Number 78 July 1992

Wisconsin TAX BULLETIN

Wisconsin's *Wrigley* assessment sticks
See page 8.

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New Delinquent Tax Fee

A new delinquent tax collection fee (DTC fee) became effective on July 1, 1992. This fee, which was enacted into law by the Wisconsin Legislature, places the cost of delinquent tax collection on the delinquent taxpayer rather than on all citizens of the state.

The DTC fee is the greater of $25 or 4½% of the tax, fees, interest, and penalty owed on each separate delinquency included in the total delinquent balance as of July 1, 1992.

The fee is also imposed at the time each assessment or notice of amount due is referred for delinquent tax collection on or after July 1, 1992. The fee is the greater of $25 or 4½% of the unpaid balance of tax, interest, fees, and penalty that become subject to delinquent tax collection action. □

Avoid Penalty—Pay Sales and Use Taxes on Time

Failure to timely pay sales and use taxes can result in a criminal conviction. You are guilty of theft if you collect state and county sales and use tax moneys from a consumer, user, or purchaser and you

- intentionally fail or refuse to pay these tax moneys to the Department of Revenue by the due date for payment, or
- fraudulently withhold, appropriate, or use these tax moneys.

If the amount involved is more than $1,000, the theft is a felony under sec. 943.201, Wis. Stats.

Payment to creditors in preference to the payment of the tax moneys to the Department of Revenue is prima facie evidence of an intent to fraudulently use these tax moneys.

Avoid the problem and pay your taxes by the due date. □

Index to Prior Issues Included

Once each year the *Wisconsin Tax Bulletin* includes an index of articles, tax releases, court cases, private letter rulings, and other materials that have appeared in past Bulletins. The index for issues 1 to 75 can be found on pages 27 to 50 of this Bulletin. □

Don't Forget Use Tax

Failure to report use tax is the most common error on sales and use tax returns. Make sure use tax is correctly reported on your sales and use tax return.

The 5% use tax is imposed on the purchase price of tangible personal property or taxable services that are to be used, stored, or consumed within Wisconsin, **upon which a sales tax is not imposed or paid.** Common examples include:

- Property used in Wisconsin is purchased outside Wisconsin without tax.

  Example: A Wisconsin company purchases an office machine from an Illinois seller without tax. The machine is used in Wisconsin. The Wisconsin company owes Wisconsin use tax on the purchase price of this machine.

- Property is purchased without tax for resale or for a nontaxable use and then is used by the purchaser in a taxable manner.

  Example: A furniture store buys desks to resell to customers without tax by giving the seller a "resale certificate." A desk is then taken from the furniture store's inventory and used by the store bookkeeper. The store owes use tax on the desk.

- Property is purchased outside Wisconsin without tax and is then brought into Wisconsin and given away free.

Failure to report use tax may result in penalties being assessed in addition to interest. Penalties may be as much as 50% of the use tax not reported. □

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New Laws

Wisconsin Tax Bulletin 77, May 1992, reported a number of changes to Wisconsin tax laws enacted by the Wisconsin Legislature. In addition, 1991 Wisconsin Act 309 renumbered sec. 71.59(1)(b)1 to 5, amended sec. 71.59(1)(b)(intro.), and created sec. 71.59(1)(b)4, to establish a new reporting requirement for farmland preservation credit claimants. This requirement is first effective for claims filed in 1993, based on 1992 property taxes.

Under Act 309, a farmland preservation credit claimant is required to certify to the Department of Revenue on Schedule FC that the appropriate county conservation committees have been notified of the claimant's intent to file a farmland preservation credit claim. This notification must be made to the land conservation committee of each county that has jurisdiction over farmland on which the claimant's farmland preservation credit claim is based. (Note: Act 309 does not specify the manner in which claimants are to notify county land conservation committees. The certification to the department will be made on the claimant's Schedule FC.) □

Recycling Surcharge Rates Unchanged

The temporary recycling surcharge rates remain unchanged for taxable years ending after April 1, 1992, and before April 1, 1993.

Section 77.945, Wis. Stats., as created by 1991 Wisconsin Act 60, requires the Department of Revenue annually, in December, to establish annual recycling surcharge rates for taxable years that end after April 1, 1992, and before April 1, 1999, that are necessary to generate a sufficient level of revenue to fund the appropriations from the recycling fund for the following fiscal year. The annual surcharge rates must be approved by the Legislature's Joint Committee on Finance.

As a result of this process, the following surcharge rates will continue to apply for taxable years that end before April 1, 1993:

- Corporations (except tax-option (S) corporations), insurance companies, and exempt organizations taxable as corporations: The greater of $25 or 5.5% of gross tax liability, but not more than $9,800.

- Tax-option (S) corporations: The greater of $25 or 0.4345% of Wisconsin net income, but not more than $9,800.

- Partnerships, except partnerships engaged only in farming: The greater of $25 or 0.4345% of net business income as allocated or apportioned to Wisconsin, but not more than $9,800.

- Individuals, estates, trusts, and exempt trusts, except those entities engaged only in farming: The greater of $25 or 0.4345% of net business income as allocated or apportioned to Wisconsin, but not more than $9,800.

- Partnerships, individuals, estates, trusts, and exempt trusts engaged in farming: $25, provided the entity has a net farm profit of $1,000 or more.

If the recycling surcharge rates change for taxable years ending after April 1, 1993, the new rates will be published in a future issue of the *Wisconsin Tax Bulletin.* □

New Sales and Use Tax Laws Explained

The Wisconsin Legislature enacted many changes to Wisconsin tax laws in 1992, as described in *Wisconsin Tax Bulletin* 77, dated May 1992. The June Tax Report gives explanations of the major changes to the sales and use tax laws. See pages 25 and 26 of this Bulletin for a copy of the June Tax Report, which was sent in June to all active sales and use tax registrants. □

Information or Inquiries?

Madison - Main Office
Area Code (608)

Beverage, Cigarette, Tobacco Products	266-6701
Corporation Franchise and 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
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

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 your Wisconsin tax questions. This index references Wisconsin statutes, administrative rules, Wisconsin Tax Bulletin articles, tax releases, publications, Attorney General opinions, and court decisions.

The first part of the index, the "Topical Index," gives references to alphabetized subjects for the various taxes, including individual income, corporation franchise and income, withholding, sales and 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. The $14 fee includes a volume published in December, and an addendum published in May.

To order your copy, complete the order blank that appears on page 51 of this Bulletin. The order blank may also be used for subscribing to the *Wisconsin Tax Bulletin* and for ordering the Wisconsin Administrative Code. □

Speakers Bureau

The department's Speakers Bureau provides speakers to 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, homestead credit issues, how tax laws apply to exempt organizations, and sales tax problems of contractors or manufacturers. □

Eau Claire Man Jailed

An Eau Claire man has been ordered to serve jail time and pay a $5,000 fine and court costs, for criminal violations of Wisconsin state income tax laws. In addition, a Prairie du Chien man has been charged with criminal violations of Wisconsin state income tax laws.

Lyle E. Myher of 661 Carol Court, Eau Claire, was sentenced in Eau Claire County Circuit Court, Branch 1, by Judge Thomas Barland, on two counts of filing false state income tax returns for the years 1985 and 1986. Judge Barland placed Myher on probation for two years on each count, to run concurrently. As conditions of probation, Myher was fined $5,000 and was ordered to spend 50 days in Eau Claire County Jail and pay all taxes, penalties, and interest due to the State of Wisconsin. Myher was charged with four counts of filing false and fraudulent income tax returns for the years 1985, 1986, 1987, and 1988, and three counts of filing false and fraudulent amended 1985, 1986, and 1987 state income tax returns, for failing to report more than $18,000 of taxable income and evading state income tax in excess of

$1,400. Five of the seven criminal counts were dismissed.

Roy O. Dobbs, Route 2, Box 275, Prairie du Chien, has been charged with three counts of failing to file Wisconsin income tax returns for the years 1988, 1989, and 1990. The complaint alleges that Dobbs had gross earnings of $28,700 in 1988, $43,996 in 1989, and $22,262 in 1990.

Filing a false or fraudulent Wisconsin state income tax return is a crime punishable by a fine of not more than $10,000 or imprisonment not to exceed five years, or both. Failing to file a Wisconsin state income tax return at the time required by law is a crime punishable by a fine of up to $10,000, imprisonment for up to nine months, or both. In addition to the criminal penalties, Wisconsin law provides for substantial civil penalties on the civil tax liability. Assessment and collection of the taxes, penalties, and interest due follows convictions for criminal violations. □

Administrative Rules 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 stage in the process as of July 1, 1992, or at the stage in which action occurred during the period from April 2, 1992, to July 1, 1992.

Each affected rule lists the rule number and name, and whether it is amended (A), repealed (R), repealed and recreated (R&R), or a new rule (NR).

Rules at or Reviewed by Legislative Council Rules Clearinghouse

11.08 Medical appliances, prosthetic devices and aids-A
11.17 Hospitals, clinics and medical professions-A
11.18 Dentists and their suppliers-A
11.26 Other taxes in taxable gross receipts and sales price-A
11.32 "Gross receipts" and "sales price"-A
11.45 Sales by pharmacies and drug stores-A
11.51 Grocers' guidelist-A
11.68 Construction contractors-A
11.86 Utility transmission and distribution lines-A
11.87 Meals, food, food products and beverages-A
11.925 Sales and use tax security deposits-A

Rules at Legislative Standing Committee

2.475 Apportionment of net business incomes of interstate railroads, sleeping car companies and car line companies-NR

Emergency Rules (including effective date)

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

Recently Adopted Rules Summarized

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

For each rule that is adopted, the *Wisconsin Tax Bulletin* will include a brief description of the new rule or the substantive changes to the existing rule, and the effective date or anticipated effective date of the change or creation. In addition, the parts of any rule being amended will be published, showing any deletions from or additions to the previous rule.

