Number 79 October 1992

Wisconsin TAX BULLETIN

FOCUS ON . . .

Computer programs — sales and use tax treatment

See page 23.

Forms Changes for 1992

Following is a brief description of the major changes to the Wisconsin individual income tax and homestead credit forms for 1992.

Forms WI-Z, 1A, 1, and 1NPR

- A check box is added to Form WI-Z (line 2) and Form 1A (line 9) to identify persons who can be claimed as dependents on someone else's return.
- Line 24 of Form 1 (line 22 of Form 1A and line 51 of Form 1NPR) is revised to refer to "qualifying" children rather than "dependent" children, for the computation of the Wisconsin earned income credit.
- Line 20 of Form 1NPR is revised to indicate that the federal self-employed health insurance deduction is not allowed for Wisconsin.

Schedule H

- A check box is added above question 1, to check if the claimant's spouse was age 65 or older as of December 31, 1992 (for use in conjunction with the "PartnerCare" Program).
- Boxes are added in question 7a, to check if a claimant became married or divorced in 1992.

Proof copies of the 1992 Forms WI-Z, 1A, 1, and 1NPR and Schedule H can be found on pages 34 to 44 of this Bulletin. The copies are subject to further revision. □

In This Issue

Information From Illinois Nets Wisconsin Use Tax

The Illinois Department of Revenue provided the Wisconsin Department of Revenue with information from an

audit it had performed of an Illinois furrier. The fur company had sold furs to individuals located throughout the country, including Wisconsin, where Illinois tax was not imposed.

Based on this information, 44 Wisconsin individuals who purchased furs from the Illinois furrier voluntarily remitted over $15,000 in Wisconsin use tax and interest, and an additional $13,000 was assessed to 30 individuals who did not remit the tax voluntarily.

In addition, three other individuals were referred for audit because of indications of under reporting of other Wisconsin taxes, in addition to the tax due on the fur purchased.

This "fur project" is one of many instances where the exchange of information agreements the Wisconsin Department of Revenue has with other states have proven useful in the collection of Wisconsin taxes. □

Travelers May Be Subject to Use Tax

Travelers who have purchased merchandise in foreign countries and brought the items into Wisconsin may be subject to Wisconsin use tax on their purchases. In an effort to improve voluntary compliance with use tax, the department is sending letters to persons who have purchased items from abroad. The letters indicate that they may be subject to Wisconsin use tax on their purchases and explain how to report any use tax due.

Those who fail to respond to the contact letter and a written follow-up will be assessed use tax, based on values determined using U.S. Customs Service information.

The department also has developed two new use tax publications, Publication 212 for businesses (*Businesses: Don't Forget About Use Tax*) and Publication 213 for individuals (*Travelers: Don't Forget About Use Tax*). These publications are included with information sent to purchasers by the U.S. Customs Service, and copies are also available at U.S. Customs locations. □

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NCR Case Generates Claims for Refund

As reported in the "Report on Litigation" (page 5 of *Wisconsin Tax Bulletin* 76, April 1992), the Wisconsin Tax Appeals Commission (WTAC) held in *NCR Corporation vs. Department of Revenue* that the Wisconsin dividend received deduction, for dividends received from corporations doing 50 percent or more of their business in Wisconsin, violates the equal protection clause of the U.S. Constitution. The WTAC also ruled that the application of the Wisconsin apportionment formula to NCR's unitary business violates the foreign commerce clause of the U.S. Constitution. The department has appealed this decision to the Circuit Court.

The department has received approximately 700 claims for refund based on the *NCR Corporation* case. Taxpayers who filed refund claims were sent a "Stipulation and Agreement," extending the department's time to act on their claims until one year after a determination by a court becomes final.

Taxpayers who wish to file a claim for refund but have not yet done so should request an "Agreement Extending Time to File Claim for Refund" from the department. The signed agreement will extend their time to file a refund claim until six months after a determination by a court becomes final.

Refund claims and extension agreements are being held in abeyance in the department's Audit Bureau. The department will take appropriate action on all refund claims and extension agreements when a final court determination is made.

For more information about the *NCR Corporation* case, or to request an "Agreement Extending Time to File Claim for Refund," you may contact the department by writing to Wisconsin Department of Revenue, P.O. Box 8906, Madison, WI 53708-8906, or by phoning (608) 266-2772 in Madison. Indicate whether your claim will be based on the issue of the deductibility of dividends received, the issue of income apportionment, or both issues. □

The "Tax Audit"

Taxpayers are occasionally treated to "news items" on radio or television, usually around the April 15 filing deadline, about that dreaded topic, The Tax Audit. This article is intended to help you better understand the Wisconsin Department of Revenue's audit procedures and perhaps answer some of the questions you may have.

The department conducts two types of audits, which are commonly known

as **"office audits"** and **"field audits."** This issue of the *Wisconsin Tax Bulletin* will focus on office audits. Field audits will be discussed in a separate article in a future issue.

Most **office audits** are conducted by auditors located in Madison. Both the income tax returns of individuals and the franchise and income tax returns of corporations are routinely office audited. Usually a taxpayer's returns for a three- or four-year period are audited at one time.

In an office audit the auditor examines tax returns to verify the correctness of the information being reported. When an office auditor requires additional information from you, the information is typically requested by letter. If the audit will include an interview, you have the right to ask that it take place at a reasonable time and at a place that is convenient for both you and the department.

At the conclusion of the examination, the department will send you a notice explaining any adjustments being made to your return, along with an explanation of how you may appeal if you disagree with the adjustments. The adjustments may result in either an assessment of additional tax or a refund. If the examination results in no adjustments, you will also be notified of that.

Returns may be selected for audit for a number of reasons, including tax filing history, type of business, type of deductions or credits, audit history, and third-party sources of information. Having your return selected for audit does not mean that the department thinks you are dishonest. The audit may or may not result in additional tax. Some audits are completed without any adjustments, and some result in refunds!

For the fiscal year ending June 30, 1992, the department issued 31,002 office audit assessments for $41,800,000, and 8,633 office audit refunds for $17,500,000. This compares with 38,914 assessments for $48,700,000 and 12,799 refunds for $18,700,000 for the previous year ending June 30, 1991. The fiscal 1991-92 assessments included $27,700,000 assessed to individuals and $14,100,000 to corporations. Refunds of $7,100,000 were issued to individuals and $10,400,000 to corporations. □

Focus on Forms: Dependents With Unearned Income May File Form WI-Z or 1A

WI-Z *Wisconsin income tax return for single persons under 65 with no dependents* **1992**

2 If your parent (or someone else) can claim you as a dependent, check here ....▷ 2 ☐

* * *

1A *Wisconsin income tax* **1992**

9 If your parent (or someone else) can claim you as a dependent, check here .....▷9 ☐

A check box to indicate that an individual can be claimed as a dependent on a parent's (or someone else's) tax return has been added to Form WI-Z, as line 2, and to Form 1A, as line 9 (see the Forms WI-Z and 1A inserts above).

With the addition of this check box on the Form WI-Z and Form 1A, and a worksheet, standard deduction table, and tax rate schedule for computing tax in the instruction booklet, a large number of single dependents with unearned income will be able to file their Wisconsin income tax return on a short Form WI-Z or 1A for 1992. In prior years, dependents with unearned income were required to file on the Wisconsin long form, Form 1.

Counties Adopt or Extend County Tax

Effective January 1, 1993, the ½% county sales and use tax is

- adopted by Price County, and
- extended by Douglas and LaCrosse Counties.

Price County is the first county to take advantage of a law change, enacted as part of 1991 Wisconsin Act 39, which allows counties to adopt the county tax on January 1,

April 1, July 1, or October 1, rather than just April 1 as was previously allowed. See *Wisconsin Tax Bulletin* 73 (August 1991), page 23, for a description of this law change.

LaCrosse County adopted the county tax effective April 1, 1990. A provision in the ordinance adopting the county tax stated that the county tax would expire December 31, 1992. However, in 1992, LaCrosse County adopted an ordinance to re-enact the county tax effective January 1, 1993; therefore, there will be no lapse in the county tax for LaCrosse County.

Douglas County, which adopted the county tax effective April 1, 1991, also included a provision in its ordinance that the county tax would expire December 31, 1992. Douglas County amended its ordinance adopting the county tax to remove the expiration date; therefore, there will be no lapse in the county tax for Douglas County.

The December 1991 *Tax Report*, a copy of which appeared in *Wisconsin Tax Bulletin* 75 (January 1992), explains how the county tax applies to retailers and other persons. It includes a listing of the counties that currently have the county tax. □

Reciprocity With Maryland Ends

Because of a law enacted by the state of Maryland on May 1, 1992, reciprocity between Wisconsin and Maryland has terminated, effective for taxable years beginning after December 31, 1991. Wisconsin had practiced reciprocity with Maryland for a number of years under the provisions of sec. 71.05(2), Wis. Stats. (1989-90), based on an informal agreement between the states.

With the termination of reciprocity between Wisconsin and Maryland, Maryland residents are no longer exempt from Wisconsin income tax on personal service income earned in Wisconsin. Wisconsin residents earning income from personal services performed in Maryland are subject to Maryland income tax and may claim a credit for taxes paid to Maryland on their 1992 or subsequent Wisconsin income tax returns.

Under reciprocity, personal service income is taxed by an employe's state of residence rather than an employe's state of employment. For further information regarding reciprocity, refer to sec. Tax 2.02, Wis. Adm. Code. (Note: Wisconsin continues to practice reciprocity with Illinois, Indiana, Kentucky, Michigan, and Minnesota.) □

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

Annual Bulletin Index

Once each year the *Wisconsin Tax Bulletin* includes an index of materials that have appeared in past Bulletins. The latest index available appears in *Wisconsin Tax Bulletin* 78 (July 1992) and includes information for issues 1 to 75 (January 1992). □

Topical and Court Case Index Available

The Department of Revenue's *Wisconsin 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 *Wisconsin Topical and 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 45

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. □

1992 Package WI-X Will Be Available

The department will again be offering Package WI-X, which will contain actual size copies of most 1992 Wisconsin individual and fiduciary income tax, corporation franchise and income tax, partnership, inheritance and estate tax, motor fuel tax, sales and use tax, and withholding tax forms.

Package WI-X should be available by January 31, 1993. The cost is $7.00 per copy. It may be ordered on the bulk order blank (Form P-744). The bulk order blank is being mailed in October. See the following article for more information on bulk orders.

If you do not receive an order blank and you wish to purchase copies of 1992 Package WI-X, mail your request indicating the number of copies, along with the amount due, to Shipping and Mailing Section, Wisconsin Department of Revenue, P.O. Box 8903, Madison, WI 53708-8903. □

Bulk Order of Tax Forms

During October, the department is mailing the order blank (Form P-744) which tax preparers should use to request bulk orders of 1992 Wisconsin income tax forms. There is a handling charge on these orders.

The department is also mailing order blanks (Forms P-744b and P-744L) which banks, post offices, and libraries should use to request bulk orders of 1992 Wisconsin income tax forms. No charge is made for forms used for distribution to the general public (for example, in a bank, library, or post office).

This year's mailing list for bulk order blanks contains the names of all persons and organizations who placed orders for 1991 forms. If you are not on this mailing list and do not receive a Form P-744, P-744b, or P-744L, you may request the bulk order blank by contacting any department office or by writing to Shipping and Mailing Section, Wisconsin Department of Revenue, P.O. Box 8903, Madison, WI 53708-8903. You may also phone the Shipping and Mailing Section at (608) 267-2025.

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

IRS 1992 Mileage Rate Change Applies for Wisconsin

The optional standard mileage rate specified by the IRS for computing business automobile expenses for 1992 also applies for Wisconsin. The IRS increased the rate from 27.5¢ per mile for all business miles driven, to 28¢ per mile. The 28¢ per mile rate is allowed without regard to whether the automobile was previously considered fully depreciated.

If the standard mileage rate of 28¢ per mile is used, depreciation is considered to be allowed at 11.5¢ per mile for 1992, an increase from 11¢ per mile for 1991. However, no portion of the 28¢ per mile rate is considered to be depreciation after the adjusted basis of the automobile reaches zero.

The mileage rate used to calculate automobile expenses for charitable deduction purposes, which remains at 12¢ per mile in 1992, also applies for Wisconsin.

For both federal and Wisconsin purposes, a rate of 9¢ per mile is used in 1992 to calculate automobile expenses for medical and moving expense deductions. □

Reminder: Deadlines for Filing Credit Claims Have Changed

The former December 31 deadline for filing homestead credit claims and most farmland preservation credit and farmland tax relief credit claims is no longer in effect. As a result of 1991 Wisconsin Act 39, the deadline for an individual to file a 1991 or subsequent year's claim for homestead credit is 4 years, 3½ months after the close of the taxable year to which the claim relates. The deadline for filing a farmland preservation credit or farmland tax relief credit claim is also 4 years, 3½ months after the close of the taxable year, except for corporations, for which the deadline is 4 years, 2½ months after the close of the taxable year. Claims filed by persons not required to file an income

tax return must be filed on a calendar-year basis.

