under sec. 42.245(1)(c), Wis. Stats. (1965-66). This section reduces by one-half the number of years of creditable service when the teacher previously withdrew required member deposits. Therefore, the account of a member making a sec. 42.242(5) withdrawal should not have been completely closed. One-half of the creditable service should have remained in the account, even though there were no contributions remaining in the account to fund a benefit.

There is a 7-year statute of limitations on corrections to a member's account. As a result of the *Schmidt* case, the Department of Employe Trust Funds is correcting the accounts of teachers who appealed the loss of the years of creditable service within the 7-year period.

Facts and Question: Prior to 1964, a teacher withdrew his deposits in the Wisconsin State Teachers Retirement System as allowed by sec. 42.242(5), Wis. Stats. (1965-66). His account in the retirement

system was closed by the Department of Employe Trust Funds. The individual returned to teaching in 1964. The individual timely appealed the loss of creditable service to the Department of Employe Trust Funds. As a result of the decision in *Schmidt v. Department of Employe Trust Funds*, his account was corrected to allow one-half of the creditable service forfeited through the withdrawal.

Are the retirement benefits received by this individual exempt from Wisconsin tax?

Answer: Yes. Because of the restoration of one-half of his pre-1964 creditable service, this individual is deemed to have been a member of the Wisconsin State Teachers Retirement System as of December 31, 1963. Therefore, payments received by this individual from the Wisconsin State Teachers Retirement System qualify for the exemption provided by sec. 71.05(1)(a), Wis. Stats. (1989-90).

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2. **Farm Loss Carryover May Offset Gain From Sale of Partnership Interest**

Statutes: Section 71.05(6)(a)10 and (b)10, Wis. Stats. (1989-90)

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

Background: Section 71.05(6)(a)10, Wis. Stats. (1989-90), limits the amount of farm loss that may be deducted each year. The limitations are based on the amount of the taxpayer's nonfarm Wisconsin adjusted gross income.

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

Facts and Question: The taxpayer is a partner in a farm partnership. The partnership generated farm losses in 1986-1990. The taxpayer's deduction for the farm partnership losses was limited each year under sec. 71.05(6)(a)10, Wis. Stats. As a result, the taxpayer has a farm loss carryover available for 1991 of $20,000. The taxpayer sold his interest in the farm partnership in 1991 to the other partners. He has a gain on the sale of his partnership interest.

Can the gain from the sale of the farm partnership interest be offset by the farm loss carryover to 1991?

Answer: Yes. Income from the sale of the farm partnership interest is considered income from the sale of a business asset which can be offset by carryover losses from the same farm partnership. The taxpayer can claim a subtraction modification on his 1991 Form 1 for the lesser of the farm loss carryover ($20,000) or the gain realized on the sale of the partnership interest.

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3. **Limited Partnership Loss - Carryforward of Loss From Taxable Years Beginning Before January 1, 1991**

Statutes: Sections 71.02(1) and 71.04(1)(a), Wis. Stats. (1989-90)

Background: As a result of changes made by 1991 Wisconsin Act 39, all partners (i.e., both general and limited partners) who are not full-year residents of Wisconsin are subject to taxation by Wisconsin for that part of the taxable year during which they are nonresidents on their proportionate share of all items of partnership income, loss, or deduction attributable to a business in, services performed in, or rental of property in Wisconsin. For any part of the taxable year a partner is a resident of Wisconsin, those same items of partnership income, loss, or deduction are subject to taxation by Wisconsin, regardless of whether attributable to business, services, or property in Wisconsin or outside Wisconsin.

Before the 1991 Wisconsin Act 39 changes, limited partners who were precluded from management of the partnership and who could not act for the partnership did not recognize any items of income, loss, or deduction of the partnership for the part of the taxable year they were nonresidents of Wisconsin.

The 1991 Wisconsin Act 39 changes were effective with respect to partnership taxable years beginning on or after January 1, 1991, and a limited partner's taxable years as appropriate to conform to the limited partner's treatment of the income from the partnership to the partnership's tax treatment.

Question: Can pre-1991 losses from a limited partnership, which are available as a carryforward for purposes of computing a nonresident limited partner's federal adjusted gross income, also be used in computing Wisconsin taxable income for 1991 or subsequent taxable years?

Answer: No. Limited partners who are nonresidents of Wisconsin may not deduct their pre-1991 limited partnership losses for Wisconsin purposes in 1991 and subsequent taxable years. The 1991 Wisconsin Act 39 changes to limited partners' treatment of partnership income, loss, and deduction items only apply for partnership years beginning on or after January 1, 1991.

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4. **Rent for School Property Tax Credit Includes Separate Charges**

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

Background: Section 71.07(9), Wis. Stats. (1989-90), provides for the school property tax credit for individuals. This credit is equal to a percentage of property taxes, or rent constituting property taxes, paid during the year for a principal dwelling.

"Rent constituting property taxes" means 25% of rent if heat is not included, or 20% of rent if heat is included, paid at arm's length during the taxable year for the use of a principal dwelling. However, "rent constituting property taxes" does not include any payment for domestic, food, medical, or other services or rent paid that is deductible as a trade or business expense.

Facts and Question: An individual pays $350 to his landlord each month. This includes $300 for rental of his apartment, $30 for the use of a garage, and $20 for the use of a stove, refrigerator, and window air conditioner. The garage and appliances are "optional" items which the individual would not be required to use in order to rent the apartment.

May the "optional" payments for the garage and appliances be included as rent in determining the school property tax credit?

Answer: Yes. Amounts paid by an individual to a landlord in addition to basic rental for items normally associated with the occupancy of a dwelling are considered to be a part of the total rent for purposes of determining the allowable school property tax credit. Examples of additional amounts which are considered rent include payments to a landlord for a garage or other parking space, appliances, furniture, or utilities. (Caution: Allowable rent for school property tax credit purposes does not include amounts paid to a landlord for domestic, food, medical, or other services, as these items are expressly excluded from the definition of "rent constituting property taxes" by statute.)

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HOMESTEAD CREDIT

1. **Lottery Credit for Mobile Home Parking Fees**

Statutes: Section 71.52(7), Wis. Stats. (1989-90)

Background: Under sec. 71.52(7), Wis. Stats. (1989-90), "property taxes accrued" includes monthly parking permit fees paid under sec. 66.058(3)(c), Wis. Stats., for a mobile home. A homestead credit claimant who owns a mobile home, uses it as his or her homestead, and pays monthly parking permit fees rather than property taxes, may claim those fees as property taxes on a homestead credit claim.

A mobile home owner who pays monthly parking permit fees for a mobile home that is his or her primary residence is entitled to a lottery credit. The lottery credit for mobile home owners is first available in 1992 and applies to parking permit fees paid in 1992.

The credit is claimed by filing a special claim form with the local municipal treasurer, attesting that as of January 1, 1992, the person owns the mobile home, and it is his or her primary residence. The claim form must be filed by July 31, 1992. Upon receipt of the claim form, the local municipal treasurer computes the allowable lottery credit. The credit is allowed to the mobile home owner in the form of a reduction in the parking permit fees assessed for 1992.