Included in this issue is information regarding sections Tax 11.01 and 11.47. The effective date for each of these sections is February 1, 1992.

In Tax 11.01 (Sales and use tax return forms), Tax 11.01(1)(e) is repealed in order to delete a reference to the obsolete Form S-174, and pars. (f), (g), (h) and (i) are renumbered (e), (f), (g) and (h).

In Tax 11.47 (Commercial photographers and photographic services), Tax 11.47(title), (1)(intro.), (a) and (e), (2)(a) and (3)(a)(intro.) and 2, (b)(intro.) and 3 and (c) are amended to correct punctuation, update language per Clearinghouse standards, and reflect that video taping is a photographic service subject to Wisconsin sales tax. Tax 11.47(3)(b)8 is created to reflect that persons providing photographic services are required to pay Wisconsin sales tax when purchasing video tape other than that specifically exempted. The amended and created parts are shown below.

Tax 11.47(title) COMMERCIAL PHOTOGRAPHERS AND PHOTOGRAPHIC SERVICES. (ss. 77.51(13)(e) and (f) and (14)(L), 77.52(2)(a)7, (2m)(b) and (13), 77.53(10) and 77.54(2), Stats.)

(1)(intro.) TAXABLE GROSS RECEIPTS. Taxable services and sales of tangible personal property of commercial photographers and others providing photographic services, including video taping, include gross receipts from:

(1)(a) Taking, reproducing and selling photographs and video tapes.

(1)(e) Reproducing copies of documents, drawings, photographs, video tapes or prints by mechanical and chemical reproduction machines, blue printing and process camera equipment.

(2)(a) Gross receipts subject to the tax include charges for photographic and video materials, time and talent.

(3)(a)(intro.) Commercial photographers and others providing photographic services, including video taping, may purchase, without paying sales or use tax, any item which will be resold or which becomes a component part of an article destined for sale if a properly completed resale exemption certificate is given the seller. ~~Such~~ These items include:

(3)(a)2. ~~Film~~ Video tapes and film, including colored transparencies and movie film, in which the negative and the positive are the same, and are permanently transferred to a customer as part of the taxable photographic service.

(3)(b)(intro.) Photographers and others providing photographic services, including video taping, are required to pay tax when purchasing tangible personal property which is used, consumed or destroyed in providing photographic services. ~~Such~~ These items include:

(3)(b)3. Film, other than exempted in ~~sub. (3)~~ par. (a)2.

(3)(b)8. Video tape, other than exempted in par. (a)2.

(3)(c) If a photographer or other person providing photographic services, including video taping, gives a resale certificate for property to a seller and then uses the property for a taxable purpose, the photographer or other person providing photographic services shall be liable for use tax at the time the property is first used in a taxable manner. □

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 following decisions are included:

INDIVIDUAL INCOME TAXES

Nonresidents — entertainers and professional athletes. *Wisconsin Department of Revenue vs. James L. Kern, Bryan E. Haas, Danny W. Darwin, Hilda Darwin, and Edgardo Romero* (Circuit Court for Dane County, March 4, 1992). The department appeals an order of the Wisconsin Tax Appeals Commission. The issue in this case is the proper method of allocating the taxpayers' total baseball compensation to the State of Wisconsin for Wisconsin income tax purposes.

The department challenges the validity of the Commission's decision on three grounds: first, the decision and order is affected by an error of law, under sec. 227.57(5), Wis. Stats; second, the decision and order is not supported by substantial evidence in the record; and third, the decision and order is arbitrary and capricious.

Each of the taxpayers (except Hilda Darwin, wife of Danny Darwin), was a professional baseball player, employed by the Milwaukee Brewers Baseball Club, Inc. (Brewers), a member club of the American League of Professional Baseball Clubs. The Brewers played all of their "home" games in Milwaukee, Wisconsin. All of their "away" games were played outside of Wisconsin. Preceding each regular playing season, the Brewers conducted a "spring training" camp in the State of Arizona. Each of the taxpayers was a nonresident of Wisconsin for income tax purposes.

The department contended that a baseball player's salary is paid only for his regular season play and, therefore, allocated the taxpayers' salaries to Wisconsin on the basis of the ratio of regular season days in Wisconsin to total regular season days, without taking into account the spring training/exhibition season. Conversely, it is the taxpayers' contention that a player's salary must be allocated to Wisconsin on the basis of the ratio of days in Wisconsin to total days of service, including the spring training/exhibition season.

The Commission determined as a matter of law that the phrase "duty days" in the formula used to compute income tax owed by nonresident professional athletes under sec. Tax 2.31, Wis. Adm. Code, conflicted to an extent with the statutory provisions of secs. 71.02 and 71.04(1)(a), Wis. Stats. Therefore, the Commission modified the formula to comport with the statutory "situs of the service" provisions and the term "service" in the players' contracts.

The Commission held that the department's application of sec. Tax 2.31, Wis. Adm. Code, under the circumstances, was in error and held that the taxpayers' compensation must be allocated to the State of Wisconsin on the ratio of days in Wisconsin to total days of service, including the spring training/exhibition season.

The Circuit Court concluded that the Commission's conclusions of law were reasonable in light of relevant statutory and contractual provisions, and that the Commission's decision and order is supported by substantial evidence in the record and was not arbitrary and capricious.

The department has not appealed this decision. □

CORPORATION FRANCHISE AND INCOME TAXES

Allocation of income — business income; Statute of limitations. *Port Affiliates, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, February 10, 1992). The issues in this case are:

A. Whether the department's assessment against the taxpayer for 1984 was barred by the four-year statute of limitations.

B. Whether the taxpayer's 1984-87 "investment" portfolio income was apportionable.

C. Whether the taxpayer's 1984-87 office building losses were apportionable.

For most of 1984 and all of 1985, the activities of the taxpayer, a Wisconsin corporation, included operating a Wisconsin-based manufacturing business, managing and maintaining an office building adjacent to the manufacturing facility, operating a boathouse marina located in Florida, and managing an investment portfolio.

Late in 1985, the taxpayer transferred its manufacturing and marina operations to a newly-formed, wholly-owned subsidiary, but retained ownership of the manufacturing facility and leased it to the subsidiary. In connection with the transfer, the taxpayer also agreed to provide certain management services to the subsidiary. At the same time, the duties of physical maintenance of the office building were transferred to employes of the subsidiary.

After 1985, the taxpayer's activities included continuing to manage the investment portfolio, continuing to manage (but not directly maintain) the Wisconsin office building, owning and leasing the Wisconsin manufacturing plant, and providing some management services to the manufacturing subsidiary.

In 1984 the taxpayer's CEO conducted his corporate responsibilities almost entirely through his Wisconsin office, but in 1985-87 he conducted his corporate responsibilities mainly through his Florida office, though

also through his Wisconsin office to a relatively minor degree.

The department received the taxpayer's 1984 return on March 18, 1985, and mailed the assessment notice on March 17, 1989. The taxpayer received the notice on March 20, 1989.

The taxpayer argues that both the investment portfolio and office building income are non-apportionable; the portfolio income, because the taxpayer's investment activities were conducted by a separate arm of the business, and the income earned from those activities was never, with one inconsequential exception, used to support any of the taxpayer's other operations or activities; and the rental income, because the office building was nonbusiness property in that its operation was not a part of any of the taxpayer's "regular" business operations.

The department contends that both portfolio and rental income are apportionable. Portfolio income is apportionable, the department claims, because the portfolio activity was an integral part of, and unitary with, the rest of the taxpayer's businesses, and apportionability does not depend on whether investment returns are used to support the rest of the business. Similarly, the office rental income is apportionable, because the real estate was also part of the taxpayer's unitary business.

The Commission concluded as follows:

A. The department's assessment notice was given in time and not barred by the four-year statute of limitations because the notice was mailed within four years of receiving the return.

B. The portfolio income is apportionable, because in all years the income was business income, and because the income arose in part from activities in Wisconsin.

C. The 1984-87 rental income was apportionable, because the rental income was business income, and because the income arose from activities in Wisconsin.

The taxpayer has appealed this decision to the Circuit Court. □

Apportionment — factors; Dividends — deductible dividends; Foreign source income. *NCR Corporation vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 27, 1992). The taxpayer petitioned the Wisconsin Tax Appeals Commission (Commission) for a rehearing of its February 10, 1992, decision. For a summary of the February 10, 1992, decision, see *Wisconsin Tax Bulletin* 76, April 1992.

In its February 10, 1992, decision, the Commission held, among other things, as follows:

A. Sums labelled as "dividends" which the taxpayer received in 1975-79 from its unitary foreign subsidiaries ("inside source dividends") were not true passive dividends, but transfers of active business income that originated from within a unitary business.

B. The "concentration exemption" Wisconsin allowed corporate payees which received dividends from corporations 50% or more concentrated in Wisconsin did not in 1975-79 operate to exempt any fictitious inside source "dividend," even those from Wisconsin concentrated payors. Thus, the exemption did not constitute unlawful **facial** discrimination against the taxpayer in respect to the 1975-79 inside source "dividends" which it received from non-Wisconsin concentrated sources.

C. There was no **non-facial** discrimination against the taxpayer, since there was no evidence that the department allowed the exemption to other taxpayers receiving inside source dividends.

D. As to the 1980 inside source dividends the taxpayer received from non-Wisconsin concentrated subsidiaries, however, Wisconsin had, in violation of the equal protection clause, discriminated against the taxpayer by taxing part of its dividends while wholly exempting the similar dividends received by parents of Wisconsin concentrated subsidiaries.

In its petition for rehearing, the taxpayer argues that the Commission erred in reaching its conclusions that there was neither facial nor non-facial discrimination as to the 1975-79 inside source dividends.