The following examples illustrate various deadlines for filing a 1991 claim for homestead credit, farmland preservation credit, or farmland tax relief credit.

Example 1: A trust with a calendar-year taxable year wishes to file a 1991 farmland preservation credit claim. The claim may be filed any time up to April 15, 1996.

Example 2: A corporation with a fiscal taxable year ending November 30, 1992, wishes to claim farmland tax relief credit for 1991. The credit may be claimed any time up to February 17, 1997.

Example 3: An individual with a fiscal taxable year ending November 30, 1992, is required to file a 1991 income tax return and wishes to file a 1991 homestead credit claim. The claim may be filed any time up to March 17, 1997.

Example 4: Assume the person in Example 3 did not have a filing requirement. The 1991 homestead credit claim would have to be filed by the deadline which applies for calendar-year filers, which is April 15, 1996. □

Under Reporting of Receipts Is Costly

Charges against a Brillion, Wisconsin, couple, Lyle A. and Arlis L. Krizenesky, were filed in March 1992, by the Calumet County District Attorney. The Krizeneskys, owners and operators of a tavern in Brillion, were each charged with one count of being party to keeping a place of prostitution, one count of soliciting a person to practice prostitution, and one count of permitting an entertainer to solicit drinks from customers.

A plea agreement was reached in May 1992, in which Lyle Krizenesky pled no contest to one count of keeping a house of prostitution and one count of filing a fraudulent 1990 Wisconsin income tax return. Arlis Krizenesky pled no contest to one count of filing a fraudulent 1990 Wisconsin income tax return. The remaining charges were dismissed.

On June 17, 1992, they were each sentenced to 3 years probation, with the conditions that they make restitution of the taxes, penalty, and interest, and they execute a mortgage in favor of the Department of Revenue in the amount of $40,000. The investigation showed that for the years 1987-1991, gross receipts from the tavern business were under reported by more than $174,000.

In another case of under reporting income, Patricia G. Hass, 44, of LaCrosse, Wisconsin, was charged in August 1992, with three counts of filing false and fraudulent income tax returns regarding her 1988 original return, a 1988 amended return, and her 1989 return. According to the LaCrosse County District Attorney's Office, Hass had been charged in May 1991 with nine counts of felony theft, accused of depositing nine checks worth $99,825 from Metallics, Inc. into her personal bank accounts. These checks were all made payable to Olsten of LaCrosse, a temporary employment service operated by Hass. She had not reported any of the income on her Wisconsin income tax returns.

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. In addition to the criminal penalties, Wisconsin law provides for substantial civil penalties, and interest due follows convictions for criminal violations. □

PartnerCare Enrollment Card Procedures Changed

In October 1992, the department mailed PartnerCare enrollment cards and an explanatory flyer to approximately 135,000 individuals. The mailing was based on a listing of persons age 65 or older, whose household income for 1991 did not exceed $19,154, and who filed a 1991 homestead credit claim.

PartnerCare is a program sponsored by the State Medical Society of Wisconsin and the Coalition of Wisconsin Aging Groups. Its purpose is to help low-income senior citizens get the medical care they need. Participating doctors volunteer to charge PartnerCare cardholders no more than the amount Medicare approves, for Medicare-covered services.

In past years, PartnerCare cards mailed by the department were temporary or "annual" cards, with an expiration date (the cards mailed in October 1991, for example, expire December 31, 1992). The cards mailed out beginning this year, however, are "permanent" cards, with no expiration date. Individuals will no longer be issued a new card each year.

To enable more eligible persons to receive a PartnerCare card, the 1992 homestead credit claim, Schedule H, will include a check box near the box for the claimant's age. By checking the box if the claimant has a spouse age 65 or older, the department will be able to issue a PartnerCare card to the spouse if applicable, as well as to the claimant. □

Over 1.7 Million Refunds Issued

Taxpayers were issued a total of 1,735,000 income tax refunds during

the period July 1, 1991, to June 30, 1992, for an average refund of $304. The average refund for the prior year was $296.

There were 2,535,000 Wisconsin individual income tax returns filed during the 12 months ending June 30, 1992. This compares to 2,533,000 income tax returns filed for the prior 12 months. The 2,535,000 returns were filed by 3,652,000 individuals.

An itemized deduction credit was claimed by 24% of the taxpayers on 1991 returns. The average credit allowed was $342, compared to an average credit of $326 for the prior year.

There were 249,000 homestead credit claims and 25,000 farmland preservation credit claims filed during the year. This compares to 259,000 homestead credit claims and 25,000 farmland preservation credit claims filed for the prior year.

Homestead credit refunds averaged $424 per claimant, a decrease from the average refund of $438 issued last year. About 48% of the claimants were age 65 or older. Of all individuals claiming homestead credit, 50% were renters and 50% were homeowners.

An average farmland preservation credit of $1,188 was issued to each claimant. The average payment for 1991 was $1,115. □

Endangered Resources Contributions Exceed $650,000

The 1991 Wisconsin income tax returns, Forms WI-Z, 1A, 1, and 1NPR, included a line for taxpayers to contribute to the Wisconsin Endangered Resources Fund. These donations either reduce a taxpayer's income tax refund or increase the amount of income tax owed. Amounts contributed go to the Wisconsin Department of Natural Resources to help protect and care for Wisconsin's endangered species, nongame wildlife, and rare plant and animal habitats.

On 1991 Wisconsin income tax returns filed, 60,977 taxpayers contributed $655,941 to the Endangered Resources Fund. This compares with 1990 income tax returns, where 66,473 taxpayers contributed $679,489. □

Taxpayers Designate $407,179 to State Election Campaign Fund

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

During the period July 1, 1991, to June 30, 1992 (primarily 1991 tax returns), taxpayers designated $407,179 to the election campaign fund on their Wisconsin tax returns. This compares to $431,478 for the prior 12 months ending June 30, 1991. □

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 October 1, 1992, or at the stage in which action occurred during the period from July 2, 1992, to October 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
- 11.12 Farming, agriculture, horticulture and floriculture-A
- 11.17 Hospitals, clinics and medical professions-A
- 11.18 Dentists and their suppliers-A
- 11.33 Occasional sales-A
- 11.45 Sales by pharmacies and drug stores-A
- 11.49 Service stations and fuel oil dealers-A
- 11.57 Public utilities-A
- 11.83 Motor vehicles-A
- 11.84 Aircraft-A
- 11.85 Boats, vessels and barges-A
- 11.88 Mobile homes-A

Rules at Revisor of Statutes Office for Publication of Hearing Notice

- 11.03 Elementary and secondary schools and related organizations-A
- 11.05 Governmental units-A
- 11.70 Advertising agencies-R&R
- 11.71 Computer industry-A
- 11.95 Retailer's discount-A

Rules at Legislative Standing Committee

- 11.26 Other taxes in taxable gross receipts and sales price-A
- 11.32 "Gross receipts" and "sales price"-A
- 11.51 Grocers' guidelist-A
- 11.68 Construction contractors-A
- 11.87 Meals, food, food products and beverages-A
- 11.925 Sales and use tax security deposits-A

Rules Adopted and in Effect (including effective date)

2.475 Apportionment of net business incomes of interstate railroads, sleeping car companies and car line companies-NR (9/1/92)

Emergency Rules Expired (including expiration date)

2.475 Apportionment of net business incomes of interstate railroads, sleeping car companies and car line companies-NR (9/13/92)

Rules Withdrawn From Promulgation (including date withdrawn)

11.86 Utility transmission and distribution lines-A (7/27/92)

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. Adopted rules are printed and distributed to Administrative Code subscribers and certain Department of Revenue employes and tax services, near the effective date of adoption.

For each rule that is adopted, the *Wisconsin Tax Bulletin* includes a summary of the new rule or changes to the existing rule and the effective date of adoption. In addition, the entire text of new rules and the amended subunits of existing rules, showing changes made to the previous rules, are published.

Included in this issue is information regarding section Tax 2.475. The effective date for this new rule is September 1, 1992.

Tax 2.475, relating to the apportionment of income of interstate railroads, sleeping car companies and car line companies, is created because of the amendment to s. 71.26(1)(a), Stats., by 1991 Wisconsin Act 39 which imposes a franchise or income tax on these entities for taxable years beginning on or after January 1, 1991. This rule provides a procedure for these entities that are doing business within and without Wisconsin to apportion or allocate their income to Wisconsin. The new rule is shown below.

Tax 2.475 APPORTIONMENT OF NET BUSINESS INCOMES OF INTERSTATE RAILROADS, SLEEPING CAR COMPANIES AND CAR LINE COMPANIES. (ss. 71.04(8)(c) and 71.25(10)(c), Stats.)

(1) DEFINITIONS. In this section:

(a) "Gross receipts from carriage" means gross receipts received for the carriage of property or persons net of interline payments made to other railroads as a result of the interchange of carriage between and among railroads. Gross receipts from carriage includes interline payments received from other railroads.

(b) "Revenue ton mile" means the movement of one net ton of property or persons, or both, the distance of one mile, for consideration. For carriage of persons, each person shall be considered the equivalent of 150 pounds, and the average weight of the contents of head end cars, or "baggage cars," is considered to be 4 tons.

(2) INTERSTATE RAILROADS AND SLEEPING CAR COMPANIES. With respect to the imposition of Wisconsin franchise or income tax measured by or on net income for taxable years beginning on or after January 1, 1991, the income of a railroad or sleeping car company operating within and without Wisconsin shall be apportioned to Wisconsin on the basis of the arithmetical average of the following 2 factors:

(a) The ratio of the gross receipts from carriage of property or persons, or both, first acquired for carriage in Wisconsin to the total gross receipts from carriage of property or persons, or both, everywhere.

(b) The ratio of revenue ton miles of carriage in Wisconsin to revenue ton miles of carriage everywhere.

(3) SUBSTITUTION OF FACTORS. Whenever gross receipts data is not available the department may authorize or direct substitution of a similar factor, such as gross tonnage, and whenever revenue ton mile data is not available the department may similarly authorize substitution of a similar factor, such as revenue miles.

(4) CAR LINE COMPANIES. With respect to the imposition of Wisconsin franchise or income tax measured by or on net income for taxable years beginning on or after January 1, 1991, the income of a car line company operating within and without Wisconsin shall be allocated or apportioned to Wisconsin as provided in s. 71.04(4) or 71.25(6) and s. Tax 2.39.

Note: Section 71.26(1)(a), Stats., was amended by 1991 Wisconsin Act 39, effective for taxable years beginning on or after January 1, 1991. For taxable years beginning before January 1, 1991, railroads, sleeping car companies and car line companies were exempt from Wisconsin franchise and income taxation. □

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

Corporate liquidations — sec. 333. *Keith Breyer vs. Wisconsin Department of Revenue* (Court of Appeals, District III, January 15, 1991). See *Wisconsin Tax Bulletin* 71, page 8, for a summary of the January 15, 1991, decision.

The taxpayer appealed the Court of Appeals decision to the Wisconsin Supreme Court in February 1991. The Supreme Court denied the taxpayer's petition for rehearing on April 2, 1991. □

Gain or loss — corporate liquidation. *Oliver G. and Jeanne K. Berge and Wilmer E. and Marijean Trodahl vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 11, 1992). The issue in this case is whether the distribution of real property resulted in a taxable gain to the taxpayers.

The taxpayers were equal 50% shareholders in Hearthstone, Inc., a Wisconsin corporation formed in 1963 to own and rent out apartments. The taxpayers dissolved the corporation on January 2, 1988, transferring the apartment building to themselves as equal 50% individual owners.

The taxpayers argue that a mere change in the form of ownership had taken place which did not require recognition of gain in the year of distribution. Section 336 of the Internal Revenue Code (IRC) provides as a general rule that gain or loss shall be recognized to a liquidating corporation on the distribution of property

in complete liquidation as if such property were sold to the distributee at fair market value. Under sec. 633(a)(1) of the Tax Reform Act of 1986, the amendments to sec. 336, IRC, apply to any distribution in complete liquidation made by a corporation after July 1, 1986, unless such corporation is completely liquidated before January 1, 1987.

The Commission concluded that the 1988 liquidating distribution from Hearthstone, Inc., to the taxpayers resulted in recognized taxable gain.

The taxpayers have appealed this decision to the Circuit Court. □

Gain or loss — transitional adjustments — federal basis differs from state; Gain or loss — sales price of stock; Interest income — constructive; Penalties — negligence — incorrect return. *Martin and Ingeborg Kraninger vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, May 7, 1992). The issues in this case are:

A. What was the taxpayer's sale price of the stock?

B. What was the taxpayer's basis in the stock sold?

C. Did the taxpayer have constructive interest income, and if so, was he entitled to claim a bad debt expense for unpaid accounts receivable repurchased?