Question 1: Does the lottery credit for a mobile home owned and occupied as of January 1, 1992, affect the 1991 homestead credit claim of a claimant who pays monthly parking permit fees rather than property taxes?

Answer 1: No. The 1991 homestead credit claim is based on monthly parking permit fees paid in 1991. The lottery credit based on January 1, 1992, ownership and occupancy does not apply to mobile home parking permit fees paid in 1991.

Question 2: Will the lottery credit based on ownership and occupancy as of January 1, 1992, affect the **1992** claim of a homestead credit claimant?

Answer 2: Yes. The lottery credit based on January 1, 1992, ownership and occupancy is deducted by the local municipal treasurer from the monthly parking permit fees for 1992, and those reduced fees may then be claimed on a **1992** homestead credit claim filed on or after January 1, 1993.

Example: Claimant X owns and resides in a mobile home, for which parking permit fees of $320 were assessed for 1991. The local municipal treasurer is advised that the 1992 parking permit fees for X's mobile home are $360.

In January 1992, X files a lottery credit claim form for his mobile home, and the local treasurer computes a lottery credit of $120. The treasurer then deducts the $120 lottery credit from the $360 parking permit fees for 1992, and X is required to pay parking permit fees totaling only $240 for 1992.

When X files his 1991 homestead credit claim, he may claim the entire parking permit fee of $320 for 1991. If he files a 1992 homestead credit claim on or after January 1, 1993, X may claim only the parking permit fee after the lottery credit ($240), rather than $360.

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SALES/USE TAXES

1. **Advertising Signs**

Statutes: Sections 77.51(2) and (14)(i), 77.52(1) and (2)(a)10, and 77.53(1), Wis. Stats. (1989-90)

Wis. Adm. Code: Sections Tax 11.68(1)(a), (4), and (6)(a)10, June 1991 Register, and 11.70(1)(e), December 1977 Register

Background: Section Tax 11.68(1)(a) and (6)(a)10, Wis. Adm. Code, June 1991 Register, provides that the sale, installation, service, and repair of advertising signs, except their concrete foundations, are subject to sales tax. The signs retain their character as tangible personal property after installation, regardless of whether the sign is located on land owned by the owner of the sign.

Section Tax 11.70(1)(e), Wis. Adm. Code, December 1977 Register, provides that nontaxable services include obtaining media space and time.

Facts and Question 1: Sign Company A sells, installs, and repairs advertising signs consisting of a billboard, steel supports, and a concrete foundation. On its billings, Company A separately states the amount billed for the concrete foundations. Are Company A's receipts from selling, installing, and repairing advertising signs subject to sales tax?

Answer 1: Yes, except for the amounts allocated to the concrete foundations, Company A's receipts are subject to sales tax. Company A may purchase materials for the billboard and steel supports exempt from sales tax by furnishing properly completed resale certificates to its suppliers. Company A's purchases of concrete for the foundation are subject to sales or use tax.

Note: The amount charged for the concrete foundation is not taxable, whether or not it is separately stated. If not separately stated, Company A may allocate a reasonable portion of its receipts as being attributable to the concrete foundation.

Facts and Question 2: Sign Company B sells, installs, and repairs advertising signs which are attached to buildings. Are Company B's receipts from selling, installing, and repairing these signs subject to sales tax?

Answer 2: Yes. Company B's receipts are subject to sales tax since these signs retain their character as tangible personal property after installation. It does not matter whether the customer owns the building. Company B may purchase the signs, and related repair parts, exempt from sales tax by furnishing properly completed resale certificates to its suppliers.

Facts and Question 3: A car dealership leases a sign from sign Company C on which the dealership displays various advertising messages. The car dealership has possession and control of the sign. Are Company C's lease receipts subject to sales tax?

Answer 3: Yes. Company C's lease receipts are subject to sales tax since the receipts are from the lease of tangible personal property.

Facts and Question 4: Sign Company D owns and maintains a large sign for which it contracts with customers to have their advertising messages displayed for specified periods of time. No consideration is paid to Company D for possession of the sign, rather the charges are for displaying a message. Are Company D's receipts from displaying advertising messages subject to sales tax?

Answer 4: No. Company D's receipts from the service of displaying a message are not subject to sales tax.

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2. Effective Date of Imposition of Use Tax on Items Stored in Wisconsin and Subsequently Shipped Outside Wisconsin

Statutes: Section 77.51(18), Wis. Stats. (1989-90), as amended by 1991 Wisconsin Act 39, and sec. 9449(13), 1991 Wisconsin Act 39

Background: Section 77.51(19), Wis. Stats. (1989-90), was repealed and sec. 77.51(18), Wis. Stats. (1989-90), was amended by 1991 Wisconsin Act 39 to redefine "storage" for purposes of imposing Wisconsin use tax. The effect of the repeal and amendment is that purchases of tangible personal property (other than printed advertising materials) purchased without Wisconsin sales or use tax and stored in Wisconsin, even though subsequently shipped outside Wisconsin, are subject to Wisconsin use tax.

Section 9449(13) of 1991 Wisconsin Act 39 provides that the treatment of sec. 77.51(18) and (19) of the statutes takes effect on the first day of the 2nd month beginning after the publication date of August 14, 1991. Therefore, it takes effect on October 1, 1991.

Question: Does the imposition of use tax under sec. 77.53(1), Wis. Stats. (1989-90), apply to the storage of tangible personal property that will subsequently be shipped outside Wisconsin, if the storage occurs on or after October 1, 1991, regardless of when the tangible personal property was purchased?

Answer: No. Wisconsin use tax, as imposed under sec. 77.53(1), Wis. Stats. (1989-90), will not apply to the storage of tangible personal property in Wisconsin that is subsequently shipped outside Wisconsin if the property was purchased prior to October 1, 1991, except if storage occurs in another state prior to October 1, 1991, and is shipped to Wisconsin for additional storage after October 1, 1991, for subsequent shipment outside Wisconsin. Use tax will apply if the property is purchased on or after October 1, 1991, and is stored in Wisconsin on or after that date.

Example 1: Company A, headquartered in Wisconsin with branches in neighboring states, purchases computer hardware from a supplier located in California. The supplier does not have nexus in Wisconsin and is not registered to collect Wisconsin use tax. The supplier had the hardware shipped to Wisconsin by common carrier in 1990. Company A has stored the hardware in Wisconsin and will continue doing so until the computer hardware is needed by the branch offices (after October 1, 1991).

The storage of the computer hardware is not subject to Wisconsin use tax because it was purchased prior to October 1, 1991, the effective date of the change to the definition of storage by 1991 Wisconsin Act 39.

Example 2: Assume the same facts as in Example 1 except that the computer hardware was purchased October 15, 1991.

The storage of the computer hardware is subject to Wisconsin use tax because it is stored in Wisconsin and was purchased after October 1, 1991, the effective date of the change to the definition of storage by 1991 Wisconsin Act 39.