In its March 27, 1992, decision, the Commission denied the petition for rehearing, concluding that in 1975-79, Wisconsin was legally obliged to avoid the kind of double taxation the taxpayer alleges would have occurred without the concentration exemption; and that the parent of a Wisconsin-concentrated subsidiary would have secured relief even if the concentration exemption had never existed. Thus the discrimination the taxpayer claims existed in 1975-79 did not statutorily arise until 1980.

In regard to non-facial discrimination, the Commission concluded that without evidence or a showing of a pre-1980 practice or pattern of the department treating fictitious inside source dividends as real dividends, the Commission can only assume that the department would have treated all inside source dividends equally, irre-

spective of whether they had a Wisconsin origin.

The taxpayer has appealed this March 27, 1992, decision to the Circuit Court. The department had previously appealed the February 10,1992, decision to the Circuit Court. □

Extension of time — additional assessments and refunds. *Paramount Farms Incorporated vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, February 13, 1992). The issue in this case is whether the department's assessment dated February 20, 1987, was barred by applicable statutes of limitation or by an extension agreement dated September 28, 1982.

The taxpayer is a Wisconsin corporation in the business of farming. The department began an audit of the taxpayer on September 8, 1982.

On September 28, 1982, at the department's request, an extension agreement was entered into. This agreement provided that the periods in which the department may give notice of additional assessment or refund, for the years 1976 to 1981, be extended to and include three months after receiving the final results of the Internal Revenue Service's (IRS) audit of those years.

The taxpayer signed an assessment agreement with the IRS on September 28, 1982, for the years 1976 and 1977. In November 1984, the IRS issued its findings regarding the years 1981 through 1983. The taxpayer did not accept these findings and entered into extension agreements to permit adjustments for 1981 through 1983. On April 22, 1987, the IRS accepted an assessment agreement for 1981 through 1983.

The final results of the IRS audit of 1981 though 1983 were received by the department on or about October 31, 1988.

The Commission concluded that the extension agreement between the taxpayer and the department clearly and expressly extends the time the department may issue an additional assessment to and including three months after receiving the final results of the IRS audit of these years.

The extension agreement did not require the department to issue a piecemeal assessment for any one of the six years involved when it had sufficient information to do so; but clearly allowed the department to wait until receiving the final results of the federal audit for the entire period covered by the audit before acting.

The department's assessment was not barred by either the applicable statute of limitations or by the extension agreement.

The taxpayer has appealed this decision to the Circuit Court. □

Nexus. *Wisconsin Department of Revenue vs. William Wrigley, Jr., Co.* (U.S. Supreme Court, June 19, 1992). The issue in this case is whether the taxpayer's activities in Wisconsin fell outside the protection of P.L. 86-272, 15 U.S.C. sec. 381, which prohibits a state from taxing the income of a corporation whose only business activities within the state consist of "solicitation of orders" for tangible goods, provided that the orders are sent outside the state for approval and the goods are delivered from out-of-state. The U.S. Supreme Court reversed the judgment of the Wisconsin Supreme Court and held that the taxpayer's activities in Wisconsin exceeded those protected under 15 U.S.C. sec. 381. See *Wisconsin Tax Bulletins* 50, 55, 59, 66, and 71 for summaries of prior decisions in this case.

Based in Chicago, William Wrigley, Jr., Co. (Wrigley) sells chewing gum nationwide through a marketing system that divides the country into districts, regions, and territories. During 1973-1978, the Midwestern district included a Milwaukee region, covering most of Wisconsin and parts of other states. The district manager for the Midwestern district had his residence and company office in Illinois, and visited Wisconsin only six to nine days each year, usually for a sales meeting or to call on a particularly important account.

The regional manager of the Milwaukee region resided in Wisconsin, but Wrigley did not provide him with a company office. He had general responsibility for sales activities in the region, and would typically spend 80-95% of his time working with the sales representatives in the field or contacting certain "key" accounts.

The remainder of the regional manager's time was devoted to administrative activities, including writing and reviewing company reports, recruiting new sales representatives, and evaluating their performance. He would preside at full-day sales strategy meetings for all regional sales representatives once or twice a year.

The manager from 1973 to 1976, John Kroyer, generally held these meetings in the "office" he maintained in the basement of his home, whereas his successor, Gary Hecht, usually held them at a hotel or motel. Mr. Kroyer also intervened two or three times a year to help arrange a solution to credit disputes between the Chicago office and important local accounts. Mr. Hecht testified that he never engaged in such activities, although Wrigley's formal position description for regional sales manager continued to list as one of the as-

signed duties "[r]epresenting the company on credit problems as necessary."

The sales or "field" representatives in the Milwaukee region, each of whom was assigned his own territory, resided in Wisconsin. They were provided with company cars, but not with offices. They were also furnished a stock of gum (with an average wholesale value of about $1,000), a supply of display racks, and promotional literature. These materials were kept at home, except that one salesman, whose apartment was too small, rented storage space at about $25 per month, for which he was reimbursed by Wrigley.

On a typical day, the sales representative would load up the company car with a supply of display racks and several cases of gum, and would visit accounts within his territory. In addition to handing out promotional materials and free samples, and directly requesting orders of Wrigley products, he would engage in a number of other activities which Wrigley asserts were designed to promote sales of its products.

He would, for example, provide free display racks to retailers (perhaps several on any given day) and would seek to have these new racks, as well as pre-existing ones, prominently located. The new racks were usually filled from the retailer's existing stock of Wrigley gum, but it would sometimes happen—perhaps once a month—that the retailer had no Wrigley products on hand and did not want to wait until they could be ordered from the wholesaler.

In that event, the rack would be filled from the stock of gum in the salesman's car. This gum, which would have a retail value of $15 to $20, was not provided without charge. The representative would issue an "agency stock check" to the retailer, indicating the quantity supplied; he would send a copy of this to the Chicago office or to the wholesaler, and the retailer would ultimately be billed (by the wholesaler) in the proper amount.

When visiting a retail account, Wrigley's sales representative would also check the retailer's stock of gum for freshness, and would replace stale gum at no cost to the retailer. This was a regular part of a representative's duties, and at any given time up to 40% of the stock of gum in his possession would be stale gum that had been removed from retail stores. After accumulating a sufficient amount of stale product, the representative either would ship it back to Wrigley's Chicago office or would dispose of it at a local Wisconsin landfill.

Wrigley did not own or lease real property in Wisconsin, did not operate any manufacturing, training, or warehouse facility, and did not have a telephone listing or bank account. All Wisconsin orders were sent to Chicago for acceptance, and were filled by shipment through common carrier from outside the state.

Credit and collection activities were similarly handled from the Chicago office. Although Wrigley engaged in print, radio, and television advertising in Wisconsin, the purchase and placement of that advertising was managed by an independent advertising agency located in Chicago.

Wrigley had never filed tax returns or paid taxes in Wisconsin; it was not licensed to do business in the state. In 1980, the department concluded that the company's in-state business activities during the years 1973-1978 had been sufficient to support imposition of a franchise tax, and issued a tax assessment on a percentage of the company's apportionable income for those years.

The court addressed the following two questions: (1) what is the scope of the term "solicitation of orders," and (2) whether there is a *de minimis exception* to the activity (beyond "solicitation of orders") that forfeits sec. 381 immunity.

"Solicitation of orders" covers those activities that are *entirely ancillary* to requests for purchases—those that serve no independent business function apart from their connection to the soliciting of orders.

The court concluded that the term "solicitation of orders" includes not just explicit verbal requests for orders, but also any speech or conduct that implicitly invites an order.

Since "solicitation of orders" covers more than what is strictly essential to making requests for purchases, the next clear line is the one between those activities that are *entirely ancillary* to requests for purchases—those that serve no independent business function apart from their connection to the soliciting of orders—and those activities that the company would have reason to engage in anyway but chooses to allocate to its in-state sales force.

Providing a car and a stock of free samples to salesmen is part of the

"solicitation of orders," because the only reason to do it is to facilitate requests for purchases.

Contrariwise, employing salesmen to repair or service the company's products is not part of the "solicitation of orders," since there is good reason to get that done whether or not the company has a sales force. Repair and servicing may help *increase* purchases; but it is not ancillary to *requesting purchases*, and cannot be converted into "solicitation" by merely being assigned to salesmen.

Section 381(c) requires one exception to this principle: Even if engaged in exclusively to facilitate requests for purchases, the maintenance of an office within the state, by the company or on its behalf, would go beyond the "solicitation of orders."

The court also concluded that there is a *de minimis* exception to sec. 381. Whether in-state activity other than "solicitation of orders" is sufficiently *de minimis* to avoid loss of tax immunity conferred by sec. 381 depends upon whether that activity establishes a nontrivial additional connection to the taxing state. Wisconsin asserted that at least six activities performed by Wrigley within its borders went beyond the "solicitation of orders." Since none of these activities can reasonably be viewed as requests for orders covered by sec. 381, Wrigley was subject to tax unless they were either ancillary to requesting orders or *de minimis*.

The court concluded that the replacement of stale gum, the supplying of gum through "agency stock checks," and the storage of gum were not ancillary. Because the vast majority of the gum stored by Wrigley in Wisconsin was used in connection with stale gum swaps and agency stock checks, that storage (and the indirect rental of space for that storage) was in no sense ancillary to "solicitation."

By contrast, Wrigley's in-state recruitment, training, and evaluation of sales representatives and its use of hotels and homes for sales-related meetings served no purpose apart from their role in facilitating solicitation. The same must be said of the instances in which Wrigley's regional sales manager contacted the Chicago office about "rather nasty" credit disputes involving important accounts in order to "get the account and [Wrigley's] credit department communicating." The purpose of the activity was to ingratiate the salesman with the customer, thereby facilitating requests for purchases.