D. Was the taxpayer liable for the 25% negligence penalty in respect to the above issues?

The taxpayer's installment payment stock sale on December 31, 1985, called for a maximum price of $1,341,671 and a minimum price of $1,250,000. The final price was dependent upon the extent to which the taxpayer would, after the 1985 closing, be obliged to reimburse the buyer for various contingent corporate liabilities the taxpayer had contractually assumed. In 1986, the final price was brought down to the minimum of $1,250,000.

The taxpayer acquired the stock from his father-in-law and mother-in-law in 1977 for a price of $23.48 per share. The father-in-law died three months after the sale and the IRS subsequently asserted that the sale was a bargain sale and that the true value was $63.50 per share.

The taxpayer paid a federal gift tax on the gift component ($40.02) of the bargain sale. For the shares purchased from the father-in-law, the IRS included the gift component of the transfer in the father-in-law's taxable estate as a gift in contemplation of death, crediting the estate tax for the gift tax paid.

In lieu of including the gift component in the father-in-law's Wisconsin taxable estate and in lieu of assessing an inheritance tax on that component, the department accepted the taxpayer's payment of a Wisconsin gift tax based on a compromise value of $50 per share.

In 1986, the stock buyer unilaterally took setoffs against the interest it owed the taxpayer. These setoffs were for certain corporate accounts receivable, which the taxpayer had contractually agreed to "repurchase" if they remained unpaid for more than 180 days following the stock sale.

The accounts receivable were six months old at the time of the stock sale, the accounts remained unpaid through 1986, the three companies that owed on the accounts went into Chapter 11 bankruptcy in 1986, and the taxpayer made no bad debt claim for these accounts on his 1986 return.

The Commission concluded as follows:

A. As of the closing date of December 31, 1985, the sales price is deemed to be the contractual maximum of $1,341,671. The minimum price of $1,250,000 was not known until 1986, the year after the sale contract was signed.

B. The federal basis applies for the stock. This includes the sale price, the gift component, and gift tax paid.

C. Because the sales contract provides that setoffs for the accounts receivable will be offset against *any amounts owed* by the buyer to the taxpayer, the constructive interest adjustment was proper. Interest is part of "any amounts owed" under a note.

   The accounts were legally worthless in 1986. The fact that the taxpayer made no bad debt claim on his 1986 or subsequent returns does not disqualify the claim now. The taxpayer's claim for bad debt recognition is in essence an equitable recoupment claim offsetting the assessment of tax due to the constructive interest.

D. At the time the taxpayer filed his 1985 return, he had a reasonable basis and good, though legally mistaken, cause to believe that the sale price was no greater than the minimum. This satisfies the "good cause" standard and the penalty is abated.

The department filed a petition for rehearing with the Wisconsin Tax Appeals Commission, which was denied on June 25, 1992. The department has not appealed but has adopted a position of nonacquiescence in regard to issue B of this decision.

The taxpayer has not appealed the decision. □

FARMLAND PRESERVATION CREDIT

Farmland preservation credit — zoning certificate erroneously prepared. *Delbert E. and Margaret Rentmeester vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, June 5, 1992). The issue in this case is whether the department properly disallowed the taxpayer's 1986 through 1989 farmland preservation credit claims. Although the taxpayer's farmland in those years was not zoned for exclusive agricultural use, the zoning certificate filed with the claims, erroneously prepared by the Brown County Land Conservation Department, stated that the farmland was located within exclusive agricultural zoning.

On April 3, 1990, the Land Conservation Department issued a letter to the taxpayers informing them that, although they had received a zoning certificate for 1986 through 1989, the Land Conservation Department would be unable to issue that zoning certificate to them in the future because their land was not in an exclusive agricultural zoning district.

At the October 30, 1991, meeting of the Town of DePere Plan Commission, a request by the taxpayers to change the zoning of these parcels from agriculture to exclusive agriculture passed on a vote of 5 to 0.

The Commission concluded that:

A. Because the taxpayer's land was not properly zoned exclusive agricultural use for 1986 through 1989 the taxpayers were not eligible for the credits received for such years.

B. In filing their 1986 through 1989 farmland preservation credit claims, the taxpayers reasonably relied upon the zoning certificate. Such reliance was detrimental in that it induced them to substantially restrict use of this property during the credit years to satisfy the farmland preservation credit eligibility requirements even though eligibility was impossible given the improper zoning. Under the circumstances, it would result in a manifest injustice to require the taxpayers to repay such credits. The doctrine of equitable estoppel must be applied to prevent such an injustice.

The department has not appealed but has adopted a position of nonacquiescence in regard to the conclusion that the doctrine of equitable estoppel applies. □

Service of process; Appeals — Tax Appeals Commission. *John R. Steenlage and Roberta M. Steenlage vs. Wisconsin Tax Appeals Commission and Wisconsin Department of Revenue* (Circuit Court for Trempeleau County, May 7, 1992). This is a petition for judicial review of a decision of the Wisconsin Tax Appeals Commission (Commission), which had dismissed the taxpayer's petition for review for lack of jurisdiction.

The issues in this case are:

A. Whether the Commission's finding that the taxpayers received the department's notice of redetermination is proper and supported by substantial evidence in the record.

B. Whether the Commission legally and properly concluded that it lacked jurisdiction to review the department's redetermination because the taxpayers failed to timely file their petition for review with the Commission.

C. Whether the Commission is an improper respondent in this judicial review proceeding.

The department issued a farmland preservation tax credit adjustment to the taxpayers on August 17, 1987, assessing taxes and interest. On October 19, 1987, the taxpayers filed a petition for redetermination, and, on April 14, 1988, the department issued a decision denying the petition for redetermination. The department sent a notice of its decision to the taxpayers, by certified mail, informing them that the tax and interest assessed against them would become final if they did not file an appeal within 60 days of receiving the notice. The certified mail return receipt shows that the notice was delivered to the taxpayers' address on April 5, 1988, and was signed by Bill Eilers, a person who was living with the taxpayers at that time. The taxpayers then sent a letter, by ordinary mail, postmarked June 3, 1988, to the Commission, seeking review of the department's redetermination. The Commission received the letter on June 7, 1988, after the expiration of the 60-day limit for filing a petition with the Commission under sec. 73.01(5)(a), Wis. Stats.

The taxpayers argue that they were not aware of the arrival of the notice until several days after Bill Eilers signed for it. Testimony in the record by Ms. Steenlage, however, indicates that the notice was received on April 5, 1988, and the taxpayers introduced no evidence in the record before the agency to show that they did not personally receive the notice of redetermination on April 5, 1988.

The applicable statutes provide that if an individual cannot be served personally, service can be accomplished by leaving a copy of the summons at

the individual's usual place of abode, with someone other than the individual.

The taxpayers attached brochures to their brief concerning appeals to the Commission, and make various arguments concerning the failure of these brochures to define the word "file." There is no indication in the record that these brochures were before the agency, and the court will not, therefore, consider the brochures nor the arguments based on the brochures.

The taxpayers also argue that their appeal was placed in the mail prior to the expiration of the 60-day time limit, and that the Commission should have deemed the appeal "filed" as of the postmark on the envelope. The taxpayers cite as authority for their argument, the IRS procedure for allowing the filing of income tax returns by placing them in the mail by midnight on the date of the tax filing deadline.

The Circuit Court approved and affirmed the Commission's ruling and order, concluding as follows:

A. The Commission's finding that the taxpayers received the department's notice of redetermination on April 5, 1988, is proper and supported by substantial evidence in the record.

B. The Commission legally and properly concluded that it lacked jurisdiction to review the department's redetermination because the taxpayers failed to file their petition for review with the Commission within the 60-day time limit.

C. The Commission is improperly named a respondent in this proceeding. Section 227.53(1)(b)1, Wis. Stats., clearly provides that in petitions for review of a decision of the Commission, the department shall be the named respondent.

The taxpayers have not appealed this decision. □

WITHHOLDING OF TAX

Penalties — negligence — late — 5-25% graduated. *William Pagel vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, June 3, 1992). The issue in this case is whether the taxpayer's late filing of tax returns was due to "reasonable cause" rather than "wilful neglect."

The taxpayer is a carpenter contractor doing business as Birch Enterprises. Currently, Birch Enterprises has approximately 37 employes and annual sales of more than $1 million.

The taxpayer's principal activities as business owner include dealing with homeowners and builders, scheduling and overseeing work crews, and estimating. When he first started in business, he also handled the bookkeeping and tax accounting, including the filing of annual tax withholding statements. At that time he had no employes.

Since 1977, the taxpayer has delegated his business bookkeeping and tax accounting. At first these tasks were handled by a small bookkeeping firm for whom his daughter worked. A year later, his daughter left that firm to work exclusively for Birch Enterprises, and she handled these tasks until the taxpayer fired her in 1989 following the disclosures which led to the assessment at issue here.

The evidence showed that the respondent's various tax notices were sent to the taxpayer at his home address in Colgate, Wisconsin until 1983, when, at the taxpayer's request, the department began sending them to the Birch Enterprises office at the taxpayer's daughter's home. The taxpayer had a history of numerous late tax report filings, delinquencies, and penalties dating back to 1979 and continuing through March 1989, including at least one estimated assessment. It was not clear from the evidence if the taxpayer himself had actual knowledge of any of these defaults even though all notices were sent to him at Colgate until 1983.

For the period under review, January 1988 to March 1989, there were 11 delinquencies resulting in the imposition of $5,886.61 in penalties.

The taxpayer testified that he was unaware of any tax filing problems or delinquencies during the period under review until he learned from the Internal Revenue Service (IRS) that no W-2 forms had been filed with the IRS from 1985 through 1988 and that his daughter had been embezzling funds from the business. At that point, the taxpayer fired his daughter.

Upon learning he had federal tax problems, Pagel initiated contact in April 1989, with the department, learned there were outstanding delinquencies, and set up a monthly schedule to pay the state delinquencies, which was accomplished in about six months.

The apparent cause of both the federal and state tax delinquencies was the embezzlement by the taxpayer's daughter/bookkeeper of business funds which should have been used to pay those taxes.

The taxpayer testified that he delegated the entire tax accounting responsibility to his daughter and believed she was handling it properly.

The Commission concluded that the taxpayer produced sufficient evidence to show that his tax filing delinquen-

cies were due to reasonable cause and not wilful neglect.

The actions of the taxpayer's daughter/bookkeeper in not filing timely tax returns cannot reasonably be imputed to the taxpayer for penalty purposes under these circumstances, since her embezzlement was the cause of the taxpayer's failure to file returns and pay the tax.

The imposition of the 25% negligence penalty is not justified under these facts.

The department has not appealed but has adopted a position of nonacquiescence in regard to this decision. □

CORPORATION FRANCHISE AND INCOME TAXES

Allocation of income — apportionable vs. nonapportionable. *Transportation Leasing Co., f/k/a Greyhound Lines, Inc. vs. Wisconsin Department of Revenue* (Circuit Court for Dane County, October 26, 1991). The Wisconsin Tax Appeals Commission issued a decision on July 16, 1990, which was appealed to the Circuit Court. See *Wisconsin Tax Bulletin* 70, page 14, for a summary of the July 16, 1990, decision.

The department and the taxpayer entered into a written agreement in October 1991, and based on the written stipulation, the Circuit Court dismissed the appeal on October 26, 1991. □

Business loss carryforward — merger. *Wisconsin Department of Revenue vs. Appleton Papers, Inc.* (Court of Appeals, District IV, March 28, 1991). See *Wisconsin Tax Bulletin* 72, page 5, for a summary of the March 28, 1991, decision.

The taxpayer appealed the Court of Appeals decision to the Wisconsin Supreme Court in April 1991. The Supreme Court denied the petition for review on June 5, 1991. □

Business loss carryforward — merger. *Wisconsin Department of Revenue vs. United States Shoe Corporation and United States Shoe Corporation vs. Wisconsin Department of Revenue* (Court of Appeals, District, IV, September 6, 1990). See *Wisconsin Tax Bulletin* 70, page 14, for a summary of the September 6, 1990, decision.

The taxpayer appealed the Court of Appeals decision to the Wisconsin Supreme Court in October 1990. The Supreme Court denied the petition for review on November 5, 1990. □

Interest Income — imputed; Estoppel; Allocation of income — business income. *Ladish Co., Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, May 1, 1992). The issues in this case are:

A. Whether monies transferred in increments from the taxpayer, a subsidiary corporation, to its parent, were interest free loans on which Wisconsin could impute interest, or dividends.

B. Whether the taxpayer had nexus in Ohio.

   1. Did the presence of a car in Ohio give Ohio nexus?

   2. Was Ohio's ruling that it had jurisdiction over the taxpayer entitled to full faith and credit in Wisconsin?

   3. Was Ohio's ruling that it had nexus over the taxpayer entitled to "comity," observance of another state's judgments out of courtesy, in the department's 1987 audit of tax years 1980-1984, given a statement from the department in 1984 that it would honor the nexus determinations of other states when the other state issues a written opinion claiming nexus and when the taxpayer agrees with the opinion?