Example 3: Assume the same facts as in Example 1, except that the computer hardware was shipped from the California supplier to Company A's branch office in Minnesota for storage. On or after October 1, 1991, Company A has the computer hardware shipped to Wisconsin for additional storage.

The storage of the computer hardware in Wisconsin is subject to Wisconsin use tax, even though it was purchased before October 1, 1991.

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3. Imposition of County Use Tax on Tangible Personal Property Used Outside Taxable County

Statutes: Sections 77.51(18), Wis. Stats. (1989-90), as amended by 1991 Wisconsin Act 39, and 77.71(2) and (3), 77.72(1), 77.73 and 77.79, Wis. Stats. (1989-90)

Note: This tax release applies to purchases made on or after October 1, 1991.

Background: Section 77.71(2), Wis. Stats. (1989-90), imposes an excise tax on the storage, use, or other consumption of tangible personal property in a county that has adopted the county tax, provided the buyer has not paid a similar tax under sub. (1), (3), or (4) or paid a similar local tax in another state on the purchase of the same property.

Section 77.79, Wis. Stats. (1989-90), provides that the provisions of subch. III of ch. 77, Wis. Stats., including those related to exemptions, exceptions, exclusions, and the retailers' discount, that are consistent with subchapter V (county sales and use taxes), apply to the county tax.

Section 77.51(18), Wis. Stats. (1989-90), was amended by 1991 Wisconsin Act 39 to provide that purchases of tangible personal property (except advertising materials) from a retailer are subject to Wisconsin use tax if the tangible personal property is stored or used in Wisconsin, even if the property is subsequently used outside Wisconsin.

Question: Does the amendment to sec. 77.51(18), Wis. Stats. (1989-90), by 1991 Wisconsin Act 39, affect the imposition of county use tax under sec. 77.71(2), Wis. Stats. (1989-90)?

Answer: Yes. The definition of "use" in sec. 77.51(18), Wis. Stats. (1989-90), as amended by 1991 Wisconsin Act 39, also applies for purposes of imposing county use tax under sec. 77.71(2), Wis. Stats. (1989-90). Therefore, if a person purchases tangible personal property outside Wisconsin or in a nontaxable county and no county tax is paid, and stores it in a taxable county, the purchase of the tangible personal property is subject to county use tax, even though the property may be used in a nontaxable county.

Note: The following examples use Eau Claire County, a county which has not adopted the county tax as of April 1, 1992, and Marathon County and LaCrosse County, counties which have adopted the county tax.

Example 1: Company A is located in Marathon County and has a branch office in Eau Claire County. Company A purchases computer hardware, for use in its Eau Claire office, from a supplier located outside Wisconsin. The supplier does not have nexus in Wisconsin and is not registered to collect Wisconsin use tax. The supplier has the hardware shipped to Company A's office in Marathon County. The computer hardware is stored in Marathon County by Company A and subsequently shipped to its Eau Claire office for installation and set up.

Company A is subject to the Marathon County use tax on its purchase of the computer hardware under sec. 77.71(2), Wis. Stats. (1989-90), because the computer hardware was stored in Marathon County. The supplier is not subject to the county tax because there is no jurisdiction to tax under sec. 77.73, Wis. Stats. (1989-90).

Example 2: Assume the same facts as in Example 1, except that the supplier delivers the computer hardware into Wisconsin using its own trucks (rather than by common carrier). As a result, the supplier has nexus in Wisconsin and nexus in Marathon County under sec. 77.73(1), Wis. Stats. (1989-90), and is registered to collect Wisconsin and county use tax.

The supplier is required to collect Marathon County use tax on the sales price of the computer hardware.

Example 3: A construction contractor located in Marathon County purchases lumber from a supplier located in Eau Claire County. The supplier does not have nexus in Marathon County. The supplier has the lumber shipped to Marathon County by common carrier. The lumber is stored in Marathon County by the construction contractor until it is subsequently used in real property construction in Eau Claire County.

The contractor is subject to Marathon County use tax on its purchase of the lumber under sec. 77.71(2), Wis. Stats. (1989-90), because the lumber is stored in Marathon County. The supplier is not subject to the county tax because there is no jurisdiction to tax under sec. 77.73, Wis. Stats. (1989-90).

Example 4: Assume the same facts as in Example 3, except that the supplier delivers the lumber into Marathon County using its own trucks (rather than by common carrier). As a result, the suppler has nexus in Marathon County under sec. 77.73(1), Wis. Stats. (1989-90).

The supplier is required to collect Marathon County use tax on the sales price of the lumber.

Example 5: Assume the same facts as in Example 3, except that the contractor picks up the lumber in Eau Claire County in its own truck and returns to Marathon County where the lumber is stored. The contractor is not subject to Marathon County tax. Section 77.73(2), Wis. Stats. (1989-90), provides an exception to the county use tax imposed under sec. 77.71 (2), Wis. Stats. (1989-90), when the sale takes place in a Wisconsin county that has not adopted the county tax. Because the sale took place in Eau Claire County, a county that has not adopted the county tax, and the lumber is used in real property construction in Eau Claire County, a county use tax does not apply.

Example 6: A construction contractor located in Eau Claire County purchases lumber from a supplier located in Eau Claire County. The supplier has the lumber shipped within Eau Claire County by common carrier. The lumber is stored in Eau Claire County by the construction contractor until it is subsequently used in real property construction in Marathon County.

Although the contractor stores the lumber in a nontaxable county, the contractor is subject to Marathon County tax under sec. 77.71(3), Wis. Stats. (1989-90), because the lumber is used in real property construction in a taxable county.

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4. Payment for Photocopies of Medical Records Under Worker's Compensation Law

Statutes: Sections 77.51(14)(h) and (L), 77.52(1) and (2)(a)7, and 102.13(2)(b), Wis. Stats. (1989-90)

Background: In a tax release titled "Photocopies of Medical Records" (*Wisconsin Tax Bulletin* 61, p. 21), it is explained that charges by a company for photocopies of medical records are subject to Wisconsin sales or use tax.

Section 102.13(2)(b), Wis. Stats. (1989-90), provides that a physician, chiropractor, podiatrist, psychologist, hospital, or health service provider must furnish a legible certified duplicate of written material under a worker's compensation claim upon payment of the greater of actual costs not to exceed 25 cents per page or $5 per request.

Facts and Question: Company ABC employs people in Wisconsin hospitals to photocopy medical records for insurance companies handling worker's compensation claims. Insurance Company B hires Company ABC to photocopy the medical records of John Doe as it relates to a worker's compensation claim. Company ABC photocopies 50 pages of medical records for Insurance Company B at a cost of 25¢ per page not to exceed $5. If Company ABC charges sales tax on the sales of photocopies the charge will exceed the limits prescribed in sec. 102.13(2)(b), Wis. Stats. (1989-90).

Is the sale of photocopies exempt from Wisconsin sales tax because of sec. 102.13(2)(b), Wis. Stats. (1989-90)?