Wrigley argued that the various nonimmune activities, considered singly or together are *de minimis*. In particular, Wrigley emphasized that the gum sales through agency stock checks accounted for only 0.00007% of Wrigley's annual Wisconsin sales, and in absolute terms amounted to only several hundred dollars a year. Although the relative magnitude of these activities was not large compared to Wrigley's other operations in Wisconsin, the court concluded that they constituted a nontrivial additional connection with the state. Because Wrigley's business activities within Wisconsin were not limited to those specified in sec. 381, the prohibition on net income taxation contained in that provision was inapplicable. Accordingly, the judgment of the Wisconsin Supreme Court is reversed. □

SALES AND USE TAXES

Computer software — tangible vs. intangible; Nexus. *Wisconsin Department of Revenue vs. B.I. Moyle Associates, Inc.* (Court of Appeals, District IV, April 21, 1992). The department has filed a notice of voluntary dismissal of its appeal of a decision by the Dane County Circuit Court. For a summary of that decision, see *Wisconsin Tax Bulletin* 76, page 6. □

Occasional sales — business assets. *DVL, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, February 13, 1992). The issue in this case is whether the department correctly determined that the sale of the taxpayer's restaurant business did not qualify as an exempt "occasional" sale.

For a number of years the taxpayer operated a supper club in Beloit, Wisconsin. On May 29, 1990, the taxpayer sold the supper club for $600,000, including $54,000 of tangible personal property. At the time of the sale, the taxpayer held a Wisconsin seller's permit, which was turned over to its accountant on or about May 31, 1990, for surrender to the department.

By certified mail postmarked June 15 (17 days after the sale) and received by the department June 18 (20 days after the sale), the taxpayer's seller's permit was surrendered to the department. The taxpayer's accountant credibly testified that he laid the permit on his desk but did not timely mail it to the department due to human error resulting from the many other papers on his desk and his preoccupation with the sale of his own accounting business at the time.

The Commission concluded that the sale of the supper club 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 taxpayer's seller's permit was not delivered to the department for cancellation within 10 days after the sale.

The taxpayer has not appealed this decision. □

Personal liability. *William Gould and Lois Gould vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 9, 1992). The issues in this case are:

A. Whether the taxpayers are responsible for the unpaid taxes of a corporation.

B. Whether the department was guilty of a bad faith delay, precluding the collection of interest attributable to the delay, in refusing to negotiate a settlement.

The taxpayers, who had been passive investors in the corporation, took over sole managerial control of the corporation on December 3, 1987. The taxpayers made decisions to pay various non-tax debts the corporation had.

The taxpayers operated the business until it folded on February 15, 1988, knowing that sales of the corporation's product were generating sales taxes, but both taxpayers were unaware of the particulars of the corporation's obligation to file returns and remit taxes.

Three months before the hearing in the case, the department's attorney told the taxpayers that he would consider a settlement offer from them. The taxpayers submitted an offer, but the department's attorney then decided there was no legal basis on which the department could settle the case.

The Commission concluded that:

A. The taxpayers are responsible for the corporation's unpaid taxes. The taxpayers had the authority and the duty to direct the payment of taxes. The taxpayers intentionally breached this duty by paying other creditors while knowing that sales taxes were due.

B. There was no bad faith on the part of the department by refusing to negotiate a settlement.

The taxpayers have not appealed this decision. □

Successor's liability. *Robert Kastengren vs. Wisconsin Department of Revenue* (Circuit Court for Dane County, February 17, 1992). This is an action for judicial review of a decision of the Wisconsin Tax Appeals Commission (Commission). The issues in this case are:

A. Whether the responsibility for unpaid sales tax of a predecessor is abated when the purchase price is used to pay, not the predecessor, but the holder of a perfected security interest in the sold goods.

B. Whether the record establishes that the department has attempted adequate collection efforts from the predecessor.

On December 22, 1988, the taxpayer and his wife entered into an "Asset Purchase Agreement" with Harry Dembrowski "President" to purchase certain equipment and inventory of "Uncle Harry's Fine Food Products, Inc.," a Wisconsin corporation engaged in the production and sale of frozen custard, ice cream, sorbet, and other related products. At the time of sale, Uncle Harry's Fine Food Products, Inc., owed sales taxes to the State of Wisconsin.

The check in payment of the purchase price was drawn on the Bank of Burlington and ran from R.H. or J. Kastengren to the Bank of Burlington and Uncle Harry's Fine Food Products, Inc. At the time of the asset purchase, the Bank of Burlington held a perfected security interest in all of the assets of Uncle Harry's Fine Food Products, Inc.; and was entitled to and did, in fact, receive all the proceeds of said asset purchase.

The taxpayer did not withhold any of the purchase price to cover possible unpaid sales and use taxes and did not submit a written request for a sales and use tax clearance certificate from the department.

The sales tax liability of Uncle Harry's Fine Food Products, Inc., has not been paid; its seller's permit has been revoked, and the collection efforts have been terminated because the department has reached the conclusion that the corporation is defunct, has no assets, and the tax is uncollectible. The department can document eleven contacts with Uncle Harry's Fine Food Products, Inc., in collecting and attempting to collect delinquent tax. On August 30, 1989, the department issued a successor sales and use tax assessment against the taxpayer, who challenges his personal liability for it.

In its July 25, 1991 decision, the Commission concluded that the taxpayer is personally liable for the unpaid sales and use taxes incurred by his predecessor, Uncle Harry's Fine Food Products, Inc., because he neither withheld from the purchase price nor requested clearance from the department as required by sec. 77.52(18), Wis. Stats. There is no exception from successor liability in a situation where the entire sales proceeds were distributed not to the seller, but to a secured creditor in satisfaction of its secured lien rights.

The Circuit Court concluded that:

A. Responsibility for the unpaid sales tax of a predecessor under sec. 77.52(18), Wis. Stats., is not abated even when the purchase price is used to pay, not the predecessor, but the holder of a

perfected security interest in the sold goods.

B. Before the department may be found to have attempted adequate collection efforts from the predecessor, the department must also attempt collection efforts from Uncle Harry's president, Harry Dembrowski, and any other officer, employe, or responsible person pursuant to sec. 77.60(9), Wis. Stats. Since the department made no collection efforts against Dembrowski, it may not proceed against the taxpayer.

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

DRUG TAX

Drug tax — double jeopardy. *State of Wisconsin vs. Quinn J. Riley* (Court of Appeals, District IV, December 19, 1991). The issue in this case is whether the tax assessed against the taxpayer by the department under sec. 139.95, Wis. Stats., for possession of controlled substances, was punishment within the meaning of the double jeopardy clauses of the United States and Wisconsin Constitutions.

The taxpayer appeals from a judgment convicting him of delivery of cocaine and possession of drugs without paying the requisite drug tax. The taxpayer pled guilty to both counts. Between the plea hearing and sentencing, the department notified him that he owed taxes, interest, and a penalty based on his possession of the cocaine. He was taxed at a rate of $200 per gram on 217 grams for a total of $43,600. He was also notified that he owed $2,616 in interest and a $34,600 penalty, for a total of $89,816.

The taxpayer was sentenced to five years in jail on the delivery charge and placed on probation for fifteen years for failing to pay the drug tax. The taxpayer moved the court for reconsideration, arguing that he had been punished twice for the same crime. The Circuit Court denied the motion, and this appeal followed.

The Court of Appeals concluded that the tax assessed against the taxpayer was not punishment within the meaning of the double jeopardy clauses of the United States and Wisconsin Constitutions. The penalty assessed against the taxpayer was merely equal to the tax he failed to pay.

The taxpayer appealed this decision to the Wisconsin Supreme Court. The petition for review was denied. □

Tax Releases

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

The following tax releases are included:

INDIVIDUAL INCOME TAXES

1 Election to Capitalize Real Estate Taxes and Carrying Charges

Statutes: Section 71.01(6), Wis. Stats. (1989-90)

Facts: The taxpayer paid real estate taxes in 1991 on the following properties:

Principal residence	$ 1,500
Cottage in Wisconsin	$ 1,300
Unimproved lot	$ 400
Hunting property	$ 700

For federal tax purposes, all real estate taxes are claimed on federal Schedule A as itemized deductions.

For Wisconsin tax purposes, only the real estate taxes paid on the principal residence may be used in computing the school property tax credit. No credit or deduction is allowed for the real estate taxes paid on the cottage, unimproved lot, or hunting property.

Question 1: Since the property taxes for the cottage, unimproved lot, and hunting property are not eligible for the school property tax credit, may these taxes be capitalized for Wisconsin purposes, even though such taxes are claimed as an itemized deduction for federal purposes?

Answer 1: Yes, subject to the provisions of Internal Revenue Code (IRC) sec. 266. IRC sec. 266 and related Regulation 1.266-1 provide that an election is available to capitalize real estate taxes and certain carrying charges if certain conditions are met. In the case of unimproved and unproductive real property, such as the unimproved lot, an election to capitalize real estate taxes is available without any restrictions. In the case of other types of real property, an election to capitalize real estate taxes is available only for taxes paid or incurred during a period when the real property is being developed, or an improvement to the property is being constructed. The taxpayer may make an election under IRC sec. 266 for Wisconsin tax purposes even if the election is not made for federal tax purposes.

Question 2: What must the taxpayer do to notify the department that an election is being made to capitalize real estate taxes, and must the election also be made in each subsequent year?

Answer 2: To make an election to capitalize real estate taxes, the taxpayer must include a statement with his/her return indicating which charges are being capitalized. The statement must be attached to the original tax return for the year the choice is to be effective. With respect to the unimproved lot, the election is effective only for the year in which it is made. A separate election must be made for any future years. In the case of the cottage and hunting properties, an election will be effective until the development or construction work which qualifies the taxpayer for the election has been completed.

Question 3: If the taxpayer capitalizes real estate taxes only for Wisconsin purposes, the property will have a different basis for Wisconsin and federal purposes. How will the basis difference be accounted for in the year of sale for Wisconsin purposes?