C. Whether the gain realized by the taxpayer on its 1983 sale of Texas real estate should be treated as business income (apportionable in Wisconsin) or as nonbusiness income (allocable to Texas).

None of the formalities of a lender-borrower relationship were observed with respect to the monies transferred during the period of February 1982 up to September 10, 1984. The parent sent "thank you" notes to the taxpayer for the transfers and the transfers were shown on the taxpayer's books and Wisconsin tax returns as a debt owing from parent to taxpayer. The taxpayer neither declared any dividends contemporaneously with the transfers nor contemporaneously reduced its retained earnings account to reflect dividend payments.

On September 10, 1984, more than 2½ years after the first of the transfers, the taxpayer declared a $180 million dividend to the parent, a dividend that was "paid" by the taxpayer zeroing out the account receivable, thereby canceling the putative debt from parent to taxpayer shown in that account. The parent did not report the transfers as dividends on its Wisconsin tax returns until its 1984 return was filed.

The parties agree, as an abstract proposition at least, that Wisconsin has the authority to impute interest when a controlled subsidiary in a

bona-fide loan transaction lends money on an interest-free basis to its parent, even when the imputation creates new income rather than reallocates existing income.

In 1980 through 1984, the taxpayer owned a car used by an Ohio based salesman employed by the taxpayer. The taxpayer received a written ruling from the State of Ohio that Ohio had nexus over the taxpayer, a ruling the taxpayer did not appeal.

The Texas real estate sold was a 12-acre parcel of vacant land adjoining a 34-acre business facility the taxpayer operated in Texas. The parcel was acquired in 1956 and sold to Texas authorities in lieu of condemnation. The parcel was never physically used in business operations.

From 1977 through 1983, the taxpayer claimed Wisconsin tax deductions for real estate taxes for both the 12-acre parcel and the 34-acre parcel and weed cutting expenses for the 12-acre parcel and included the cost of both parcels in the denominator of the property factor of its Wisconsin apportionment formula.

A. The Commission affirmed the imputed interest portion of the assessment. Because the taxpayer originally booked the transfers as repayable debt, carried those transfers for as much as 2½ years as debt, showed the transfers as debt on its Wisconsin tax returns, and failed to declare the transfers to be dividends or to account for them as dividends, the monies transferred were interest-free loans.

B. The Commission reversed the Ohio sales throwback portion of the assessment, concluding that:

   1. Ohio was incorrect in ruling that it had nexus over the taxpayer. The mere presence of a company car in the hands of a salesman who uses the car in his solicitation activities does not destroy otherwise immune solicitation as defined by federal statute.

   2. The Ohio ruling does not, by the full faith and credit clause, bind Wisconsin, because Wisconsin was not a party to the proceedings.

   3. Wisconsin, by its 1984 statement, is statutorily precluded from now arguing that Ohio's ruling is non-preclusive. Section 227.20(8), Wis. Stats. (1983-84), provides that a court shall reverse or remand the action of an agency if the agency's exercise of discretion is inconsistent with an agency rule, an officially stated agency policy, or a prior agency practice, if deviation therefrom is not explained satisfactorily.

C. The Commission affirmed the Texas property gain portion of the assessment, concluding that the gain on the real estate sold is business income and, therefore, apportionable. The 12-acre parcel is conceptually inseparable from the contiguous 34-acre income-producing parcel.

The taxpayer filed a petition for rehearing with the Commission. The petition was denied on June 18, 1992.

Both the taxpayer and the department have appealed this decision to the Circuit Court. □

Leases — 1986 and prior — safe harbor rules. *International Paper Company vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, May 8, 1992). The issue in this case is whether cash payments the taxpayer received from the transfer of federal tax benefits under "safe harbor leases" were includable in its gross income under sec. 71.03(1)(k), Wis. Stats. (1981).

During the years 1981 and 1982, Internal Revenue Code (IRC) sec. 168(f)(8) allowed "leases," which would not have otherwise qualified as leases for federal income tax purposes, to be treated as leases for federal income tax purposes so as to permit a "seller/lessee" of property to transfer to a "buyer/lessor" the benefit of federal depreciation deductions and federal investment and other tax credits. Such transactions are referred to herein as "safe harbor leases."

During the years 1981 and 1982, the taxpayer, as seller/lessee, sold and leased back certain property under sec. 168(f)(8), IRC, for the purpose of transferring to the buyer/lessor the federal income tax benefits related to such property. The Wisconsin franchise tax laws were not federalized for those years and did not recognize the benefits of sec. 168(f)(8), IRC.

The safe harbor leases entered into by the taxpayer as seller/lessee with the various buyer/lessors were substantially the same in form and effect. In each, specified property owned by the taxpayer was sold to the buyer/lessor for an amount equal to the original cost of such property to the taxpayer. An "initial payment" representing the price to be paid for the tax benefits (described in the safe harbor leases as a percentage of the original cost of such property) was made by the buyer/lessor to the taxpayer. The remainder of the purchase price was represented by a nonrecourse "installment obligation" owed by the buyer/lessor to the taxpayer over the term of the lease. The buyer then, as lessor, leased back to the taxpayer, as lessee, the same property for terms

ranging from 10 to 19.5 years. The "installment obligation" and the "rent" payable under the leases called for identical payments which offset each other without any requirement for actual payments to be made. Under the leases, the legal and equitable title to the property remained with the taxpayer. For all purposes other than federal income taxation, all burdens and benefits of ownership of the property remained with the taxpayer. The only money that changed hands between the taxpayer and the buyer/lessor was the initial payment.

From the taxpayer's standpoint, the purpose of the safe harbor lease transactions was solely to take advantage of sec. 168(f)(8), IRC, which allowed it to sell the federal tax benefits related to the equipment to another taxpayer. This allowed the taxpayer to realize immediate cash in lieu of the right to claim federal tax credits and federal depreciation deductions.

In conformity with the position of the department, stated in its July 1984 *Wisconsin Tax Bulletin* 38 tax release entitled "Wisconsin Tax Treatment of Safe Harbor Leases," the taxpayer for the years 1981 and 1982 did not claim a deduction for rent under the safe harbor leases, did not recognize any interest income under the installment obligations, and deducted depreciation based on its original cost of the property. However, contrary to the position expressed in the tax release, in 1981 and 1982, the taxpayer did not recognize the money, i.e. the initial payments, received in exchange for the transfer of the federal tax benefits as income to the taxpayer in those years.

Wisconsin did not, for the years 1981 and 1982, impose a franchise or income tax on the reduction in the amount of federal tax paid as the result of claiming federal tax credits or depreciation deductions.

The taxpayer contends that the initial payments received under the safe harbor leases are not properly treated as part of either allocable or apportionable income for Wisconsin franchise tax purposes.

The department contends that the money the taxpayer received as initial payments under the safe harbor leases are properly treated as apportionable income for the purposes of the Wisconsin franchise tax.

The Commission concluded that:

A. The initial payments received by the taxpayer under the safe harbor leases were for the sale of a property right associated with the leased equipment, namely the right to certain federal tax benefits, and as such constituted a partial recovery of the taxpayer's basis in the leased assets rather than gross income under sec. 71.03(1)(k), Wis. Stats. (1981).

B. The denominator of the taxpayer's sales factor used in its apportionment formula should be increased by the amount of the initial payments.

C. None of the initial payments is includable in the numerator of the taxpayer's sales factor because none of the property involved in the safe harbor lease transactions had a situs in Wisconsin.

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

Liquidating corporations. *Wisconsin Department of Revenue vs. Ins. Serv. Liquidating, Inc. and Insurance Services, Inc.* (Court of Appeals, District IV, January 6, 1992). The Circuit Court for Dane County issued a decision on July 23, 1991, which the taxpayer appealed to the Court of Appeals, in October 1991. See *Wisconsin Tax Bulletin* 75, page 12, for a summary of the July 23, 1991, decision.

The department and the taxpayer reached a settlement agreement in January 1992, and based on the agreement, the appeal was dismissed by the Court of Appeals on January 6, 1992. □

SALES AND USE TAXES

Occasional sales — business assets. *Carrion Corporation vs. Wisconsin Department of Revenue* (Circuit Court for Dane County, April 15, 1992). This is an action for judicial review of a decision by the Wisconsin Tax Appeals Commission (Commission), which sustained the department's sales and use tax assessment.

The issues in this case are:

A. Whether the taxpayer's sales of the assets of the retail division on January 17, 1983, and the assets of the commercial division on February 18, 1983, were exempt as occasional sales.

B. Whether the taxpayer was entitled to exemption of any portion of the sales price of either the retail division assets or the commercial division assets, because the bank to which the sales proceeds were assigned might not have received full payment of those proceeds.

C. Whether the measure of the sales tax on the commercial division sale was $400,000 as the taxpayer claims, or $458,100, as the department claims.

D. Whether the true seller of the retail and commercial divisions was the bank or the taxpayer.

E. Whether the taxpayer was liable for sales tax on miscellaneous equipment sales to out-of-state buyers occurring during the period October 23, 1981, through October 15, 1982.

F. Whether the taxpayer was liable for use tax on the taxpayer's purchases of property from out-of-state sellers during the calendar years 1979-82.

G. Whether the taxpayer should have been assessed a negligence penalty on the equipment sales in Issue E and on the equipment purchases in Issue F.

The taxpayer had conducted business through its retail and commercial divisions. The retail division provided laundry and dry cleaning services to hotels, restaurants and the general public through a network of stores and truck routes. The commercial division serviced mainly hospitals and nursing homes on a pick-up and delivery basis.

In early 1982, the taxpayer was in substantial default on its loans from its secured lender, the First Wisconsin National Bank of Milwaukee. The taxpayer maintains that the bank ordered it to liquidate its operations and that pursuant to the order, it sold the retail division's assets to D.S. Nicholas of Wisconsin, Inc. (Nicholas) on January 17, 1983, for $1,401,618, and the commercial division's assets to Tousey Laundry Corporation (Tousey) on February 18, 1983, for $600,000. The taxpayer received notes of $1,361,618 and $600,000 from the buyers which were then assigned to First Wisconsin.

Less than one hour before completing the sale to Nicholas, the taxpayer surrendered its seller's permit to the department, believing that both asset sales would qualify as occasional sales under sec. 77.51(10), Wis. Stats., and be exempt from sales tax under sec. 77.54(7), Wis. Stats. The taxpayer filed sales and use tax returns in January and February, 1983, and reported taxable sales for both months.

The department audited the taxpayer's sales and use tax returns for the period January 1, 1979 to February 18, 1983, and issued an assessment for additional sales and use tax as follows: (1) $30,126.65 for the sale of the retail division's assets; (2) $22,905.00 for the sale of the commercial division; (3) $5,883.34 for miscellaneous equipment sales in 1981 and 1982; and (4) $7,993.82 for out-of-state purchases of tangible personal property. The department also assessed a 25% penalty ($3,469.28) on items (3) and (4), under sec. 77.60(3), Wis. Stats.

The Circuit Court affirmed the Commission's decision, concluding that:

A. Substantial evidence supports the Commission's finding that the taxpayer was required to hold a seller's permit at the time of the asset sale and did not qualify for the occasional sale exemption.

B. The taxpayer failed to meet its burden of proof that it should be relieved of certain sales tax liabilities on the basis that accounts were worthless because the taxpayer never wrote off the accounts for income tax purposes and received full credit from First Wisconsin, which constituted valid consideration.

C. Substantial evidence supports the $458,100 measure of sales tax.

D. Substantial evidence supports the Commission's finding that the taxpayer was the true seller of the retail and commercial divisions, although the bank dictated the terms of the sale.

E. No credible evidence was presented to support the taxpayer's claim that certain sales were made outside Wisconsin.

F. In order for the taxpayer's out-of-state purchases to be exempt from use tax, the taxpayer would have to have been a nondomiciliary and the property purchased must not have been used in the taxpayer's Wisconsin business. The taxpayer did not claim either condition to be the case.

G. The Commission clearly acted within the range of discretion delegated by law when it determined that the taxpayer had not met its burden of proving that the inaccurate returns were due to good cause.

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

Telecommunication services — billing and collection services. *Wisconsin Bell, Inc., American Telephone and Telegraph Co., and AT&T Communications of Wisconsin, Inc. vs. Wisconsin Department of Revenue, and Mark D. Bugher* (Court of Appeals, District IV, July 25, 1991). See *Wisconsin Tax Bulletin* 75, page 14, for a summary of the July 25, 1991, decision.