Answer: No. The sale of photocopies *is* subject to Wisconsin sales or use tax even though Company ABC is precluded from collecting the tax from its customer under sec. 102.13(2)(b), Wis. Stats. (1989-90). The Wisconsin sales tax is imposed on the retailer, who in turn may pass the tax on to its customer. There is no provision in the worker's compensation law that precludes the department from collecting sales tax on photocopies from the retailer of such photocopies.

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INDIVIDUAL AND CORPORATION FRANCHISE OR INCOME TAXES

1. Wisconsin Treatment of Corporations and Partnerships That Are Limited Partners in Partnerships Doing Business in Wisconsin

Statutes: Sections 71.20(1), 71.21(1), 71.22(1) and 71.23, Wis. Stats. (1989-90)

Wis. Adm. Code: Section Tax 2.82, January 1979 Register

Background: Section 71.02(1), Wis. Stats. (1989-90), relating to the imposition of tax on individuals and fiduciaries, was amended by 1991 Wisconsin Act 39 to provide that income derived from business transacted within the state includes income derived from a limited partner's distributive share of partnership income. In addition, sec. 71.04(1)(a), Wis. Stats. (1989-90), relating to the situs of income for nonresidents, was amended to state that a nonresident limited partner's distributive share of partnership income follows the situs of the business. These changes first apply to a partnership's taxable year beginning on January 1, 1991, and to a limited partner's taxable year as appropriate to conform the limited partner's treatment of the income from the partnership to the partnership's tax treatment.

Facts - Situation 1: ABC Limited Partnership does business in Wisconsin and 20 other states and reports its income on a calendar-year basis. DEF Corporation, a calendar-year corporation organized under Delaware law that is not engaged in business in Wisconsin, owns a limited partnership interest in ABC Limited Partnership during 1991. ABC Limited Partnership's activities are not unitary with the corporation's business operations.

Question 1: Does DEF Corporation's ownership of a limited partnership interest in ABC Limited Partnership, which is doing business in Wisconsin, make DEF Corporation subject to Wisconsin franchise or income taxation for 1991?

Answer 1: No. DEF Corporation is not subject to Wisconsin franchise or income taxation. Because ABC Limited Partnership's activities are not unitary with the corporation's business operations, DEF Corporation is not doing business in Wisconsin based on its

ownership of a limited partnership interest in ABC Limited Partnership which is doing business in Wisconsin. Ownership of an interest in a limited partnership that does business in Wisconsin does not establish nexus with Wisconsin under Wis. Adm. Code Sec. Tax 2.82.

Facts - Situation 2: GHI Limited Partnership does business in Wisconsin and 20 other states and reports its income on a calendar-year basis. JKL Limited Partnership, a calendar-year limited partnership organized under Delaware law that is not engaged in business in Wisconsin, owns a limited partnership interest in GHI Limited Partnership during 1991. Individuals throughout the United States are limited partners in JKL Limited Partnership.

Question 2(a): Does JKL Limited Partnership's interest in GHI Limited Partnership, which is doing business in Wisconsin, require JKL Limited Partnership to file a 1991 Wisconsin partnership return?

Answer 2(a): Yes. JKL Limited Partnership is required to file a 1991 Wisconsin partnership return. The net income of a partnership, except a publicly traded partnership, is computed under sec. 71.21(1), Wis. Stats. (1989-90), in the same manner and on the same basis as provided for computing the income of persons other than corporations. Since income from a limited partnership is classified as business income for persons other than corporations, JKL Limited Partnership is considered to have income from business transacted in Wisconsin.

Question 2(b): Are JKL Limited Partnership's nonresident individual limited partners required to file 1991 Wisconsin individual income tax returns?

Answer 2(b): Yes. The nonresident individual limited partners of JKL Limited Partnership are required to file Wisconsin individual income tax returns for their taxable year in which the partnership's 1991 year ends. They are subject to Wisconsin income tax on their distributive shares of JKL Limited Partnership's distributive share of GHI Limited Partnership's income derived from business transacted in Wisconsin.

Facts - Situation 3: MNO Limited Partnership does business in Wisconsin and 20 other states and reports its income on a calendar-year basis. PQR Limited Partnership, a calendar-year master limited partnership organized under Delaware law, is not engaged in business in Wisconsin. PQR Limited Partnership owns a limited partnership interest in MNO Limited Partnership during 1991. Investment units in PQR Limited Partnership are held by individuals throughout the United States. PQR Limited Partnership is taxed as a corporation for federal income tax purposes because it is a publicly traded partnership under sec. 7704 of the Internal Revenue Code (IRC). PQR's unit interest holders' distributions are taxed federally as if they are dividend income.

Question 3(a): Since PQR Limited Partnership is treated as a corporation for federal income tax purposes, is it also treated as a corporation for Wisconsin franchise and income tax purposes?

Answer 3(a): Yes. Since PQR Limited Partnership is treated as a corporation for federal income tax purposes, it is also treated as a corporation for Wisconsin franchise and income tax purposes, regardless of whether or not it has nexus in Wisconsin. The term "corporation," as defined in sec. 71.22(1), Wis. Stats. (1989-90), includes publicly traded partnerships treated as corporations in IRC sec. 7704. This definition applies to an entity regardless of whether or not it has nexus with Wisconsin.

Question 3(b): If PQR Limited Partnership is treated as a corporation for Wisconsin franchise and income tax purposes, must it file a 1991 Wisconsin franchise or income tax return?

Answer 3(b): No. PQR Limited Partnership is not required to file a Wisconsin franchise or income tax return. Because it is treated as a corporation, it does not have nexus with Wisconsin. The ownership of a limited partnership interest under these circumstances does not create nexus with Wisconsin.

Question 3(c): Are the individual limited partners owning interests in PQR Limited Partnership subject to Wisconsin individual income taxation on their distributive shares of the partnership income?

Answer 3(c): No. The nonresident individual limited partners owning interests in PQR Limited Partnership are not subject to Wisconsin individual income taxation since their partnership distributions are treated as dividends.

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TEMPORARY SURCHARGE

1. Deductibility of Temporary Surcharge

Statutes: Sections 71.05(6)(a)13, 71.07(5)(a)2, 71.22(4m), 71.26(1)(a), (2)(b), and (3)(g), 71.34(1)(ag), and 71.45(2)(a)5, Wis. Stats. (1989-90)

Note: The temporary surcharge applies to taxable years ending after April 1, 1991, and ending before April 1, 1999. For additional information about the temporary surcharge, refer to Publication 400, *Wisconsin's Temporary Surcharge*, which may be obtained from any Department of Revenue office.

Background: The Department of Revenue has received an opinion from the Internal Revenue Service (IRS) regarding the deductibility of the temporary surcharge that is imposed on certain corporations, exempt organizations, partnerships, individuals, estates, and trusts.

For federal income tax purposes, the IRS is going to treat the temporary surcharge as a state tax within the meaning of sec. 164(a) of the Internal Revenue Code (IRC). Therefore, it may be deducted from income as provided under sec. 164(a), IRC. The department has asked the Internal Revenue Service for further clarification of the federal treatment of the temporary surcharge by S corporations

and partnerships that have income which is classified under the federal passive activity loss rules as portfolio income, rental income, or passive activity income.