Answer 3: Since the difference in basis results from an election to compute federal adjusted gross income for Wisconsin purposes differently than it is computed for federal purposes, federal adjusted gross income in the year the property is sold must be computed in a manner which reflects the election. In other words, the taxpayer will be required to prepare a "pro-forma" federal return for Wisconsin purposes in the year the election is made, and in all subsequent years to the extent necessary to reflect such election. □

2 Rollover of a Retirement Plan Distribution Which Includes U.S. Government Interest to an IRA

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

Facts: Taxpayer A retired and received a lump-sum distribution from the retirement plan of his employer. The assets of the retirement plan had been partially invested in U.S. Government securities (for example, U.S. Treasury bonds). Taxpayer A has records to show what portion of the lump-sum distribution is attributable to interest from U.S. Government securities. Within the allowable time period, Taxpayer A rolls over the distribution to an individual retirement arrangement (IRA).

Question: When amounts are withdrawn from this IRA, does any portion of the amount withdrawn constitute interest from a U.S. Government security which is exempt from Wisconsin income tax?

Answer: Yes. Any portion constituting interest from a U.S. Government security is exempt from state income tax. Federal law (31 USCS §3124) prohibits states from taxing interest from U.S. Government obligations. When Wisconsin taxable income is computed, sec. 71.05(6)(b)1, Wis. Stats. (1989-90), treats interest from U.S. Government securities as nontaxable by providing a subtraction from federal adjusted gross income. The U.S. Government interest portion of the lump-sum distribution retains its tax-exempt character when it is rolled over to an IRA. Thus the portion of the amount withdrawn from the IRA which is attributable to interest from U.S. Government secu-

rities is exempt from Wisconsin income tax.

(**Note:** For information on how to compute the portion of an IRA distribution which is considered interest from U.S. Government securities, see the tax release titled "Distributions From IRAs Which Invest in U.S. Government Securities" in *Wisconsin Tax Bulletin* 61, July 1989.) □

CORPORATION FRANCHISE AND INCOME TAXES

3 Adjustment to Manufacturer's Sales Tax Credit Carryover

Statutes: Sections 71.28(3) and 71.77(2), Wis. Stats. (1989-90)

Wis. Adm. Code: Section Tax 2.11, February 1990 Register

Background: Section 71.28(3), Wis. Stats. (1989-90), provides for the manufacturer's sales tax credit. This credit is available to corporations and is equal to the Wisconsin and county sales and use tax paid during the taxable year on fuel and electricity consumed in manufacturing tangible personal property in Wisconsin. The credit is first used to reduce the franchise or income tax liability for the same taxable year. If the credit exceeds the tax liability, the unused balance of the credit may be offset against the tax liability of the subsequent year and each succeeding year up to 15 years.

Section 71.77(2), Wis. Stats. (1989-90), provides that the department has 4 years from the date a franchise or income tax return is filed within which to issue a notice of assessment of tax or an assessment to recover all or part of a tax credit.

Facts and Question: Corporation A claimed the manufacturer's sales tax credit on its 1986 Wisconsin franchise tax return. Its computed credit exceeded Corporation A's 1986 tax liability which resulted in an unused credit. The unused credit was carried forward and used to offset the tax liability on the corporation's 1987 Wisconsin franchise tax return.

The department conducts an audit of Corporation A's 1986 and 1987 income tax returns. At the time of the audit, the 1987 return is open to assessment by the department; the 1986 return is closed to assessment by the statute of limitations (sec. 71.77(2), Wis. Stats. (1989-90)). It is determined during the audit that Corporation A underreported income on its 1986 tax return and made an error in the computation of the 1986 manufacturer's sales tax credit. May the department adjust both the 1986 income and the manufacturer's sales tax credit?

(Note: An adjustment to the taxpayer's income would increase the 1986 tax liability and mean that an additional amount of credit is used to offset that tax liability. This would in turn reduce the carryover to 1987.)

Answer: Yes, even though the department cannot issue an assessment for 1986, it can adjust both Corporation A's reported 1986 income and manufacturer's sales tax credit. The statute of limitations only relates to assessments, and does not prevent income or a credit from being recomputed so as to determine the correct amount of carryover credit to a future year. In this situation, once the department has determined the correct manufacturer's sales tax credit carryover from 1986, it can issue an assessment to Corporation A to reflect adjustments to the carryover credit claimed on its 1987 Wisconsin franchise tax return. □

4 Insurance Companies — Add Back Modifications for Exempt or Excluded Interest Income and Dividends Received Deduction

Statutes: Section 71.45(2)(a)3 and 4, Wis. Stats. (1987-88) and (1989-90)

Background: For federal income tax purposes, the taxable income of a property and casualty insurance company generally includes investment income, underwriting income, and certain other items. Investment income includes interest, dividends, and rents. Internal Revenue Code (IRC) sec. 832(b)(2). Underwriting income is the amount of premiums earned on insurance contracts during the taxable year, minus losses incurred and expenses incurred. IRC sec. 832(b)(3). The deduction for losses incurred generally reflects losses paid during the year and the increase in reserves for losses incurred but not paid. IRC sec. 832(b)(5).

A property and casualty insurance company whose investment income includes state or local bond interest which is exempt from federal tax under IRC sec. 103 may deduct this interest under IRC sec. 832(c)(7) when computing its federal taxable income. Also, property and casualty insurance companies are allowed a dividends received deduction under IRC sec. 832(c)(12). Although these interest and dividend items are not subject to federal tax, the amounts are added to the company's reserves, thus entering into the loss reserve deduction.

Prior to the Tax Reform Act of 1986 (TRA-86), no reduction in the loss reserve deduction was required for additions to reserves that come out of income not subject to federal income tax. Therefore, the pre-TRA-86 law permitted a double deduction to property and casualty insurance companies

for additions to reserves that were funded by tax-exempt income.

For taxable years beginning after December 31, 1986, a property and casualty insurance company must reduce its deduction for losses incurred by 15 percent of tax-exempt interest income and 15 percent of the deductible portion of dividends received (with special rules for dividends from affiliates). IRC sec. 832(b)(5)(B) as amended by TRA-86. The proration rules do not apply to tax-exempt interest and the deductible portion of dividends received or accrued on obligations or stock acquired before August 8, 1986.

Facts and Question: For Wisconsin franchise tax purposes, sec. 71.45(2)(a)3 and 4, Wis. Stats. (1987-88), provides that an insurance company must add back to its federal taxable income an amount equal to interest income received or accrued during the taxable year and dividend income received during the taxable year to the extent such interest income and dividend income were used as deductions in determining the company's federal taxable income.

The language of sec. 71.45(2)(a)3 and 4, Wis. Stats. (1989-90), is similar to that in the 1987-88 statutes, although sec. 71.45(2)(a)3 was revised to require the addition of any interest income which is not included in federal taxable income.

May the 15 percent reduction amounts discussed above be used to reduce the Wisconsin addition modifications for federally tax-exempt or excluded interest income and the federal dividends received deduction?

Answer: No. The entire amount of federally tax-exempt or excluded interest income received during the taxable year and the entire federal dividends received deduction must be added back to federal taxable income to arrive at Wisconsin net income.

The 15 percent reduction in the losses incurred deduction required by IRC sec. 832(b)(5)(B) is a separate calculation that must be made for Wisconsin purposes, since it is an adjustment necessary to arrive at federal taxable income. The 15 percent reduction amount is a required federal adjustment for which there is no Wisconsin modification.

Example: Insurer A receives $3,000,000 of federally tax-exempt state bond interest during 1991. For federal purposes, Insurer A must reduce its losses incurred deduction by $450,000 ($3,000,000 x 15%). For Wisconsin purposes, Insurer A must add back to its federal taxable income the $3,000,000 of federally tax-exempt interest income to arrive at its Wisconsin net income. The $450,000 reduction in the losses incurred deduction applies for Wisconsin purposes as well as for federal purposes. □

5 Manufacturer's Sales Tax Credit — Taxes Paid to Other States Not Allowed

Statutes: Sections 71.28(3) and 77.53(16), Wis. Stats. (1989-90)

Background: Section 71.28(3), Wis. Stats. (1989-90), provides a credit against Wisconsin corporation franchise or income tax for sales or use tax under Chapter 77 of the Wisconsin Statutes paid by a corporation on fuel and electricity consumed in manufacturing tangible personal property in Wisconsin. This section further provides that for this purpose, sales and use tax under Chapter 77 of the Wisconsin Statutes paid by a corporation includes use taxes paid directly by the corporation and sales and use taxes paid by the corporation's supplier and passed on to the corporation whether separately stated on the invoice or included in the total price.

Section 77.53(16), Wis. Stats. (1989-90), provides a credit against Wisconsin use tax for sales or use tax paid in another state on sales of tangible personal property which occurred in that other state, when that property is used or consumed in Wisconsin.

Facts and Question: Corporation A, a Wisconsin manufacturer, purchases natural gas at the wellhead in another state and contracts with a pipeline, which is a contract carrier, to have it transported to Wisconsin where it is consumed in an activity that qualifies as manufacturing for purposes of the manufacturer's sales tax credit. Corporation A pays sales tax to the state where it takes possession of the natural gas and claims such taxes as a credit against the Wisconsin use tax due when the natural gas is used in Wisconsin.

May Corporation A claim a manufacturer's sales tax credit for the sales tax paid to the other state and claimed as a credit against Wisconsin use tax?