The taxpayer appealed the Court of Appeals decision to the Wisconsin Supreme Court. The Supreme Court denied the petition for review on October 8, 1991. □

Waste reduction and recycling. *Wisconsin Department of Revenue vs. Parks-Pioneer Corporation* (Court of Appeals, Dis-

trict IV, June 25, 1992). This is an appeal from an order of the Circuit Court for Dane County, which found that certain machinery and equipment used in the taxpayer's business is exempt from Wisconsin sales and use taxes under the exemption for recycling activities set forth in sec. 77.54(26m), Wis. Stats. See *Wisconsin Tax Bulletin* 71, page 12, for a summary of that decision.

The issue in this case is whether the taxpayer's machinery and equipment purchases, and its purchase of engine starting fluid, come under the recycling exemption.

The taxpayer recycles solid waste. It prepares, sorts, weighs, and processes scrap metal for use by smelters, foundries, and steel mills. In 1984, 1985, and 1986, it purchased lugger boxes and roll-off boxes; tarps and bands to cover the lugger boxes; truck scales, including repair and replacement parts; platform scales; a dead-lift roll-off hoist mounted on one of its trucks; replacement hydraulic hose for its trucks; and starting fluid used to start crane engines. It paid no sales or use tax on those purchases.

The taxpayer uses the lugger and roll-off boxes solely to collect scrap metal at its suppliers' premises, to transport the scrap to its premises, and to deliver recycled metal to its customers. Customer delivery does not exceed 10% of the total use of the boxes. The record shows that the taxpayer places the boxes at scrap collection sites. It picks up the full boxes, leaves replacement boxes, and transports the scrap metal in the boxes to its premises.

Tarps and bands are used solely to cover the boxes to prevent the metal from falling out in transit. Truck and platform scales are used solely to weigh the metal to determine its purchase or sale price. Dead-lift roll-hoists are mounted on trucks and used to lift the boxes onto and off the trucks. Hydraulic hoses are replacement parts for the trucks. Starting fluid is used in cold weather to start engines on cranes the taxpayer has on its premises to move heavy pieces of scrap metal.

The recycling exemption applies to the gross receipts from the sale and use of "recycling machinery and equipment . . . exclusively and directly used for . . . recycling activities . . ." The department contends that the machinery and equipment at issue are not "exclusively and directly used for" the taxpayer's recycling business, and that the starting fluid is not machinery or equipment and, in any event, the fluid is not used in connection with the machinery or equipment coming within the exemption.

The Court of Appeals concluded that the machinery and equipment are not directly used for recycling activities, within the meaning of sec. 77.54(26m), Wis. Stats., and are therefore not exempt, and the starting fluid is not machinery, equipment, or parts therefor, and is not exempt under that statute.

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

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:

SALES AND USE TAXES

1 Advertising Material Printed Out-of-State and Delivered in Wisconsin

Statutes: Sections 77.51(22) and 77.53(2) and (3), Wis. Stats. (1989-90)

Background: In a decision dated July 27, 1982, the Wisconsin Court of Appeals, District IV, held in the case of *Wisconsin Department of Revenue vs. J.C. Penney, Inc.*, that a retailer's catalogs published by a printer located outside Wisconsin that did not have nexus in Wisconsin, and shipped directly to the retailer's customers in Wisconsin by mail or common carrier, were not subject to Wisconsin use tax. The Court concluded that J.C. Penney, Inc., had not "used" the catalogs in Wisconsin as defined in sec. 77.51(15), Wis. Stats. (1975-76). Because the catalogs moved by mail or common carrier from Minnesota to Wisconsin, they remained the property of the printer until they were delivered. Therefore, J.C. Penney, Inc., did not exercise any right or power over the tangible personal property in Wisconsin and was not subject to use tax on its purchase of the catalogs from the printer.

The department proposed sec. 77.51(15)(b), Wis. Stats., created by 1983 Wisconsin Act 27 (later renumbered sec. 77.51(22)(b) by 1983 Wisconsin Act 189), in an attempt to reverse the *J.C. Penney* decision and provide that for purposes of defining use, "'enjoyment' includes a purchaser's right to direct the disposition of property, whether or not the purchaser has possession of the property. 'Enjoyment' also includes, but is not limited to, having shipped into this state by an out-of-state supplier printed material which is designed to promote the sale of property or services, or which is otherwise related to the business activities, of the purchaser of the printed material or printing service."

However, in a decision dated May 21, 1985, the Circuit Court for Dane County in the case of *J.C. Penney, Inc., et al. vs. Wisconsin Department of Revenue*, held that the 1983 creation of sec. 77.51(15)(b), Wis. Stats., did not reverse previous court actions prohibiting the imposition of use tax on J.C. Penney, Inc., for catalogs it had printed by an out-of-state printer and sent to Wisconsin customers by mail or common carrier because J.C. Penney did not exercise any right or power over the catalogs. The department did not appeal this decision.

Section 77.53(2), Wis. Stats. (1989-90), imposes a Wisconsin use tax on every person storing, using, or otherwise consuming in Wisconsin tangible personal property purchased from a retailer.

Section 77.53(3), Wis. Stats. (1989-90), imposes a Wisconsin use tax on every retailer engaged in business in Wisconsin and making sales of tangible personal property for delivery into this state.

Facts and Question 1: Company ABC is a corporation with nexus in Wisconsin and is registered to collect Wisconsin sales or use tax. Company ABC contracts with Company XYZ (a Minnesota corporation that does not have nexus in Wisconsin and is not registered to collect Wisconsin use tax) to print some advertising flyers. Company XYZ produces the flyers, and upon the direction of Company ABC, mails the flyers by U.S. Mail to Company ABC's potential customers located in Wisconsin.

Is Company ABC subject to Wisconsin use tax under sec. 77.53(2), Wis. Stats. (1989-90), on its purchase of the advertising flyers from Company XYZ, which Company XYZ mailed to Company ABC's potential customers located in Wisconsin?

Answer 1: No. Since Company XYZ mails the flyers it prints by U.S. Mail directly to Company ABC's potential customers in Wisconsin, the flyers remain the property of Company XYZ until they are delivered to Company ABC's potential customers, at which time the flyers become the property of the potential customers. Therefore, Company ABC does not "use" the flyers it purchases from Company XYZ in Wisconsin based on the *J.C. Penney* decision dated May 21, 1985, and is not subject to Wisconsin use tax on its purchase of the flyers.

Note: This answer applies regardless of whether company ABC has nexus in Wisconsin.

Facts and Question 2: Assume the same facts as in Facts and Question 1, except that Company XYZ (the printer) has nexus in Wisconsin and is registered to collect Wisconsin use tax.

Is Company XYZ subject to Wisconsin use tax under sec. 77.53(3), Wis. Stats. (1989-90), for its sale of advertising flyers to Company ABC, which Company XYZ mails to Company ABC's potential customers in Wisconsin?

Answer 2: Yes. Section 77.53(3), Wis. Stats. (1989-90), provides that every retailer engaged in business in Wisconsin who makes sales of tangible personal property for delivery into Wisconsin is required to collect Wisconsin use tax from the purchaser. Company XYZ is engaged in business in Wisconsin (has nexus) and makes a sale of tangible personal property (flyers) which it has delivered into Wisconsin.

The *J.C. Penney* decision dated May 21, 1985, does not apply in this

situation, because the imposition of use tax is not based on use by the purchaser in Wisconsin, but rather on the sale of tangible personal property for delivery in Wisconsin by an out-of-state retailer engaged in business in Wisconsin.

Caution: If Company XYZ does not have nexus in Wisconsin and is not registered to collect Wisconsin use tax, the provisions of sec. 77.53(3), Wis. Stats. (1989-90), do not apply.

Note: The potential customers in Wisconsin are not subject to Wisconsin use tax for the flyers they receive because they are given away free to them; therefore, there are no gross receipts on which to impose the use tax. □

2 Processing Contaminated Soil

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

Wis. Adm. Code: Section Tax 11.68(10), June 1991 Register

Background: Section 77.52(2)(a)10, Wis. Stats. (1989-90), provides that except when installing tangible personal property which when installed will constitute a real property improvement, the service to or cleaning of tangible personal property is subject to Wisconsin sales or use tax. Therefore, when a person is servicing or cleaning tangible personal property which that person will install or reinstall, the servicing or cleaning is not subject to Wisconsin sales or use tax.

Soil, when removed from the earth, is tangible personal property. However, placing soil in its final resting place is a real property improvement.

Facts and Question 1: Company A is in the business of recycling or cleaning contaminated soil. Company A removes the soil from the earth, processes it to remove the contaminants through use of machinery at the site where the soil is removed, and replaces the processed soil back into the earth where it was removed.

Is the charge by Company A for this service subject to Wisconsin sales or use tax?

Answer 1: No. Company A is cleaning soil which is tangible personal property. However, since Company A places the soil in its final resting place, this constitutes a real property improvement. Therefore, the charge by Company A is not subject to Wisconsin sales or use tax.

Facts and Question 2: Assume the same facts as in Facts and Question 1, except that Company A loads the soil it removes from the earth onto its truck and transports the soil to its facility at a different location where the soil is processed. Once the soil is processed, Company A returns the soil to the location where it was removed and places the processed soil back into the earth.

Is the charge by Company A for this service subject to Wisconsin sales or use tax?

Answer 2: No. Company A is cleaning soil which is tangible personal property. However, since Company A places the soil in its final resting place, this constitutes a real property improvement. Therefore, the charge by Company A is not subject to Wisconsin sales or use tax.

Facts and Question 3: Company A removes soil from the earth for Company B and processes it to remove contaminants, but it does not place the soil back into the earth. Instead, Company B stores the soil for future use at some other location.

Is the charge by Company A for this service subject to Wisconsin sales or use tax?

Answer 3: Yes. Since Company A does not return the soil to its final resting place, it is performing a service to tangible personal property. The service to tangible personal property is subject to Wisconsin sales or use tax under sec. 77.52(2)(a)10, Wis. Stats. (1989-90).

Facts and Question 4: Company B contracts with Company C to have soil removed, cleaned, and placed back into the earth. Company C removes the soil from the earth and hauls it to Company A which Company C has contracted with to process the soil to remove contaminants. Company C hauls the soil back to where it was removed and places it in its final resting place.

A. Is the charge by Company A to Company C subject to Wisconsin sales or use tax?

B. Is the charge by Company C to Company B subject to Wisconsin sales or use tax?

Answer 4:

A. Yes. The charge by Company A to process the soil is subject to Wisconsin sales tax because Company A is performing a service to tangible personal property. It does not perform the real property improvement of placing the soil in its final resting place.

B. No. The charge by Company C is not subject to Wisconsin sales or use tax because Company C is performing a real property improvement. □

3 Purchases and Sales by Pet Stores, Pet Breeders, and Kennels

Statutes: Sections 77.52(1) and (15) and 77.53(1), Wis. Stats. (1989-90)

Wis. Adm. Code: Section Tax 11.12(2)(d), June 1991 Register

Background: Section 77.52(15), Wis. Stats. (1989-90), provides that if a purchaser who gives a resale certificate makes any use of the property other than retention, demonstration, or display while holding it for sale, lease, or rental in the regular course of operations, the use is taxable at the time of first use. The use tax is based on the purchase price of such property.

Facts and Question 1: When purchasing pet food and other pet supplies, a pet store owner gives its supplier a resale certificate, because most of the pet food and supplies are resold to customers. However, some of the pet food and supplies are used in the store to feed and take care of the pets which are held for sale.

Does the pet store owner owe use tax on the pet food and supplies used in feeding and caring for the pets in the store?

Answer 1: Yes. Although the pets are being held for sale, the pet food and supplies used in feeding and caring for them are used by the store owner and are subject to use tax under sec. 77.53(1), Wis. Stats. (1989-90). The use tax is based on the pet store's purchase price of such food and supplies.

Facts and Question 2: The XYZ Co. is in the business of breeding and raising dogs for sale. Are its purchases of dog food used in the business subject to sales or use tax?

Answer 2: Yes. Sales of tangible personal property are subject to sales or use tax under sec. 77.52(1) or sec. 77.53(1), Wis. Stats. (1989-90), unless an exemption applies. No exemption applies for purchases of such dog food. Since sec. Tax 11.12(2)(d), Wis. Adm. Code, June 1991 Register, specifically excludes from the definition of "farming" the raising of dogs, cats, or other pets, the farming exemption does not apply.

Facts and Question 3: ABC Kennels is in the business of boarding dogs and cats. Their services include feeding, grooming, supervision, and providing indoor and outdoor exercise areas. ABC Kennels purchases food which is used to feed the dogs and cats which customers bring to it for boarding.

A. Are the charges made by ABC Kennels to its customers for boarding dogs and cats subject to sales tax?

B. What is the sales and use tax treatment of the feed ABC Kennels purchases to feed the dogs and cats it boards?

Answer 3:

A. Yes. The boarding of dogs and cats is a service to tangible personal property which is taxable under sec. 77.52(2)(a)10, Wis. Stats. (1989-90).