Question: Based on the IRS opinion, is the temporary surcharge paid deductible for Wisconsin franchise or income tax purposes?

Answer: Based on the information currently available, the Wisconsin treatment of the temporary surcharge paid is as follows:

Entity	Wisconsin Treatment
C corporations (except RICs, REITs, and REMICs)	Not deductible — add back to federal taxable income on Form 4 or 5, Schedule V. [sec. 71.26(3)(g), Wis. Stats.]
Exempt corporations	Deductible in computing Wisconsin unrelated business taxable income. [secs. 71.22(4m) and 71.26(1)(a), Wis. Stats.]
Insurance companies	Not deductible — add back to federal taxable income on Form 4I, Schedule A. [sec. 71.45(2)(a)5, Wis. Stats.]
RICs, REITs, and REMICs	Deductible in computing Wisconsin net income. [sec. 71.26(2)(b), Wis. Stats.]
S corporations	Not deductible — add back to federal income if deductible in computing federal income. Generally, add back to federal ordinary (nonseparately stated) income from trade or business activities on Form 5S, Schedule 5K, line 1, column c. [sec. 71.34(1)(ag), Wis. Stats.]
Partnerships	Deductible in computing Wisconsin ordinary income if deductible in computing federal ordinary income. If the partnership has only portfolio, rental, or passive activity income, the treatment is unknown.
Individuals	Not deductible and not includable in the itemized deduction credit. [sec. 71.07(5)(a)2, Wis. Stats.]
Estates and trusts	Not deductible — add back to federal taxable income on Form 2, Schedule A. [sec. 71.05(6)(a)13, Wis. Stats.]
Exempt estates and trusts	Not deductible — add back to federal unrelated business taxable income on Form 4T, Schedule V. [sec. 71.05(6)(a)13, Wis. Stats.]

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2. **Estimated Temporary Surcharge Payments**

Statutes: Section 77.96(2), Wis. Stats. (1989-90), as amended by 1991 Wisconsin Act 39

Note: The temporary surcharge applies to taxable years ending after April 1, 1991, and ending before April 1, 1999. For additional information about the temporary surcharge, refer to Publication 400, *Wisconsin's Temporary Surcharge*, which may be obtained from any Department of Revenue office.

Background: The temporary surcharge is due on the due date of the taxpayer's Wisconsin franchise or income tax return. Taxpayers subject to the temporary surcharge must make an estimated temporary surcharge payment if (a) an extension of time to file the Wisconsin franchise or income tax return has been granted, and (b) the unextended due date of that return is on or after December 1, 1991. The estimated payment must be based on 100% of the Wisconsin gross tax liability or 100% of the Wisconsin net business income, as appropriate, for the prior taxable year (or for the current taxable year, if less). Section 77.96(2), Wis. Stats. (1989-90), as amended by 1991 Wisconsin Act 39.

Facts and Question 1: Corporation X, which is incorporated during 1991 and elects to report its income on the basis of a calendar year, receives a 6-month extension of time until September 15, 1992, to file its 1991 Wisconsin franchise or income tax return. On its 1991 Wisconsin return, Corporation X reports a Wisconsin gross tax liability of $10,000 and a temporary surcharge of $550 ($10,000 x 5.5%).

Is Corporation X required to make an estimated temporary surcharge payment for 1991 and, if so, how is the payment computed?

Answer 1: Yes. Corporation X must make an estimated temporary surcharge payment because it received an extension of time to file its Wisconsin franchise or income tax return and the due date of that return (March 15, 1992) is after December 1, 1991. Since Corporation X did not have a tax liability for the prior taxable year, it must make an estimated temporary surcharge payment of $25, which is the minimum temporary surcharge payment based on a 1990 zero gross tax, by March 15, 1992. The balance of the temporary surcharge ($525) must be paid when Corporation X files its return or September 15, 1992, whichever occurs first.

Facts and Question 2: Corporation Y, which has done business in Wisconsin since 1980 and reports its income on a calendar-year basis, elects to become a tax-option (S) corporation for its taxable year beginning January 1, 1991. Corporation Y receives a 6-month extension of time until September 15, 1992, to file its 1991 Wisconsin franchise or income tax return. For the 1990 taxable year, Corporation Y had Wisconsin net income of $1,000,000, and a Wisconsin gross tax liability of $79,000. On its 1991 Wisconsin tax-option (S) corporation return, Corporation Y reports Wisconsin net income of $1,500,000 and a temporary surcharge of $6,518 ($1,500,000 x 0.4345%).

Is Corporation Y required to make an estimated temporary surcharge payment and, if so, how is the payment computed?

Answer 2: Yes. Corporation Y is required to make an estimated temporary surcharge payment because it received an extension of time to file its 1991 Wisconsin franchise or income tax return and the due date of that return (March 15, 1992) is after December 1, 1991. Since Corporation Y had income for the prior taxable year, its required estimated payment is $4,345, which is 0.4345% of its 1990 Wisconsin net income (or 5.5% of its 1990 Wisconsin gross tax). The balance of the temporary surcharge ($2,173) must be paid when Corporation Y files its return or September 15, 1992, whichever occurs first.

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3. **Temporary Surcharge - Computation of Net Business Income of Individuals**

Statutes: Section 77.93(2), Wis. Stats. (1989-90), as amended by 1991 Wisconsin Act 39, secs. 77.92(4) and 77.93(5), Wis. Stats., as created by 1991 Wisconsin Act 39, and sec. 77.94(1)(b) and (c), as repealed and recreated by 1991 Wisconsin Act 39.

Note: The temporary surcharge applies to taxable years ending after April 1, 1991, and ending before April 1, 1999. For additional information about the temporary surcharge, refer to Publication 400, *Wisconsin's Temporary Surcharge*, which may be obtained from any Department of Revenue office.

Background: Individuals who must file a Wisconsin income tax return and who have a profit or loss from a trade or business, not including farming, for federal income tax purposes are subject to the temporary surcharge. Section 77.93(2), Wis. Stats., as amended by 1991 Wisconsin Act 39. The temporary surcharge is the greater of $25 or 0.4345% of net business income, but not more than $9,800. Section 77.94(1)(b), Wis. Stats., as repealed and recreated by 1991 Wisconsin Act 39. "Net business income" means profit from a trade or business for federal income tax purposes. Section 77.92(4), Wis. Stats., as created by 1991 Wisconsin Act 39.

Individuals engaged in farming are subject to a temporary surcharge of $25, if they have a net farm profit of at least $1,000. Section 77.93(5), Wis. Stats., as created by 1991 Wisconsin Act 39, and sec. 77.94(1)(c), Wis. Stats., as repealed and recreated by 1991 Wisconsin Act 39.

Facts and Question: Taxpayer B operates a bookstore as a sole proprietor. For 1991, she reports $50,000 of net profit from the business on federal Schedule C, line 31. She is required to pay $7,065 of federal self-employment tax based on her business income. During 1991, Taxpayer B pays $4,000 for health insurance for herself.