Answer: No. The manufacturer's sales tax credit is available only on sales or use taxes under Chapter 77 of the Wisconsin Statutes paid by a corporation. The taxes paid to the other state by Corporation A are not sales or use taxes under Chapter 77 of the Wisconsin Statutes paid by Corporation A. □

SALES AND USE TAXES

6 Admissions to Athletic or Recreational Events or Places

Statutes: Sections 77.51(14)(f), 77.52(2)(a)2, 6 and 9 and 77.52(2m)(a), Wis. Stats. (1989-90)

Wis. Adm. Code: Sections Tax 11.54(1)(a), 11.65(1)(a), (b) and (c), (2)(a) and (d), and (3) and 11.67(2)(c), March 1991, June 1991, and April 1990, Registers.

Background: Section 77.52(2)(a)2 and (2m)(a), Wis. Stats. (1989-90), imposes a tax on sales of admissions to amusement, athletic, entertainment, or recreational events or places. Sales of such admissions may be made by health clubs, athletic clubs, schools, municipalities, and other organizations, including organizations which sponsor races and tournaments.

Taxable admissions include receipts from participants and spectators for the following:

Swimming (open swim and lap swim)*
Racquetball*
Squash*
Handball*
Volleyball*
Walleyball*
Tennis*
Golf*
Driving Range*
Basketball*
Baseball and Softball*
Bowling*
Skiing*
Competitions such as races involving running, boating, skiing, biking, and ballooning; weightlifting tournaments; and martial arts tournaments

*Not including lessons

Other *taxable* receipts that may be associated with such admissions include receipts from:

Equipment sales or rental
Parking
Towel, laundry, and locker fees
Meals, food, and beverages

Nontaxable admissions include receipts from, and the use of facilities for:

Aerobics classes
All lessons (swimming, tennis, golf, etc.)
Free weights and machines
Whirlpool, sauna
Running track (other than for races)
Exercycles, lifecycles
Rowing machines
Stepping machines
X-country ski machines
Treadmills
Tanning booths and beds
Massage table/room

Other *nontaxable* receipts that may be associated with recreational or health and fitness facilities or events include receipts from:

Consultation (providing advice and information relating to fitness)
Nursery/child care

Question 1: When a health club, athletic club, or other organization charges a single fee which covers admissions to both taxable and nontaxable facilities, how is the taxability of the gross receipts determined?

Answer 1: The *primary purpose* of the persons paying the fee determines whether sales tax applies to the fee. Primary purpose means more than 50%. The taxability or nontaxability of a single fee applies to all participants paying the single fee. Thus, if an organization determines that its participants spend more than 50% of their overall time using nontaxable facilities, the primary purpose is to obtain access to nontaxable facilities and the single fee is nontaxable. This is true even for those participants who pay the single fee and spend most of their time using taxable facilities.

Organizations charging a single fee for taxable and nontaxable facilities must use a reasonable method of determining the primary purpose of the participants. One reasonable method is a representative survey of participants and their time spent in each facility.

(Note: Organizations must keep adequate records to substantiate how they determine the primary purpose of the participants.)

Example 1: The ABC Health and Fitness Club has two membership plans. The blue card membership ($30/month) entitles members to use the weight room, swimming pool, running track and exercise machines. A separate fee is charged to blue card members for the use of racquetball courts. The gold card membership ($40/month) entitles members to use all of the above facilities and also entitles the members to use the racquetball courts with no additional charge.

Based on a survey of blue card members, the club has found that these members spend 30% of their time swimming (free swim or lap swim, no lessons: taxable activity) and the remaining 70% of their time in nontaxable activities including running, exercising, and lifting weights. Since the primary purpose of the blue card members is to use the facilities for nontaxable activities, the club's receipts from all of the blue card memberships are not subject to sales tax.

Based on a survey of gold card members, the club has found that these members spend 75% of their time swimming or playing racquetball (taxable activities) and the remaining 25% of their time in nontaxable activities. Since the primary purpose of the gold card members is to use the facilities for taxable activities, the club's receipts from all of the gold

card memberships are subject to sales tax.

Example 2: The XYZ Health and Fitness Club charges a single fee to its members for the use of tennis courts, racquetball courts, a swimming pool, a running track, and exercise machines. In a study conducted by the club, in which it observed and recorded the use made of each area of the club, it found that 65% of the members' time was spent in taxable activities (playing tennis, racquetball, and swimming) and the remaining 35% of the members' time was spent in nontaxable activities (running and exercising).

Since the primary purpose of the members was to use the facilities for taxable activities, all of the club's membership fees are subject to sales tax.

Question 2: Are separate charges for taxable activities (such as playing racquetball), taxable services, or taxable tangible personal property subject to sales tax?

Answer 2: Yes. Even in situations where the primary purpose of the members is to use the facilities for nontaxable activities and, therefore, the organization's fee has been determined to be nontaxable, any separate charges for taxable activities, services, or property are subject to sales tax.

Example: If the blue card member in Example 1 pays a separate charge for playing racquetball, the club's receipts from these charges are subject to sales tax.

Question 3: The XYZ Health and Fitness Club periodically holds tennis tournaments in which a separate fee is charged. Trophies and prizes are awarded to contestants. Are the club's receipts from the tournaments subject to sales tax?

Answer 3: Yes. Section 77.52(2)(a)2, Wis. Stats. (1989-90), provides for a sales tax on receipts from admissions paid by participants and spectators to athletic or recreational events. Such athletic or recreational events include tennis tournaments.

Question 4: May the XYZ Health and Fitness Club in Question and Answer 3 purchase the trophies and prizes exempt from sales tax, as a purchase for resale?

Answer 4: No. The trophies and prizes awarded to the contestants are incidental to the service provided and are not considered to be resold under sec. 77.52(2m)(a), Wis. Stats. (1989-90). Tax applies to the club's purchases of trophies and prizes.

Question 5: A nonprofit organization sponsors a triathlon (bicycling, swimming, and running race), in which it charges an entry fee of $20 to participate. The nonprofit organization holds a seller's permit for other sales it makes. Are the nonprofit organization's receipts from the triathlon subject to sales tax?

Answer 5: Yes. The nonprofit organization's receipts from the triathlon are taxable because the event is athletic or recreational.

Note: See Publication 206, "Sales Tax Exemption for Nonprofit Organizations," for an explanation of exemptions which may apply if the nonprofit organization is not required to hold a seller's permit for other sales it makes. □

7 Hotel or Motel Weekend Packages

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

Wis. Adm. Code: Section Tax 11.48(2), March 1991 Register

Facts and Question: A hotel or motel offers a weekend package for $100. The package includes one night's lodging, a dinner up to $15 in value, and a Sunday brunch up to $8 in value. The $100 package also includes champagne upon arrival and six roses in the room.

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

Answer: The total $100 is subject to Wisconsin sales tax. Section 77.52(2)(a)1, Wis. Stats. (1989-90), provides that the furnishing of rooms or lodging to transients by hotel keepers, motel operators, and others furnishing accommodations to the public is a taxable service. In addition, sec. 77.54(20)(c)1, Wis. Stats. (1989-90), provides that sales of meals sold by any person, organization, or establishment for direct consumption on the premises are taxable.

The hotel or motel is required to pay Wisconsin sales or use tax on its purchase of the champagne and roses. Section Tax 11.48(2)(e), Wis. Adm. Code, provides that hotels, motels, and inns are the consumers of all items used to conduct their business, such as beds, bedding equipment, advertising supplies, and items consumed by the occupants of the room. Purchases by a hotel or motel of these items are taxable.

Note: The hotel's or motel's purchase of other items such as soap, shampoo, toothpaste, toothbrushes, cups, pens, paper, and postcards it provides in its rooms for use by occupants of the rooms is also subject to Wisconsin sales or use tax. □

8 Replacement of Light Bulbs

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

Background: Section 77.52(2)(a)10, Wis. Stats. (1989-90), provides that, except when installing tangible personal property which when installed constitutes a real property improvement, the repair, service, alteration, fitting, cleaning, painting, coating, towing, inspection, and maintenance of tangible personal property is subject to Wisconsin sales or use tax.

For purposes of repair, service, maintenance, etc., office type equipment, including lamps and chandeliers, is deemed by statute to retain its character as tangible personal property.

In the case of *James M. Salmon v. Wisconsin Department of Revenue* (Docket No. S-9178, 11/29/89), the Wisconsin Tax Appeals Commission held that the replacement of light bulbs for commercial customers constituted a service to tangible personal property in the form of "office, restaurant and tavern type equipment, including by way of illustration but not of limitation lamps, chandeliers ..." as these terms are used in sec. 77.52(2)(a)10, Wis. Stats., the gross receipts from which are subject to Wisconsin sales or use tax.

Facts and Question: Company ABC has developed a program where it will replace fully operational inefficient light bulbs in fluorescent fixtures and exit signs in commercial buildings with energy efficient fluorescent bulbs. Company ABC purchases the light bulbs from a supplier without Wisconsin sales or use tax as property for resale. Company ABC has contracted with Company XYZ to install the bulbs.

Is the charge by Company XYZ to Company ABC for installing the high efficiency light bulbs subject to Wisconsin sales or use tax?

Answer: Yes. The light fixture which holds the light bulb is deemed to be tangible personal property for purposes of repair, maintenance, service, etc. The replacement of the light bulbs is a service to tangible personal property. As such, the charge by Company XYZ for installing the light bulbs is subject to Wisconsin sales or use tax under sec. 77.52(2)(a)10, Wis. Stats. (1989-90). □

9 Transportation Charges by Related Company of Seller of Tangible Personal Property

Statutes: Section 77.51(4)(a)3 and (b)5 and (14r), Wis. Stats. (1989-90)

Wis. Adm. Code: Section Tax 11.94, June 1991 Register

Background: Section 77.51(4)(a)3 and (b)5, Wis. Stats. (1989-90), provides that for purposes of imposing Wisconsin sales tax, gross receipts include the cost of transportation of tangible personal property prior to its sale, but does not include transportation charges separately stated, if the transportation occurs after the sale of the tangible personal property is made to the purchaser.