B. By providing a properly completed resale certificate to its supplier, ABC Kennels may claim a resale exemption on feed for the dogs and cats it boards. This feed is considered to be transferred in conjunction with providing the taxable boarding service. □

4 Repair of Machinery and Equipment Purchased for Research and Development and Subsequently Used in Manufacturing

Statutes: Sections 77.52(2)(a)10 and 77.54(6)(a), Wis. Stats. (1989-90)

Background: Section 77.54(6)(a), Wis. Stats. (1989-90), provides an exemption from Wisconsin sales or use tax for gross receipts from the sale of or the storage, use, or consumption of machines and specific processing equipment and repair parts or replacements for such machines and specific processing equipment exclusively and directly used by a manufacturer in manufacturing tangible personal property and safety attachments for those machines and equipment.

Section 77.52(2)(a)10, Wis. Stats. (1989-90), provides that the gross receipts from the repair, service, alteration, fitting, cleaning, painting, coating, towing, inspection, and maintenance of tangible personal property are subject to Wisconsin sales or use tax, unless at the time of such repair, service, alteration, fitting, cleaning, painting, coating, towing, inspection, or maintenance the type of property repaired, serviced, etc., would have been exempt to the customer from sales or use tax.

Facts and Question 1: Company ABC is a new company that is experimenting with the development of a new product. Company ABC purchased various machinery and equipment during 1991 to research and develop the new product. The sale of the machinery and equipment to Company ABC was subject to Wisconsin sales or use tax.

On January 1, 1992, the research and development of the product is completed and Company ABC begins manufacturing the product. The ma-

chinery and equipment Company ABC purchased during 1991 that was used in the research and development of the product is now being used exclusively and directly in the manufacture of the tangible personal property.

Are the gross receipts from the repair, by a repair company, of the machinery and equipment used to manufacture the product exempt from Wisconsin sales or use tax on or after January 1, 1992 (the date when the machinery and equipment is first used exclusively and directly in manufacturing)?

Answer 1: Yes. The repair of the machinery and equipment on or after January 1, 1992, is exempt from Wisconsin sales or use tax. The repair is exempt from Wisconsin sales or use tax under sec. 77.52(2)(a)10, Wis. Stats. (1989-90), because, at the time of the repair it would have been exempt from Wisconsin sales or use tax under sec. 77.54(6)(a), Wis. Stats. (1989-90), if it had been purchased.

There is no requirement in sec. 77.52(2)(a)10, Wis. Stats. (1989-90), that the machinery and equipment had to have been used exclusively and directly in manufacturing at the time of purchase in order for the repair to be exempt from tax.

Facts and Question 2: Assume the same facts as in Facts and Question 1. Instead of having the repair of the machinery and equipment performed by another company, Company ABC performs its own repairs.

Is the sale of repair parts to Company ABC (that Company ABC uses to repair the machinery and equipment) exempt from Wisconsin sales or use tax on or after January 1, 1992 (the date when the machinery and equipment is first used exclusively and directly in manufacturing)?

Answer 2: Yes. The gross receipts from the sale of repair parts used to repair the machinery and equipment on or after January 1, 1992, are exempt from Wisconsin sales or use tax. The repair parts are exempt from Wisconsin sales or use tax under sec. 77.54(6)(a), Wis. Stats. (1989-90), because at the time the repair parts are used in repairing the machinery and equipment, the machinery and equipment is used exclusively and directly in manufacturing.

There is no requirement in sec. 77.54(6)(a), Wis. Stats. (1989-90), that the machinery and equipment had to have been used exclusively and directly in manufacturing when purchased in order for the exemption to apply to the repair parts. □

5 Sales and Purchases by School Districts

Statutes: Sections 77.52(2)(a) and 77.54(4), (7m), (9) and (9a), Wis. Stats. (1989-90)

Wis. Adm. Code: Section Tax 11.03, September 1991 Register

Background: Section 77.54(4), Wis. Stats. (1989-90), provides an exemption from Wisconsin sales or use tax for sales of tangible personal property by an elementary or secondary school exempted as such from payment of income tax under ch. 71, Wis. Stats. (1989-90), whether public or private.

"Elementary school" is defined in sec. Tax 11.03(1)(a), Wis. Adm. Code, as any school providing any of the first 8 grades of a 12 grade system and kindergarten where applicable. "Secondary school" is defined in sec. Tax 11.03(1)(a), Wis. Adm. Code, as a school providing grades 9 through 12 of a 12 grade system and includes the junior and senior trade schools described in sec. 119.30, Wis. Stats. (1989-90).

Section 77.54(9), Wis. Stats. (1989-90), provides an exemption from Wisconsin sales or use tax for the gross receipts from sales of tickets or admissions to public and private elementary and secondary school activities, where the entire net proceeds therefrom are expended for educational, religious, or charitable purposes, provided that no part of the net earnings inures to the benefit of any private shareholder or individual.

Section 77.54(9a)(b), Wis. Stats. (1989-90), provides an exemption from sales or use tax for gross receipts from sales to, and the storage, use, or consumption of tangible personal property and taxable services by, any school district.

"School districts" is defined in sec. 115.01(3), Wis. Stats. (1989-90), as the territorial unit for school administration. School districts are classified as common, union high, unified, and 1st class city school districts.

Section 77.52(2)(a), Wis. Stats. (1989-90), provides that sales of certain services are subject to Wisconsin sales or use tax. Specifically excluded are sales of accommodations for periods of less than one month when furnished by corporations or associations organized and operated exclusively for religious, charitable, or educational purposes, provided that no part of the net earnings inures to the benefit of any private shareholder or individual.

Sales by School Districts

Question 1: Are sales of tangible personal property by a school district subject to Wisconsin sales or use tax?

Answer 1: No. Sales of tangible personal property by a school district are not subject to Wisconsin sales or use tax.

The exemption in sec. 77.54(4), Wis. Stats. (1989-90), for sales of tangible personal property by elementary and secondary schools also applies to school districts.

Example: Sales or rentals of the following tangible personal property by a school district are not subject to Wisconsin sales or use tax (this list is not all-inclusive):

A. Books, yearbooks, annuals, magazines, directories, bulletins, papers, or similar publications.

B. Pens, pencils, and other school supplies.

C. School lunches and vending machine items.

D. Photocopies.

E. Used school equipment such as desks, computers, televisions, furniture, cabinets, and blackboards.

F. Band uniforms and musical instruments.

G. Athletic uniforms and sports equipment.

H. Cars used in driver's education.

I. The transfer of building materials to a contractor, which the contractor will use in real property construction, in exchange for a reduction in the contract price to the school district.

Question 2: Are the sales of services under sec. 77.52(2)(a), Wis. Stats. (1989-90), by a school district subject to Wisconsin sales or use tax?

Answer 2: Yes, except the following are not taxable:

A. Sales of tickets or admissions to public and private elementary and secondary school activities (including school district activities) where the entire net proceeds therefrom are expended for educational, religious, or charitable purposes. (Note: There is no requirement that the sale of tickets or admissions be made by an elementary or secondary school to qualify for the exemption from Wisconsin sales and use tax under sec. 77.54(9), Wis. Stats. The only requirements of the statute are that the sale of tickets or admissions be for a school activity and that the proceeds be used for educational, religious, or charitable purposes.)

B. Occasional sales. For more information about the occasional sales exemption, refer to Wisconsin Publication 206, *Sales Tax Exemption for Nonprofit Organizations*.

C. Accommodations furnished by schools or school districts organized and operated exclusively for religious, charitable, or educational purposes, provided no part of the net earnings inures to the benefit of any private shareholder or individual.

Example 1: The following services sold by a school district are subject to Wisconsin sales or use tax (this list is not all-inclusive):

A. Rentals of auditoriums or gymnasiums, including any charges for lights, heat, janitor fees, and equipment, when used by persons for their own recreation, entertainment, or amusement where the renter does not charge an admission.

B. Admissions to recreational facilities such as golf courses, swimming pools, ball fields, and gymnasiums which are open to the general public for recreational purposes.

C. Providing parking or providing parking space for motor vehicles and aircraft, and docking or storage space for boats.

Example 2: The following services sold by a school district are not subject to Wisconsin sales or use tax (this list is not all-inclusive):

A. Admissions to school activities such as athletic events, art and science fairs, concerts, dances, films or other exhibits, lectures, and school plays, if the net proceeds are used for educational, religious, or charitable purposes.

B. Rental of auditoriums or gymnasiums, including any charges for lights, heat, janitor fees, and equipment, when used by a promoter or professional group which will sell admissions to the public for recreational, athletic, amusement, or entertainment purposes.

C. Library and book fines.

D. Tuition and course instruction fees.

E. Dormitory or housing charges and furnishing rooms to students and nonstudents.

Purchases by School Districts

Question: Are purchases of tangible personal property and taxable services by a school district subject to Wisconsin sales or use tax?

Answer: No, provided the school district gives its supplier a purchase order or similar document indicating the school district is the purchaser.

Example: Purchases of the following items by a school district are exempt from Wisconsin sales or use tax (this list is not all-inclusive):

A. Paper, pens, pencils, file folders, and other office supplies.

B. Office and school furniture.

C. Athletic equipment.

D. Musical instruments.

E. Computer equipment.

F. Meals and lodging. For information on sales of meals and lodging to employes of a school district, refer to the tax release on this subject which appeared in *Wisconsin Tax Bulletin* 58, page 21.

G. Landscaping services.

H. Printing services. □

6 Statute of Limitations When Person Reports Use Tax on Individual Income Tax Return

Statutes: Sections 77.58(3)(a) and (b) and 77.59(3) and (8), Wis. Stats. (1989-90)

Background: Section 77.58(3)(a), Wis. Stats. (1989-90), provides that every person who purchases tangible personal property or services, the storage, use, or other consumption of which is subject to use tax, and who has not paid the use tax due to a retailer required to collect the tax shall file a return to report the tax.

Prior to taxable year 1988, persons who were not required to hold a seller's permit, use tax registration certificate, or consumer use tax registration certificate, were required to report their Wisconsin use tax liability on Wisconsin Form UT-5, Consumer Use Tax Return.

Beginning with taxable year 1988, persons who do not hold a seller's permit, use tax registration certificate, or consumer use tax registration certificate may report Wisconsin use tax on Form UT-5 or on their Wisconsin individual income tax return (Form 1, 1A, WI-Z, or 1NPR).

Section 77.59(3)(intro.), Wis. Stats. (1989-90), provides that the department may make a determination of a person's sales and use tax liability if the department provides written notice to that person within 4 years after the due date of that person's income or franchise tax return or, if exempt, within 4 years of the 15th day of the 4th month of the year following the close of the calendar year or fiscal year.

Section 77.59(8), Wis. Stats. (1989-90), provides, in part, that if a person fails to file a report or return to report Wisconsin sales or use tax required, the department may determine the proper tax due at any time and without regard to when such failure occurred.

Question: For purposes of determining the period within which the department may determine a person's sales and use tax liability, is a sales and use tax return considered filed if an individual, who does not hold a seller's permit or use tax certificate, reports Wisconsin use tax on his or her Wisconsin individual income tax return?

Answer: Yes. If an individual reported sales/use tax on his or her Wisconsin individual income tax return, a sales and use tax return is considered filed for the period covered by the Wisconsin individual income tax return. The department must determine sales and use tax liability within the time period prescribed in sec. 77.59(3), Wis. Stats. (1989-90), unless the individual files a fraudulent return with the intent to defeat or evade the tax required. □

7 Taxability of Computer Programs (Software)

Statutes: Sections 77.51(14)(h) and (j) and 77.52(1) and (2)(a)10, Wis. Stats. (1989-90), and sec. 77.51(20), Wis. Stats. (1989-90), as amended by 1991 Wisconsin Act 269

Wis. Adm. Code: Section Tax 11.71, February 1986 Register

Note: This tax release supersedes the tax release titled "Taxability of Computer Software" that appeared in *Wisconsin Tax Bulletin* 72 (July 1991). It explains the Wisconsin sales and use tax treatment of the sale of computer programs.

"Sale" for purposes of this tax release includes the license or lease of computer software.

Background: Effective May 1, 1992, sec. 77.51(20), Wis. Stats. (1989-90), was amended by 1991 Wisconsin Act 269 to clarify that tangible personal property includes computer programs, except custom computer programs.

The determination of whether a computer program is a custom program is based on the criteria set forth in sec. Tax 11.71(1)(e), Wis. Adm. Code, and the Court of Appeals decision in *Wisconsin Department of Revenue vs. International Business Machines Corporation (IBM)* (June 23, 1988).

In the *IBM* decision, the Court of Appeals held that gross receipts from the license of made-to-order computer programs to Wisconsin customers were not subject to Wisconsin sales tax. The department appealed this

decision to the Wisconsin Supreme Court, but the petition for review was denied.