When computing her federal adjusted gross income, Taxpayer B may deduct $3,533, which is 50% of the federal self-employment taxes imposed for the taxable year, on federal Form 1040, line 25.

Section 164(f), Internal Revenue Code (IRC). In addition, she may deduct $1,000, which is 25% of her health insurance premiums, on Form 1040, line 26. Section 162(l), IRC.

For purposes of the temporary surcharge, is Taxpayer B's net income from a trade or business reduced by the deductions for 50% of her self-employment tax liability and 25% of her health insurance premiums?

Answer: Yes. Section 164(f)(2), IRC, provides that the deduction for one-half of the self-employment taxes is treated as attributable to a trade or business carried on by the taxpayer. One-fourth of the health insurance costs of self-employed individuals, with certain limitations, are deductible as an ordinary and necessary business expense under sec. 162(l), IRC. Therefore, for purposes of computing the temporary surcharge, the net income from a trade or business is reduced by the deductions for 50% of the federal self-employment taxes paid and 25% of the health insurance premiums paid.

Taxpayer B's net business income is $45,467 ($50,000 - $3,533 - $1,000). Therefore, she must pay a temporary surcharge of $198 ($45,467 x 0.4345%).

Note: Net farm profit is also reduced by the deductions allowable under IRC secs. 162(l) and 164(f) for health insurance premiums and self-employment taxes paid.

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4. **Temporary Surcharge - Exempt Organization Having No Unrelated Business Taxable Income for the Current Taxable Year**

Statutes: Section 77.93(1), Wis. Stats. (1989-90), as amended by 1991 Wisconsin Act 39

Note: The temporary surcharge applies to taxable years ending after April 1, 1991, and ending before April 1, 1999. For additional information about the temporary surcharge, refer to Publication 400, *Wisconsin's Temporary Surcharge*, which may be obtained from any Department of Revenue office.

Background: Tax-exempt organizations that have unrelated business taxable income as defined in sec. 512 of the Internal Revenue Code (IRC) and that must file Wisconsin unrelated business franchise or income tax returns, Form 4T, are subject to the temporary surcharge. Sec. 77.93(1), Wis. Stats. (1989-90), as amended by 1991 Wisconsin Act 39.

Facts and Question: Organization X is an exempt organization taxable as a corporation that reports its income on a calendar-year basis. For 1990, Organization X was required to file a Wisconsin unrelated business franchise or income tax return, Form 4T, because it had more than $1,000 of gross income (gross receipts less the cost of goods sold) from an unrelated trade or business. It computed a net loss from its unrelated trade or business for both federal and Wisconsin purposes in 1990. For 1991, Organization X does not have any income from an unrelated trade or business. However, it files a 1991 Wisconsin tax return to report its net operating loss carryover.

Is Organization X subject to the temporary surcharge for the 1991 calendar year?

Answer: No. Organization X is not subject to the temporary surcharge for the 1991 calendar year. It is not required to file a 1991 Wisconsin return since it does not have at least $1,000 of gross income from an unrelated trade or business. See secs. 511 and 512, IRC, and secs. 71.24(1m) and 71.26(1)(a), Wis. Stats. (1989-90). Therefore, even though it files a Wisconsin tax return for informational purposes, Organization X is not subject to the temporary surcharge.

Note: If Organization X had at least $1,000 of gross income from an unrelated trade or business for 1991, but the net operating loss carryover reduced its net income to zero, it would be subject to the $25 minimum temporary surcharge for 1991.

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5. **Temporary Surcharge - Members of Certain Religious Groups Who Are Exempt From Federal Self-Employment Tax**

Statutes: Section 77.93(2), Wis. Stats. (1989-90), as amended by 1991 Wisconsin Act 39, and secs. 77.92(4) and 77.93(5), Wis. Stats., as created by 1991 Wisconsin Act 39.

Note: The temporary surcharge applies to taxable years ending after April 1, 1991, and ending before April 1, 1999. For additional information about the temporary surcharge, refer to Publication 400, *Wisconsin's Temporary Surcharge*, which may be obtained from any Department of Revenue office.

Background: Individuals who must file a Wisconsin income tax return and who have a profit or loss from a trade or business, not including farming, for federal income tax purposes are subject to the temporary surcharge. Section 77.93(2), Wis. Stats., as amended by 1991 Wisconsin Act 39. A trade or business is an activity regularly carried on for a livelihood or with the intention of making a profit. Trade or business income includes income, other than from farming, which is subject to federal self-employment tax. Section 77.92(4), Wis. Stats., as created by 1991 Wisconsin Act 39, and sec. 77.93(2), Wis. Stats., as amended by 1991 Wisconsin Act 39. Individuals engaged in farming are subject to a temporary surcharge of $25, if they have a net farm profit of at least $1,000. Section 77.93(5), Wis. Stats., as created by 1991 Wisconsin Act 39, and sec. 77.94(1)(c), Wis. Stats., as repealed and recreated by 1991 Wisconsin Act 39.

Facts and Question 1: Taxpayer A operates a bakery as a sole proprietorship. He is a member of a recognized religious group that has conscientious objections to any private or public insurance

which makes payments on account of death, disability, old age, or retirement or makes payments toward the cost of, or provides services for, medical care (including social security benefits). Taxpayer A files federal Form 4029, Application for Exemption From Social Security and Medicare Taxes and Waiver of Benefits, and receives the Internal Revenue Service's approval to be exempt from social security and Medicare taxes.

Is Taxpayer A subject to the temporary surcharge?

Answer 1: No. For purposes of the temporary surcharge, "trade or business" is defined in sec. 1402(c) of the Internal Revenue Code (IRC), relating to the federal self-employment tax. Generally, individuals who are exempt from self-employment tax (other than certain statutory employes) are not considered to have trade or business income for purposes of the temporary surcharge. Since IRC sec. 1402(g) provides an exemption from self-employment tax for members of certain recognized religious groups, their income is not treated as trade or business income. Therefore, Taxpayer A is not subject to the temporary surcharge.

Facts and Question 2: Taxpayer B, who is engaged in farming as a sole proprietorship, has a net farm profit of $5,000 for calendar year 1991. He files federal Form 4029 and receives the Internal Revenue Service's approval to be exempt from social security and Medicare taxes because he is a member of a recognized religious group that is conscientiously opposed to private or public insurance.

Is Taxpayer B subject to the temporary surcharge?

Answer 2: Yes. For purposes of the temporary surcharge imposed on noncorporate farms, "farming" is defined in IRC sec. 464(e)(1). Section 77.92(1), Wis. Stats. (1989-90). That Code section does not refer to a definition of a trade or business, and the definition of "trade or business" in IRC sec. 1402(c) does not apply to farming. Therefore, an individual who is engaged in the business of farming is not exempted from the temporary surcharge just because he or she is exempt from federal self-employment tax. Since Taxpayer B has at least $1,000 of net farm profit, he is subject to the $25 temporary surcharge imposed on individuals engaged in farming.

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PRIVATE LETTER RULINGS

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

The number assigned to each ruling is interpreted as follows: The "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.