Section 77.51(14r), provides that a sale or purchase involving transfer of ownership of tangible personal property shall be deemed to have been completed at the time and place when and where possession is transferred by the seller or his agent to the purchaser or his agent, except that a common carrier or the U.S. Postal Service shall be deemed the agent of the seller, regardless of any f.o.b. point and regardless of the method by which freight or postage is paid.

Facts and Question 1: ABC Company (ABC) is a Wisconsin corporation having its principal place of business in Wisconsin and engaged principally in the sale of coal at retail. ABC is a wholly-owned subsidiary of DEF Company (DEF) which in turn is a wholly-owned subsidiary of XYZ Company (XYZ).

ABC purchases coal mined in Kentucky and pays a common carrier (Railroad) to transport such coal from Kentucky to ABC's Wisconsin facility where such coal is stored until sold to one or more customers (the Customer) of ABC.

ABC and DEF together are parties to a Railroad Transportation Contract with Railroad (the Contract) under which ABC and DEF have agreed to ship under the Contract a certain percentage of tonnage of the coal they originate, cause to be originated, or as to which they act as a transhipper during the term of the contract. The sales price from ABC to the Customer for coal includes a charge for the amount ABC paid Railroad to transport the coal from Kentucky to Wisconsin.

Is the charge by ABC to the Customer for the transportation charges relating to the sale of coal subject to Wisconsin sales or use tax?

Answer 1: Yes. Since the transportation charges occur prior to the sale of the coal to the Customer (i.e., when customer receives the coal at ABC's facility), ABC is subject to Wisconsin sales tax on the transportation charges.

Facts and Question 2: Assume the same facts as in Facts and Question 1, except that ABC assigns its rights and obligations under the Contract to GHI Company (GHI), so that after such assignment, GHI, rather than ABC, will ship coal purchased by ABC via Railroad from Kentucky to ABC's Wisconsin facility. GHI is another wholly-owned subsidiary of

XYZ and is a common carrier licensed by the Interstate Commerce Commission.

The Customer will purchase coal from ABC with possession of the coal passing from ABC to the Customer at ABC's Wisconsin facility. The price for the coal purchased by the Customer from ABC will be established by contract and will exclude any charges for transportation of the coal from Kentucky to Wisconsin. The Customer will separately contract with GHI for the transportation of the coal from Kentucky to Wisconsin. The Customer will pick up the coal at ABC's Wisconsin facility at which time ABC will invoice the Customer for the coal it picks up. GHI will invoice the Customer for the transportation charges attributable to the coal then purchased by the Customer from ABC. Any increase or decrease in transportation charges shall be borne by the Customer and not ABC.

Is the charge by GHI to the Customer for transportation subject to Wisconsin sales or use tax charges?

Answer 2: Yes. Since the transportation occurred prior to the sale of the coal to the Customer, GHI is subject to Wisconsin sales or use tax on the amount charged to the Customer for transportation charges. It is irrelevant that the transportation charge is billed separately from the coal. □

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 private letter rulings are included:

✵ **W9214005**, January 13, 1992

Type Tax: Sales and Use

Issue: Computer software for disabled individuals

Statutes: Section 77.52(1), Wis. Stats. (1989-90), and section 77.54(22)(a) and (b), as amended by 1991 Wis. Act 39

This letter responds to your request for a private letter ruling regarding the sales and use tax status of Package A, a computer software package to be used by severely handicapped individuals.

Facts

ABC Company, a division of XYZ, Inc., is a provider of medical supplies and equipment in Minnesota. As part of this business, ABC Company is a dealer for the Package A company. Package A is a software product designed to operate on IBM or IBM compatible microcomputers providing people who are severely disabled with written and spoken communications and environmental controls. When installed on a personal computer with a variety of peripheral equipment, it allows the individual tremendous freedom in his daily living. The individual is enabled to perform tasks others normally take for granted, such as turning lights on, dialing a phone, typing a letter, changing a TV channel, etc. Peripheral devices are available, such as a voice synthesizer that verbalizes what the individual has typed into the computer.

Package A can potentially be used by any disabled individual who:

1. Can read newspaper print.
2. Can close and open at least one switch on command.
3. Can be positioned to view a computer monitor.
4. Can spell (not necessary but helps).
5. Is a quadriplegic (not necessary).
6. Is nonverbal (not necessary).

Package A is not individually designed, constructed or altered solely for the use of a particular physically disabled person.

The peripheral equipment does substitute for portions of the body. For example, the user may control the system using a "sip-and-puff" unit, which substitutes for their hands. The system may include a voice synthesizer which substitutes for the user's voice. However, none of this equipment is "worn" in the sense that orthotics are worn.

Request

You have requested a ruling regarding the Wisconsin sales and use tax status of the Package A software, the personal computer hardware and all peripheral equipment.

Ruling

Gross receipts from sales of the Package A software, the personal computer hardware and all peripheral equipment are subject to Wisconsin sales tax under sec. 77.52(1), Wis. Stats. (1989-90). These sales do not qualify for exemption under sec. 77.54(22), Wis. Stats., as amended by 1991 Wis. Act 39.

Analysis

Prewritten programs are defined in sec. Tax 11.71(1)(k), Wis. Adm. Code, February 1986 Register, as programs prepared, held, or existing for general use normally for more than one customer, including programs developed for in-house use or customer program use which are subsequently held or offered for sale or lease. Since the Package A software has been designed for potential use by any disabled individual who can perform certain functions, it meets the definition of prewritten program.

Section Tax 11.71(2)(b), Wis. Adm. Code, February 1986 Register, provides that the sale, lease, rental or license to use prewritten programs and basic operational programs is subject to Wisconsin sales or use tax. Therefore, the sale, lease, rental or license to use the Package A software is subject to Wisconsin sales or use tax.

Section Tax 11.71(2)(a), Wis. Adm. Code, February 1986 Register, provides that the sale, lease, or rental of new or used automatic data processing equipment, and charges for the installation, service and maintenance of this equipment are subject to Wisconsin sales or use tax. Therefore, the sale, lease or rental of personal computer hardware and peripheral equipment sold, leased or rented for use with the Package A product is subject to Wisconsin sales or use tax.

The exemption from Wisconsin sales and use tax provided under sec. 77.54(22)(a), Wis. Stats. (1989-90), requires that the device be individually designed, constructed or altered solely for the use of a particular physically disabled person so as to become a brace, support, supplement, correction or substitute for the bodily structure, including the extremities of the individual. Because the Package A program is prewritten and is not individually designed, constructed or altered solely for the use of a particular physically disabled person, it does not qualify for exemption under sec. 77.54(22)(a), Wis. Stats. (1989-90).

Section 77.54(22)(b), Wis. Stats. (1989-90), provides an exemption from Wisconsin sales and use tax for artificial limbs, artificial eyes, hearing aids and other equipment worn as a correction or substitute for any functioning portion of the body. Since the Package A software, the personal computer hardware and the peripheral equipment are not worn as a correction or substitute for any functioning portion of the body, such sales do not qualify for exemption under sec. 77.54(22)(b), Wis. Stats. (1989-90). □

✵ **W9222008,** March 5, 1992

Type tax: Sales and Use

Issue: Horse training

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

This letter responds to your request for a private letter ruling regarding the Wisconsin sales and use tax implications of the services you provide at GHI Company (GHI).

Facts

GHI was incorporated in another state. It commenced construction of a facility dedicated exclusively to "training" horses. It does business as the "X and Y Training Facility" to emphasize its nationally and internationally recognized head trainers and to substantiate its exclusive purpose of horse training.

GHI's business consists of training Western reining horses and Western pleasure horses which are almost exclusively registered Quarter Horses. Only horses requiring training in these disciplines are accepted at GHI,

with the exception of an occasional "breaking" of a horse of another breed.

The training service provided at GHI requires that the horse is only allowed on the premises if it is being trained. Older horses typically stay one to six months for specific correction. Younger horses are broken to ride, trained to perform, shown, and returned to the client once their training is completed over 12 to 18 months. Horses must be accepted at GHI and routinely "flunk out" if they fail to meet training standards.

A typical client lives out-of-state or internationally and has their own horse facility. They do not send a horse to GHI for boarding, but rather to be trained. The horse must be domiciled with GHI during the training. Clients are advised that once the training is over, the horse is returned to the client or a boarding facility.

GHI does not advertise that it will board horses. The only exception to its policy of not keeping a horse at its facility if it is not being trained is with respect to brood mares. Brood mares being trained are removed from training in the late months of pregnancy and pastured.

In addition to training horses, employes are hired by GHI for the agricultural duties of growing hay, oats, and corn, primarily to service the horse training operations.

GHI does act as an occasional intermediary between buyers and sellers of horses to facilitate its principal business of training. The buyers and sellers maintain possession and title of the horses, negotiate prices and terms, and arrange for delivery, etc. GHI merely introduces the buyers and sellers as a means of facilitating its training operations. GHI does not buy or sell horses itself.

Ruling Request

1. Is any of the charge by GHI for training horses subject to Wisconsin sales or use tax because boarding of the horses is provided?

2. Is GHI subject to Wisconsin sales or use tax as a result of brokering horses?

3. Is GHI required to register for a Wisconsin seller's permit?

Ruling

1. No part of the charge by GHI for training horses is subject to Wisconsin sales or use tax, even though GHI provides boarding. The training of horses is the primary objective of GHI, a service which is not subject to Wisconsin sales or use tax.

2. GHI is not a retailer required to collect Wisconsin sales or use tax when it brokers horses.

3. Since GHI is not selling tangible personal property or taxable services subject to Wisconsin sales or use tax, it is not required to register for a Wisconsin seller's permit.

Analysis

Training and Boarding

Section 77.52(2)(a), Wis. Stats. (1989-90), provides that certain services are subject to Wisconsin sales or use tax. These services include the service or maintenance of tangible personal property, but do not include training.