Since all computer programs, except custom programs, are tangible personal property, the sale of such computer programs is subject to Wisconsin sales or use tax under secs. 77.52(1) and 77.53(1), Wis. Stats. (1989-90), with one exception. Exception: Prior to May 1, 1992, the sale of computer software that is identical to the computer software that was at issue in the Circuit Court for Dane County decision of *Wisconsin Department of Revenue vs. B. I. Moyle and Associates, Inc.* (November 12, 1991), and is sold in the same manner as stipulated in the facts of the *B.I. Moyle* case, is not subject to Wisconsin sales or use tax. In the *B.I. Moyle* decision, the Circuit Court for Dane County held that the computer programs at issue were intangibles and not subject to taxation. The department withdrew its appeal to the Court of Appeals of this decision.

Facts and Questions: The following questions and answers illustrate the department's position regarding the taxability of sales of computer programs prior to and on or after May 1, 1992.

Facts and Question 1: Vendor SV-A develops and markets computer programs for users of computers that improve operating system performance and user productivity. The programs are system programs (i.e., basic operational programs as defined in sec. Tax 11.71(1)(c), Wis. Adm. Code), which activate and control the computer hardware. Other pertinent facts include:

a. The exact programs or modules sold by Vendor SV-A exist at the time that the customer places an order. Vendor SV-A does not change the preexisting programs or modules based upon the customer's data or specific hardware or software environment.

b. Vendor SV-A's salespersons determine which operating system program is appropriate for the customer's operating system environment when an order is placed.

c. A copy of the program in machine readable form is made by transferring a copy of the program from the master magnetic tape to a blank tape which is then sent to the customer.

d. Vendor SV-A instructs its customers to return the tape as soon as copies of the programs contained on the tape have been read into the customers' system. Vendor SV-A reuses the returned tapes to transmit the same or other programs to other customers.

e. The customer has the option of making their own backup copies of the programs on their own tape or other media.

f. Vendor SV-A does not load the programs into the customer's computer.

g. Vendor SV-A provides maintenance and improvements to these programs for most of its customers.

h. Vendor SV-A provides telephone support during and after installation.

Is the sale of the programs and maintenance of the programs by Vendor SV-A subject to Wisconsin sales and use tax?

Answer 1:

A. *On or after May 1, 1992*

Yes. The programs sold by Vendor SV-A are systems programs and are tangible personal property. Section Tax 11.71(1)(e)6, Wis. Adm. Code, specifically provides that custom programs do not include basic operational programs (commonly referred to as "systems programs"). Since the systems programs are not custom programs, they are tangible personal property under sec. 77.51(20), Wis. Stats. (1989-90), as amended by 1991 Wisconsin Act 269. Therefore, the sale of the programs and any maintenance associated with the programs are subject to Wisconsin sales or use tax.

B. *Prior to May 1, 1992*

No. The *B.I. Moyle* decision applies to the programs sold by Vendor SV-A because the stipulated facts of the *B.I. Moyle* decision are identical to the facts presented above (i.e., the computer programs sold are systems programs and the customer returns to Vendor SV-A, as instructed, the tape on which the programs were transmitted). The programs are intangibles and, therefore, the sale and maintenance of the programs are not subject to Wisconsin sales or use tax.

Facts and Question 2: Vendor SV-B sells programs which assist a computer's operating system in monitoring usage levels to help prevent system crashes. The programs are systems programs. Other pertinent facts include:

a. The exact programs or modules Vendor SV-B licenses exist at the time that the customer places an order. Vendor SV-B does not change the preexisting programs or modules based upon the customer's data or specific hardware or software environment.

b. Vendor SV-B's salespersons determine which operating system program is appropriate for the customer's operating system environment when an order is placed.

c. A copy of the program in machine readable form is made by transferring a copy of the program from the master magnetic tape to a blank tape which is then sent to the customer.

d. Vendor SV-B's customer copies the tape, retains the tape in a vault for two years as a backup, and then discards the tape when a new release is issued.

e. Vendor SV-B does not load the program into the customer's computer.

f. Vendor SV-B provides maintenance and improvements to these programs for most of its customers.

g. Vendor SV-B provides telephone support during and after installation.

Is the sale of the program and maintenance for the program by Vendor SV-B subject to Wisconsin sales and use tax?

Answer 2:

A. *On or after May 1, 1992*

Yes. The program sold by Vendor SV-B is a systems program. Section Tax 11.71(1)(e)6, Wis. Adm. Code, specifically provides that custom programs do not include basic operational programs (commonly referred to as "systems programs"). Since the systems programs are not custom programs, they are tangible personal property under sec. 77.51(20), Wis. Stats. (1989-90), as amended by 1991 Wisconsin Act 269. Therefore, the sale of the program and maintenance relating to the program are subject to Wisconsin sales or use tax.

B. *Prior to May 1, 1992*

Yes. The program sold by Vendor SV-B is a systems program. Section Tax 11.71(1)(e)6, Wis. Adm. Code, specifically provides that custom programs do not include basic operational programs (commonly referred to as "systems programs"). Section Tax 11.71(2)(b), Wis. Adm. Code, provides that the sale of basic operational programs is subject to Wisconsin sales or use tax.

The *B.I. Moyle* decision does not apply because the facts stipulated in the *B.I. Moyle* decision are not identical to the facts presented above (i.e., the customer is not instructed to and does not return to Vendor SV-B the tape on which the program was transmitted).

Facts and Question 3: Vendor SV-C sells utility programs, which capture and archive messages as jobs are run on mainframe computers. The prospective customer contacts Vendor SV-C, usually after reviewing a brochure or trade magazine. Other pertinent facts regarding these programs include:

a. Vendor SV-C's salespersons determine which operating system program is appropriate for the customer's operating system environment when an order is placed.

b. The programs exist at the time a customer places an order, and modifications are not made to any programs prior to the shipment of the program to the customer.

c. Programs are transferred to the customer on magnetic tape.

d. Vendor SV-C's customer copies the tape and returns the tape to Vendor SV-C as instructed.

e. No training is provided to the customer's personnel, although installation instructions and user instructions are included with the programs.

f. The programs are loaded, installed, and tested by the customer.

g. The program is licensed annually. Maintenance and enhancements are included in the license fee.

h. A customer may modify the programs; however, modifications to the object code (the program itself) voids the warranty.

i. Corrections to the programs are released as needed, usually every six months. Enhancements are issued about once a year.

Is the sale of the utility program by Vendor SV-C subject to Wisconsin sales or use tax?

Answer 3:

A. *On or after May 1, 1992*

Yes. Based on the criteria in sec. Tax 11.71(1)(e), Wis. Adm. Code, the computer programs are not custom programs. Therefore, the programs are tangible personal property, and the sale of the programs is subject to Wisconsin sales or use tax.

B. *Prior to May 1, 1992*

Yes. Answer 3.A. applies. The *B.I. Moyle* decision does not apply because the programs sold are not systems programs.

Facts and Question 4: Vendor SV-D sells computer systems for manufacturers and distributors. Vendor SV-D sells both the hardware and programs to a customer. The base price of the program is $20,000. The program is purchased independent of the hardware.

Other pertinent facts regarding Vendor SV-D include:

a. Prior to a sale, Vendor SV-D personnel spend 40 to 60 hours in meetings with the customer to determine the needs of the customer.

b. The systems sold are made up of several modules (programs). Each module requires some modification. A minor modification might require adding another field or changing the length of a field. A major modification might require changing the method of computing discounts. Major modifications take 160 person-hours or more.

c. Vendor SV-D will install and test the programs on a customer's system, which normally takes 20 to 40 hours.

d. Training is available and strongly recommended to customers.

e. Documentation provided to each customer includes a reference manual and actual source code (the programs). The documentation is customized for each system.

f. Vendor SV-D provides modifications to the programs as its principal form of maintenance. A modem is set up to enable Vendor SV-D's computer to talk with the customer's computer. When a problem is encountered, the customer contacts Vendor SV-D via a hotline. A technician at Vendor SV-D's headquarters can make changes to the customer's program, compile it, test it, and have it ready for the customer without leaving his or her desk. Telephone support constitutes 98% of the support provided.

g. Program upgrades are made periodically. These upgrades are purchased separately, usually at 10% of the current list price.

h. Maintenance is billed separately.

Are the programs and maintenance sold by Vendor SV-D subject to Wisconsin sales or use tax?

Answer 4:

A. *On or after May 1, 1992*

No. The programs as described above are "custom" programs for the following reasons:

1. Significant modifications are being made to virtually all programs to meet the specific needs of an individual customer.

2. The extent of useful enhancements and maintenance support far exceed that which would be required for "canned" programs.

"Custom" programs are not tangible personal property. Therefore, the sale of the program is not subject to Wisconsin sales or use tax. Since the sale of the program is not subject to tax, any maintenance to the program is not subject to tax under sec. 77.52(2)(a)10, Wis. Stats. (1989-90).

However, any charges for computer hardware are taxable.

B. *Prior to May 1, 1992*

No. Answer 4.A. applies.

Facts and Question 5: Vendor SV-E sells a computer program to Customer A (an accounting firm) for $65,000. Other facts include:

a. The program is a time/billing package used to track accountants' time and generate billings to clients.

b. The program is changed to meet the needs of Customer A. Modules are changed to customize fields (i.e. timekeeper numbers, matter numbers, account numbers, etc.), change field formats, and provide additional reports.

c. Changes are also made to conform the program to Customer A's operating environment. Interfaces to other program packages have been created. The program has been changed to accommodate Customer A's printing capabilities.

d. The program is loaded onto Customer A's system by Vendor SV-E, with the actual code transferred by magnetic tape.

e. Maintenance "fixes" are released as necessary. Enhancements are released on a quarterly or semi-annual basis.

Is the sale of the computer program and maintenance service for the computer program provided by Vendor SV-E subject to Wisconsin sales or use tax?

Answer 5:

A. *On or after May 1, 1992*

No. The programs are "custom" programs for the following reasons:

1. The program purchased by Customer A is unique as compared to

any other system sold by Vendor SV-E.

2. Modifications are made to the time and billing programs and other support programs based on the particular needs and system requirements of Customer A.

"Custom" programs are not tangible personal property. Therefore, the sale of the program is not subject to Wisconsin sales or use tax. Since the sale of the program is not subject to tax, any maintenance to the program is not subject to tax under sec. 77.52(2)(a)10, Wis. Stats. (1989-90).

B. *Prior to May 1, 1992*

No. Answer 5.A. applies.

Facts and Question 6: Vendor SV-F sells a data entry program to Customer B. The sales price of the program is $25,000. Other information regarding the data entry program sold to Customer B includes:

a. Vendor SV-F will discuss operational environment, types of programs and hardware, and current data entry methods with the customer. This involves telephone conferences and may involve on-site visits.

b. Pre-existing programs are modified to adjust for Customer B's current operating system. This is done by running several small programs (macros) which modify the existing modules.

c. Customer B can select specific modules to be added to the basic system.

d. The program can be transmitted by any magnetic media or by phone, but is usually transferred by magnetic tape.

e. Customer B installs the program per Vendor SV-F's written instructions. Phone assistance is provided if needed.

f. Maintenance is performed continuously. Enhancements are provided annually.

Is the sale of this program by Vendor SV-F to Customer B subject to Wisconsin sales or use tax?

Answer 6:

A. *On or after May 1, 1992*

No. Based on the decision in *IBM*, the sale is not subject to Wisconsin sales or use tax for the following reasons:

1. The program, as ordered by Customer B, does not exist prior to the time Customer B orders it.

2. Vendor SV-F analyzes Customer B's environment and fills the order by tailoring existing modules to fit this environment.

3. Maintenance to the programs is continuous, which is a trait of a custom program.

B. *Prior to May 1, 1992*

No. Answer 6.A. applies.

Facts and Question 7: Customer C purchased a spreadsheet program for $400 for use on its personal computer (PC). The program comes in a shrink-wrapped package and is available from many vendors.

Customer C's personnel installed the program on the PC. An installation program prompted the user for information such as type of monitor, type of printer, and default drive. Customer C's personnel took a course on how to use this program. In addition, several employes of Customer C spent in excess of 100 hours writing macros and designing templates which are used in conjunction with the program for budgeting, accounts receivable aging, inventory tracking, and other functions.

Is the sale of this computer program for $400 to Customer C subject to Wisconsin sales or use tax?

Answer 7:

A. *On or after May 1, 1992*

Yes. The spreadsheet program is not a custom program because:

1. The individual needs of Customer C were not considered in the design of the program.

2. The program existed at the time Customer C purchased the program.

3. The vendor makes no changes to the program because of Customer C's computer environment. The work done by Customer C's employes does not impact on the nature of the program. Any customizing, other than changes made by the vendor prior to the sale or license, does not affect the taxability of the sale.

Therefore, the program is tangible personal property, the sale of which is subject to Wisconsin sales or use tax.