The following rulings are included:

W9202001, October 18, 1991

Type Tax: Sales/Use

Statutes: Sections 77.51(14) and 77.52(1), (2)(a)10, and (2m), Wis. Stats. (1989-90)

Issue: Computer software

This letter responds to your request for a private letter ruling regarding the Wisconsin sales and use tax implications of the sale of computer software.

Facts

Corporation A is an affiliate of a trade association. It sells forms developed by the trade association.

In order to make these forms available to institutions through an automated loan origination system, Corporation A has entered into an agreement with the owner of a software product to integrate the standard forms which Corporation A sells into its software. The integrated software is called "Link B."

The Link B software, without further modifications, will only produce a particular set of forms consisting of the standard forms which Corporation A sells. Nearly all of the purchasers of Link B use some forms in addition to, or in place of, these standard forms.

In order to accommodate customers' desires to customize the loan document package which the software will produce, Corporation A will modify the Link B software for the customer. Corporation A will charge the customer for the basic Link B software plus a fee for making modifications, based on an hourly rate for the time involved.

The cost of a Link B software varies, depending upon whether it is installed on a single computer or a network system and the extent of modifications made for the customer.

Corporation A installs or assists the customer in installing the software on the customer's computer system and tests or assists the customer in testing to ensure it works properly.
A diskette with a copy of the program is provided to the customer, primarily as a backup. User manuals are also provided to the customer. There is no separate charge for the backup diskettes or manuals.

Software maintenance services are provided by Corporation A to all software purchasers. A monthly fee is charged based on the number of transactions processed. Maintenance services include the availability of personnel to answer telephone inquiries regarding use of the software. Corporation A also provides modifications to the software to incorporate revisions to the forms produced by the software, increase the speed, efficiency, or ease of operation of the software, or add additional capabilities to or improve the functions of the software.

For a separate charge, Corporation A provides training services. The training is usually done at the customer's business location. The training course takes approximately 2 1/2 days.

Ruling Request
Is the sale of Link B software and the sales of related maintenance and training services subject to Wisconsin sales or use tax?

Ruling
When Corporation A sells Link B software that has been modified to produce a customized loan document package, this is the sale of a custom program which is not subject to Wisconsin sales or use tax. Related maintenance and training services are also not subject to Wisconsin sales or use tax.

When Corporation A sells Link B software that produces a standard set of forms with no modifications, it is the sale of a prewritten "canned" program which is subject to Wisconsin sales or use tax. Related maintenance services are also subject to Wisconsin sales or use tax. Training services related to the sale of this software are not subject to Wisconsin sales or use tax.

The sale of training materials, such as books and manuals, furnished to customers separate from the training service is subject to Wisconsin sales or use tax. If the training materials are provided to customers as part of the training service, the transfer of the training materials to the customers is not subject to Wisconsin sales and use tax. However, Corporation A is considered to be the consumer of such materials and its purchase of the materials from its supplier is subject to Wisconsin sales or use tax.

Analysis
Section Tax 11.71(3)(b), Wis. Adm. Code, provides that the sale of custom programs is not taxable. Paragraph (e) provides that the sale of maintenance and enhancement services to custom programs is not taxable.

Section Tax 11.71(2)(b), Wis. Adm. Code, provides that the sale of prewritten programs and basic operational programs, including the maintenance and enhancement of those programs, is taxable.

Section Tax 11.71(1)(e), Wis. Adm. Code, provides that *"The determination of whether a program is a custom program shall be based upon all the facts and circumstances, including the following:*

1. *The extent to which the vendor or independent consultant engages in significant presale consultation and analysis of the user's requirements and system.*

2. *Whether the program is loaded into the customer's computer by the vendor and the extent to which the installed program must be tested against the program's specifications.*

3. *The extent to which the use of the software requires substantial training of the customer's personnel and substantial written documentation.*

4. *The extent to which the enhancement and maintenance support by the vendor is needed for continued usefulness.*

5. *There is a rebuttable presumption that any program with a cost of $10,000 or less is not a custom program.*

6. *Custom programs do not include basic operational programs.*

7. *If an existing program is selected for modification, there must be a significant modification of that program by the vendor so that it may be used in the customer's specific hardware and software environment."*

Corporation A's Link B software meets these criteria when:

1. Corporation A's personnel engage in significant* presale consultation and analysis to determine what forms the software is to produce and what is needed to modify the program to produce forms which meet the customer's specifications,

2. Corporation A installs or assists in the installation and testing of the software to ensure that the agreed upon forms are properly produced,

3. Corporation A provides substantial* documentation in the form of user manuals and training sessions for the customer's personnel,

4. Corporation A provides maintenance and updating services to its customers including answering telephone inquiries and supplying modifications to the software to enable it to produce new or revised forms as they become available,

5. The program may cost over $10,000 depending on the customer's computer system and modification needed, and

6. Corporation A makes significant* modifications to the Link B software in that loan documents are being customized to meet the specific needs of a customer.

* Determining significant and substantial is done on a case-by-case basis with a particular set of facts as to time spent, modifications made, and effort required.

Section Tax 11.71(1)(k), Wis. Adm. Code, defines "prewritten programs" to mean programs prepared, held or existing for general use normally for more than one customer, including programs developed for in-house use or custom program use which are subsequently held or offered for sale.

The Link B software when not modified to provide for customized loan documents meets the definition of prewritten programs and is subject to Wisconsin sales or use tax.

Section Tax 11.71(2)(c), Wis. Adm. Code, provides that training services are not taxable.

Section Tax 11.67(1), Wis. Adm. Code, provides that when a transaction involves the transfer of tangible property along with the performance of a service, the true objective of the purchaser must be considered to determine whether such transaction is a sale of tangible personal property or the performing of a service with the transfer of property being merely incidental to the performance of the service. Corporation A's customer's true objective is to obtain the training service Corporation A provides, and the transfer of training materials is incidental to the performance of the training service.

Under sec. Tax 11.67(2)(a), Wis. Adm. Code, persons engaged in performing a service who transfer tangible personal property incidentally in rendering the service are the consumers of the tangible personal property, and the sale of such property to them is subject to Wisconsin sales or use tax.

Therefore, if Corporation A sells the materials separate from providing the training services, it is required to charge Wisconsin sales or use tax on the sale of the materials. It may purchase the materials it sells without Wisconsin sales or use tax by giving its supplier a properly completed resale certificate. If the materials are provided to customers as part of the training service, Corporation A is the consumer of the training materials and is subject to Wisconsin sales or use tax on its purchase of the materials.

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W9202002, October 23, 1991

Type Tax: Sales/Use

Statutes: Section 77.54(30)(a)2, (c), (d), and (e), Wis. Stats. (1989-90)

Issue: Exemptions - fuel and electricity (residential)

This letter responds to your request for a private letter ruling regarding the sales and use tax status of charges for electricity and natural gas sold for use in common areas in apartment buildings.