Section Tax 11.12(6)(a)2, Wis. Adm. Code, provides that the training of animals is not subject to Wisconsin sales or use tax. Section Tax 11.12(6)(b)1 and 2, Wis. Adm. Code, provide that the boarding and grooming of animals is subject to Wisconsin sales or use tax.

In the case of *Historic Sites Foundation, Inc., d/b/a Circus World Museum v. Wisconsin Department of Revenue* (S-10066, January 21, 1986), the Wisconsin Tax Appeals Commission held that when a taxpayer provides both nontaxable and taxable services, the primary objective of the service provider may be used to determine whether the sale of the services is subject to Wisconsin sales tax.

Since GHI is providing both taxable and nontaxable services (i.e., boarding and training), the primary objective of GHI in providing its services may be used in determining whether the sales of services by GHI to clients are subject to Wisconsin sales or use tax.

The primary objective of GHI is to provide training for horses. The facts show this to be true because:

1. GHI advertises itself as a training facility.

2. GHI does not advertise that it provides boarding services.

3. Boarding services are only provided to horses that are being trained by GHI.

4. When a horse is finished being trained by GHI, it may no longer be boarded at the facility.

Brokering Horses

Section 77.52(1), Wis. Stats. (1989-90), imposes the Wisconsin sales tax on retailers for sales of tangible personal property or taxable services made at retail in Wisconsin.

Section Tax 11.55(1), Wis. Adm. Code, provides that a person who has

possession of personal property owned by an unknown or undisclosed principal and has the power to transfer title to that property to a third party, and who exercises that power, is a retailer.

GHI, when brokering horses, has possession of horses owned by clients but does not have the power to transfer title to those horses to a third party, and does not exercise that power. Therefore, GHI is not a retailer of horses and is not subject to Wisconsin sales or use tax when a horse is sold, if acting in that capacity.

Registering for a Sellers Permit

Section 77.52(7), Wis. Stats. (1989-90), provides that every person desiring to operate as a seller within Wisconsin shall file with the department an application for permit for each place of operation. Subsection (12) provides that a person who operates as a seller in Wisconsin without a permit is guilty of a misdemeanor.

"Seller" is defined in sec. 77.51(17), Wis. Stats. (1989-90), as a person selling, leasing, or renting tangible personal property, or selling, performing, or furnishing services of a kind the gross receipts from the sale, lease, rental, performance, or furnishing of which are required to be included in the measure of the sales tax.

Based on the facts above, GHI does not sell, rent, or lease tangible personal property or sell, perform, or furnish services which are subject to sales tax. Therefore, GHI is not required to register for a Wisconsin seller's permit. □

✵ **W9220007**, February 26, 1992

Type Tax: Sales and Use

Issue: Member incentive program — electric thermal storage units

Statutes: Sections 77.51(2), (4)(a)(intro.), (14)(k) and (22)(a) and (b), 77.52(1) and 77.53(1), Wis. Stats. (1989-90)

This letter responds to your request for a private letter ruling regarding the sales and use tax status of electric thermal storage units.

Facts

AB Cooperative (ABC), an electrical distribution cooperative located in Wisconsin, has recently implemented a new "member incentive program" with participation from its power supplier, Cooperative DE (CDE), also located in Wisconsin. The "member incentive program" is beneficial to all three parties listed below, as follows:

a. The member obtains a new home heating unit at one-third of true cost in exchange for allowing on/off operation of the heating unit to be controlled by ABC, by means of radio signals.

b. ABC benefits in that their "peak demands" for electricity they purchase and distribute to their members are reduced. This reduction in demand results in a reduced rate per KWH from their power supplier, CDE.

c. CDE benefits due to the fact that "demands" on their peak generation capacity periods are reduced, thus reducing the level at which their generators need to operate.

The "member incentive program" discussed above involves Electric Thermal Storage or ETS units, which come in four sizes. The largest ETS unit, a 6 KW unit, costs approximately $855.00. CDE buys these ETS units from the manufacturer. CDE in turn sells these ETS units to ABC for their cost of $855.00.

When the ABC member buys the ETS unit and agrees to have the ETS unit's on/off operation radio controlled, as explained above, the member is billed one-third of the ETS unit's cost, or $285.00. At the time of sale the ownership of the ETS unit passes to the ABC member. As these ETS units are installed, ABC bills CDE for its one-third share of the ETS units' costs.

The ETS units are not installed by ABC. An electrician must be hired by the member for installation of the unit.

There are two types of ETS units. One type is a room unit which is placed on the floor and attached to the wall, by a bracket. This unit is connected directly to the member's service entrance box using 240v wiring (it does not plug into an outlet). The other type of ETS unit is a central storage furnace. The central storage furnace is connected to heating ducts and also requires 240v wiring as a direct connection to the member's service entrance box. The ETS unit may replace the member's furnace or the unit may work in conjunction with the furnace.

Request

ABC is requesting a determination of the "measure" of Wisconsin sales and/or use tax for the "member incentive program."

Ruling

The amount that ABC bills to its members for ETS units (1/3 of the ETS unit cost) is subject to Wisconsin sales tax. The net amount billed from CDE to ABC (the full amount of the sale from CDE to ABC, less the amount that ABC later receives from CDE) is also subject to Wisconsin sales or use tax.

Analysis

The first issue to resolve is whether the billing by ABC to its members for the ETS units is subject to Wisconsin sales or use tax.

Since the ETS unit is not installed by ABC, but rather, the member who contracts with an electrician for installation, the sale of the ETS unit by ABC to the member is considered a retail sale as defined in sec.77.51(14), Wis. Stats. (1989-90). The amount billed by ABC to the member is subject to Wisconsin sales tax as provided by sec. 77.52(1), Wis. Stats. (1989-90).

The other issue is whether the amount ABC pays CDE is subject to Wisconsin sales or use tax. Sec. 77.51(22)(a), Wis. Stats. (1989-90), defines "use" to include the exercise of any right or power over tangible personal property incident to the ownership, possession or enjoyment of the property. Under sec. 77.51(22)b, Wis. Stats. (1989-90), "enjoyment" includes a purchaser's right to direct the disposition of property, whether or not the purchaser has possession of the property.

In the "member incentive program," ABC retains the right to control the on/off operation of the ETS units. This control constitutes "enjoyment" and "use" of the ETS units, resulting in a use tax liability for ABC under sec. 77.53(1), Wis. Stats. (1989-90).

Since ABC is using the ETS units, a resale exemption does not apply to its purchases of ETS units from CDE if the ETS units are identified as those used in the "member incentive program." Sec. 77.53(12), Wis. Stats. (1989-90) states:

> "If a purchaser who gives a certificate makes any storage or use of the property or service other than retention, demonstration or display while holding it for sale in the regular course of operations as a seller, the storage or use is taxable as of the time the property or service is first so stored or used."

Therefore, any ETS units purchased without tax using resale certificate are taxable to ABC at the time it first has the right to control the on/off operation of the units.

The use tax liability of ABC is based on the net amount of its purchase from CDE. Since 1/3 of the ETS unit cost is billed back to CDE, this is a delayed discount given by CDE to ABC. Use tax applies to the remaining 2/3 of the ETS unit cost to ABC. □

✵ **W9219006,** February 17, 1992

Type tax: Sales and Use

Issue: Salary surveys

Statutes: Sections 77.51(5) and 77.52(1) and (2m), Wis. Stats. (1989-90)

This letter responds to your request for a private letter ruling regarding the application of sec. Tax 11.67, Wis. Adm. Code, April 1990 Register, to the service of compiling salary surveys for Wisconsin employers.

Facts

XYZ Company enlists Wisconsin employers as members of and participants in a survey group. As members of the survey group, each employer provides salary data specific to that employer. The data from the group of employers is compiled and statistically analyzed by XYZ Company. This information is then forwarded to the participants in the form of a printed salary survey. The fee charged for belonging to the survey group includes procurement and compilation of the data, a copy of the survey data, attendance at an annual survey seminar and a limited amount of interpretation and consulting services related to applying the data to specific employer circumstances.

In addition, XYZ Company, in an effort to expand the base of employers providing data, may offer the option to an employer which has not provided data in the current survey period to pay the participation fee in the current period and receive a copy of the data. This fee would include interpretation and consulting services related to the current data. This late entrant would continue the membership and provide data in the next survey period. The survey data is not available to any employer not included in the membership group.

Sales tax related to the outside printing service for the survey is paid to the Wisconsin printer by XYZ Company.

Request

XYZ Company is requesting a ruling of whether the transfer of the tangible personal property (printed survey data) is incidental to the service provided to the employers and therefore not subject to further sales tax.

Ruling

The fee charged by XYZ Company for membership in the survey group is subject to Wisconsin sales tax.

Analysis

Sec. Tax 11.67(1), Wis. Adm. Code, April 1990 Register, provides that when a transaction involves the transfer of tangible personal 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 performance of a service with the transfer of property being merely incidental to the performance of the service. If the objective of the purchaser is to obtain the personal property, a taxable sale of that property is involved.

Section 77.51(5), Wis. Stats. (1989-90), defines "incidental" to mean "depending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal; something incidental to the main purpose of the service. Tangible personal property transferred by a service provider is incidental to the service if the purchaser's main purpose or objective is to obtain the service rather than the property, even though the property may be necessary or essential to providing the service."

It is the department's position that the main purpose or objective of the members of the survey group is to obtain the printed survey data. The printed survey data serves as a wage manual for evaluating compensation levels for new employes as well as new positions. In this capacity, the printed survey data serves as a management tool usable on a day-to-day basis. Although a nominal amount of consulting is provided as part of the fee, the consulting is largely a separate endeavor which is billed for as provided. Accordingly, a taxable sale of tangible personal property is made.

XYZ Company may purchase binders and printing for the survey data without Wisconsin sales or use tax by providing its suppliers with properly completed resale certificates. □