Fact
As a result of a request for refund received by Utility Company A, you are questioning whether sales tax applies to charges for electricity and natural gas sold for use in common areas in apartment buildings (i.e., laundry rooms, hall lighting, exit lighting, entrance lighting, and exterior parking lot lighting). Your general classification of accounts for the Public Service Commission define a residential account as being a single living unit, while accounts serving multiple residential accounts are commercial in nature.

Request
Utility Company A requests a clarification of sec. 77.54(30)(a)2, (c) and (d), Wis. Stats. (1989-90), so that the utility may properly collect sales taxes for the State of Wisconsin.

Ruling
The gross receipts from the sale of electricity and natural gas sold by Utility Company A for use in common areas in apartment buildings during the months of November through April qualify for exemption from Wisconsin sales and use tax.

Analysis
Section 77.54(30)(a)2, Wis. Stats. (1989-90), exempts from sales and use tax the gross receipts from the sale of electricity and natural gas sold for residential use during the months of November, December, January, February, March and April. Section 77.54(30)(d), Wis. Stats. (1989-90), defines residential use to mean use in a structure or portion of a structure which is a person's permanent residence.

Section Tax 11.57(2)(L)7, Wis. Adm. Code, June 1991 Register, provides that residential use includes use in apartment houses, nursing homes and farm houses even though they are on a commercial or rural meter.

Section 77.54(30)(e), Wis. Stats. (1989-90), provides that when sales of electricity or natural gas are made to accounts which are properly classified as residential pursuant to schedules which are filed for rate tariff purposes with the Public Service Commission, and which are in force at the time of the sale, the seller of electricity or natural gas is not required to obtain exemption certificates from their customers. However, because the common areas in the apartment buildings are classified as commercial for the Public Service Commission, the landlords must give the utility properly completed exemption certificates for the sales to be exempt.

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W9203003, October 25, 1991

Type Tax: Sales/Use

Statutes: Sections 77.51(14) and 77.52(1) and (2)(a), Wis. Stats. (1989-90)

Issue: Exemptions - fund-raising activities

This letter responds to your request for a private letter ruling regarding the sales and use tax status of the "XYZ Program."

Facts
In the XYZ Program, for a contribution, the Hospital A Auxiliary ("the Auxiliary") will turn on a light, or a string of lights, on a Christmas tree on the hospital grounds in recognition or memory of an individual of the contributor's request. No physical light is purchased by the contributor, and the same lights are used on the Christmas tree each year. It is a program to encourage donations to the Auxiliary. The Auxiliary has paid sales tax on the contributions related to the XYZ Program in the past.

Request
The Auxiliary requests a determination of whether the contributions relating to the XYZ Program are subject to Wisconsin sales tax.

Ruling
The Auxiliary's receipts from contributions relating to the XYZ Program are not subject to Wisconsin sales tax.

Analysis
Section 77.52(1), Wis. Stats. (1989-90) imposes Wisconsin sales tax on retail sales, leases or rentals of tangible personal property. Section 77.52(2)(a), Wis. Stats. (1989-90), imposes Wisconsin sales tax on selling, performing, or furnishing specified services. Section 77.51(14), Wis. Stats. (1989-90) defines "sale, lease or rental" to include any one or all of the following: the transfer of the ownership of, title to, possession of, or enjoyment of tangible personal property or services for use or consumption.

Since contributions in the program do not meet the definition of "sale, lease or rental," and since the Auxiliary is not providing a service which has been specified as a taxable service, there is no basis for imposing sales tax on the Auxiliary's receipts from contributions related to the XYZ Program.

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W9206004, November 18, 1991

Type Tax: Sales/Use

Statutes: Sections 77.52(2)(a)1 and 11 and (2m) and 77.54(20)(c)5, Wis. Stats. (1989-90)

Issue: Conference services

This letter responds to your request for a private letter ruling regarding the Wisconsin sales and use tax implications of providing conference facilities and services.

Facts
Company XYZ, a for-profit firm, contracted with College A to host a Conference at College A in Wisconsin. The agreement calls for College A to provide lodging facilities, meeting/recreational facilities, meals and additional catering, and administrative services, including printing and mailing brochures.

For a fee of between $350 and $500, a person may register for the conference. This fee includes conference activities, use of recreational facilities at the conference, snacks, and lunches. Participants may also obtain lodging and morning and evening meals for additional charges on a per night and per meal basis. The charge by College A to Company XYZ for the meals and lodging was the same amount Company XYZ charged conference participants for meals and lodging. Wisconsin sales tax was not charged on any amounts charged to participants.

College A billed Company XYZ for the services it provided as follows:

Printing	$2,999.29	
Sales Tax	149.96	
Total		$ 3,149.25
Postage		4,759.23
Lodging	732.50	
Sales Tax	36.63	
Total		769.13
Meals	912.00	
Sales Tax	45.60	
Total		957.60
Facilities		438.77
Administration Fees		324.00
Catering Fees	263.00	
Sales Tax	13.15	
Total		276.15
Life Guards		22.50
Custodial Chargeback		18.00
Total Billed		$10,714.63

Company XYZ did not provide College A with any resale or other exemption certificate.

Ruling Request
Did College A properly impose Wisconsin sales or use tax on the taxable services it provided to Company XYZ?

Ruling
College A correctly imposed Wisconsin sales tax on its sales of printing provided to Company XYZ. In addition, the portion of facilities fees which relate to the use of amusement, athletic, entertainment, or recreational facilities is subject to Wisconsin sales tax. The sales of meals, lodging, and catering to Company XYZ are not subject to Wisconsin sales tax.

Analysis

Section 77.52(2)(a), Wis. Stats. (1989-90), provides that the sale of certain services are subject to Wisconsin sales tax. Services subject to tax include fees for the privilege of access to amusement, athletic, entertainment, or recreational facilities (subd. 2), and the printing of tangible personal property (subd. 11). Providing education is not a taxable service.

Section 77.52(2)(a)1, Wis. Stats. (1989-90), provides that the furnishing of rooms or lodging to transients by corporations organized and operated exclusively for religious, charitable, or educational purposes, provided that no part of the net earnings of such corporations and associations inures to the benefit of any private shareholder or individual, is not a taxable service.

Section 77.54(20)(c)5, Wis. Stats. (1989-90), provides that taxable sales shall not include meals, food, food products, or beverages furnished in accordance with any contract or agreement by a public or private institution of higher education.

Section Tax 11.67(2), Wis. Adm. Code, provides that persons engaged in the business of providing services are consumers, not retailers, of tangible personal property which they use incidentally in providing their services. Wisconsin sales and use tax applies to the sale of such property to them.

Since Company XYZ is providing an educational service to participants when they hold a conference, any property they use incidentally in providing that educational service is subject to Wisconsin sales or use tax, unless a specific exemption applies. Based on the information provided, Company XYZ is furnishing brochures, snacks, and lunches, in addition to educational materials, incidentally in providing the educational service to participants. Therefore, the sale of these items by College A to Company XYZ is subject to Wisconsin sales tax except where the exemption for meals applies under sec. 77.54(20)(c)5, Wis. Stats. (1989-90). The sale of furnishing access to recreational facilities by College A to Company XYZ is subject to Wisconsin sales tax.

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