B. *Prior to May 1, 1992*

Yes. Answer 7.A. applies.

Facts and Question 8: Customer D contracts with Vendor SV-G to obtain new computer programs for use on its mainframe computer. Included in the agreement are programs which will assist in the following areas:

a. Order entry and billing.
b. Accounts receivable.
c. Purchasing.
d. Accounts payable.
e. General ledger.
f. Financial reporting and budgeting.
g. Inventory control.
h. Product structure.
i. Materials planning.
j. Production scheduling.
k. Product standard costing.
l. Shop floor control.
m. Capacity planning.

After an extensive review by Customer D and a professional consultant (Consultant E) of products on the market, Customer D purchases computer programs from Vendor SV-G for $100,000.

Additional facts regarding these programs are as follows:

a. The programs purchased existed at the time Customer D placed the order. Vendor SV-G did not change the pre-existing programs based on Customer D's data or specific hardware or software environment.

b. The programs were shipped to Customer D via magnetic tape.

c. In order to make the programs useful to Customer D, extensive modifications were necessary. Customer D did not employ Vendor SV-G to install and modify the program. Instead, the testing and installation were initially completed by Consultant E.

d. Consultant E had difficulties in modifying the program to make it operational. After one year, only two of the modules were operational. The service contract with Consultant E was terminated.

e. After another unsuccessful attempt to get the system operational using another consulting company, Vendor SV-G was hired to modify the programs to make them operational. This occurred two years after the original license of the base programs.

Is the sale of these programs for $100,000 by Vendor SV-G subject to Wisconsin sales or use tax?

Answer 8:

A. *On or after May 1, 1992*

Yes. The programs are not custom programs based on the criteria set forth in sec. Tax 11.71(1)(e), Wis. Adm. Code:

1. Vendor SV-G sold pre-written programs "as is."

2. No changes were made by Vendor SV-G prior to the licensing to tailor the programs to Customer D's data or hardware or software environment.

Modifications made by Customer D or other third parties, subsequent to the initial licensing, do not impact on the determination of taxability at the time of sale.

Therefore, the programs are tangible personal property, the sale of which is subject to Wisconsin sales or use tax.

B. *Prior to May 1, 1992*

Yes. Answer 8.A. applies. □

8 Winterizing and Dewinterizing a Residence

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

Wis. Adm. Code: Section Tax 11.68, June 1991 Register

Background: Section 77.52(2)(a)10, Wis. Stats. (1989-90), provides that the gross receipts from the repair, service, alteration, fitting, cleaning, painting, coating, towing, inspection, and maintenance of all items of tangible personal property are subject to Wisconsin sales or use tax unless, at the time of such repair, service, etc., a sale of such type of tangible personal property would have been exempt from sales or use tax. The service, maintenance, etc., to real property is not a service subject to Wisconsin sales or use tax.

Section 77.52(2)(a)10, Wis. Stats. (1989-90), also provides that property which retains its character as tangible personal property for purposes of repair, service, maintenance, etc., includes (this list is not all-inclusive):

A. Water heaters.

B. Bathroom fixtures (this includes sinks, toilets, and bathtubs and related faucets).

C. Sinks.

Section Tax 11.68(5)(d), Wis. Adm. Code, provides that buildings and improvements to buildings, such as sanitation and plumbing systems, are real property.

Section Tax 11.68(6)(a)9, Wis. Adm. Code, provides that a mobile home located in a mobile home park on land owned by a person other than the mobile home owner is tangible personal property.

Section 77.54(31), Wis. Stats. (1989-90), provides that the sale of and the storage, use, or consumption of, but not the lease or rental of, used mobile homes that are primary housing units under sec. 340.01(29), Wis. Stats. (1989-90), are exempt from

Wisconsin sales or use tax. A mobile home exceeding 45 feet in length is considered a primary housing unit.

Facts and Question 1: Company ABC is a plumbing contractor. Company ABC will winterize and dewinterize Individual D's cottage in Wisconsin for a charge of $50.

Winterizing the cottage consists of:

A. Draining the water in the cottage's water heater.

B. Opening all water faucets in the cottage to allow water to drain.

C. Attaching a hose to the water heater and blowing air into the water heater that travels through the plumbing system in the cottage. Most of the water remaining in the pipes drains out the faucets.

D. Once it appears that no water is dripping from the faucets, antifreeze is poured into the sinks, toilet bowls, and tanks to prevent freezing of any water remaining in the pipes.

Dewinterizing the cottage consists of:

A. Closing all the water faucets prior to the water being turned on by the local utility.

B. Once the water is turned on by the local utility, the water pipes within the plumbing system of the cottage are checked for any water leaks.

Is the charge by Company ABC for winterizing and dewinterizing Individual D's cottage subject to Wisconsin sale tax?

Answer 1: No. Although Company ABC does provide service to tangible personal property when winterizing and dewinterizing the cottage (water heater, sinks, faucets, toilets), the primary purpose of the service is to ensure that no water is left in the pipes within the plumbing system (real property) that could cause damage. Because the service is to real property, it is not subject to Wisconsin sales tax.

Facts and Question 2: Assume the same facts as in Facts and Question 1 except that the winterizing and dewinterizing service is performed on a mobile home, not exceeding 45 feet in length, located on land in Wisconsin owned by someone other than the mobile home owner.

Is the charge by Company ABC for winterizing and dewinterizing the mobile home subject to Wisconsin sales tax?

Answer 2: Yes. The entire mobile home, including the plumbing system, is tangible personal property for purposes of repair, service, maintenance, etc. Therefore, Company ABC is performing a service to tangible personal property which is subject to Wisconsin sales tax under sec. 77.52(2)(a)10, Wis. Stats. (1989-90).

Note: If the mobile home was located on land owned by the mobile home owner, and was permanently affixed to the real estate, the winterizing and dewinterizing service is to real property and is not subject to Wisconsin sales or use tax.

Facts and Question 3: Assume the same facts as in Facts and Question 1 except that the winterizing and dewinterizing service is performed on a mobile home exceeding 45 feet in length, located on land in Wisconsin owned by someone other than the mobile home owner.

Is the charge by Company ABC for winterizing and dewinterizing the mobile home subject to Wisconsin sales tax?

Answer 3: No. Although the mobile home is tangible personal property, the sale of the mobile home, because it would be used and qualifies as a primary housing unit, is exempt from Wisconsin sales tax under sec. 77.54(31), Wis. Stats. (1989-90). Therefore, any service to the mobile home is exempt from Wisconsin sales tax as provided in sec. 77.52(2)(a)10, Wis Stats. (1989-90). □

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:

✵ **W9238011,** June 29, 1992

Note: This private letter ruling supersedes private letter ruling W9117003 dated February 5, 1991, which appeared in *Wisconsin Tax Bulletin* 72, p. 23, due to a change in position with respect to charges for the use of a cellular telephone.

Type Tax: Sales and Use

Issue: Exemptions — transportation service

Statutes: Sections 77.51(14)(intro.), 77.52(2)(a)5, (13), and (14), and 77.59(4), Wis. Stats. (1987-88)

This is in response to your request for a private letter ruling concerning chauffeured limousine services and supersedes the private letter ruling to you dated February 5, 1991.

Facts

Corporation B currently operates and has operated a chauffeured limousine service since June 1988. It has collected and remitted sales tax on its gross receipts from its services since that time.

Corporation B's limousine service consists of one stretched limousine that is provided to the general public complete with a licensed chauffeur for a specified date and time. The corporation owns the limousine and employs chauffeurs to drive the vehicle.

Corporation B's charge to the customer for the limousine is generally structured in one of three different ways:

1. A flat hourly fee, for example $40.00 per hour.

2. A fixed rate for a particular destination, for example, $115.00 one way to O'Hare Airport in Chicago, or $60.00 one way to Madison, Wisconsin.

3. As part of a package, including dinner for two at a restaurant and the limousine ride to and from the restaurant for a fixed package price of $79.95 Sunday through Thursday or $99.95 Friday or Saturday.

The stated prices do not include the tip to the chauffeur or use of the cellular phone at the rate of $1.00 per minute.

Bottles of champagne are available for an additional charge.

Request

Corporation B requests a ruling as to the sales and use taxability of providing this service/rental. In addition, if this is a nontaxable service may Corporation B file a claim for refund for sales taxes paid on this service since its inception in 1988.

Ruling

In general, the service Corporation B provides constitutes a nontaxable transportation service. However, the charge for dinner for two at the restaurant and charge for champagne are subject to Wisconsin sales tax. The charge for the use of the cellular telephone is nontaxable. A reasonable allocation of the gross receipts must be made between the nontaxable transportation and telephone services and taxable sales of dinners and champagne for purposes of imposing Wisconsin sales tax.

The dinners and champagne Corporation B purchases and resells as part of the package may be purchased without Wisconsin sales tax with the use of properly completed resale certificates.

To the extent that any nontaxable transportation services and cellular telephone services, as identified in this ruling, were previously included in taxable gross receipts and the tax paid, Corporation B may file amended sales and use tax returns and claim a refund of such taxes paid.

Analysis

The first issue to be resolved is whether the taxpayer's operation is the rental of the limousine (tangible personal property) or a charge for providing a service.

Rule Tax 11.29(4), Wis. Adm. Code addresses the distinction.

> "(a) A person who uses the person's own equipment to perform a job and who assumes responsibility for its satisfactory completion shall be performing a service.
>
> (b) A person who furnishes equipment with an operator to perform a job which a lessee supervises and is responsible for the satisfactory completion of, shall be a lessor renting out such equipment. If it is customary or mandatory that the lessee accept an operator with leased equipment, the entire charge is subject to the tax. However, the operator's services shall not be taxable if billed separately and if a lessor customarily gives a lessee the option of taking the equipment without the operator.
>
> (c) Charges for the rental of motor trucks shall be taxable. However, if drivers are provided by the truck's owner to operate the trucks and the public service commission and the department of transportation's division of motor vehicles consider the arrangement a transportation service under statute or under rules adopted by either or both of those state agencies, the charges shall not be taxable."

Rule Tax 11.84(4)(a), Wis. Adm. Code, concerning aircraft states that transporting customers or property for hire is a nontaxable transportation service when the customer only designates the time of departure and destination while the owner retains control over the aircraft in all other respects.

Corporation B's trips clearly are a transportation service rather than the lease of tangible personal property. The driver retains control of the limousine at all times and assumes responsibility for the satisfactory completion of the trip.

Since we have determined that Corporation B is providing a nontaxable service, the second issue is whether it can file a claim for refund for sales taxes paid on the nontaxable transportation service since its inception in 1988.

Section 77.59(4), Wis. Stats. (1987-88), provides that at any time within four years after the due date of a taxpayer's income or franchise tax return, a person may file a claim for refund of taxes paid provided the person has not had a determination by the department by office audit or field audit.

Assuming Corporation B reports on a calendar year for income and franchise tax purposes and has not been subject to an office audit or field audit determination by the department, it has until March 15, 1993 to file a claim for taxes paid for 1988.

With respect to the charge for the use of the cellular telephone, the Wisconsin Public Service Commission considers limousine service providers consumers of the telephone services provided by telephone companies, rather than retailers of the telephone services they provide to their customers. The charge to the limousine service by the telephone company is subject to Wisconsin sales or use tax under sec. 77.52(2)(a)5, Wis. Stats. The charge by the limousine service to its customer is not subject to Wisconsin sales or use tax.

With regard to Corporation B's purchase of tangible personal property (meals and champagne) that it resells to its customers, section 77.51(14)(intro.), Wis. Stats., provides that "sale at retail" for purposes of imposing sales tax does not include items for resale. Section 77.52(13) and (14), Wis. Stats., provides for the use of a resale certificate when purchasing tangible personal property or taxable services without tax for resale. □

✵ **W9226010,** April 2, 1992

Type tax: Sales and Use

Issue: Leases and rental — tangible personal property in non-exempt use

Statutes: Sections 77.51(4)(a) and (14)(j) and 77.52(1), Wis. Stats. (1989-90)

This letter responds to your request for a private letter ruling regarding gross receipts for purposes of imposing Wisconsin sales tax.

Facts

ABC Company has entered into an agreement to lease certain computer equipment from a retailer registered to collect Wisconsin sales and use taxes. The lease provides for monthly payments on the financed equipment cost plus sales tax.

The lease agreement also provides that the "Lessee shall promptly reimburse Lessor for, or shall pay directly if so requested by Lessor, as additional Rent, all taxes, charges, and fees imposed or levied by any governmental body or agency upon or in connection with the purchase, ownership, leasing, possession, use or relocation of the Equipment . . ." In this instance, the lessor pays the personal property tax to the taxing agency and

in turn bills ABC Company for the amount of personal property tax.

Request

You ask the following:

1. Is the lessor correct in imposing Wisconsin sales tax on the charge to ABC Company for personal property tax paid by the lessor on computer equipment leased to ABC Company?

2. Do gross receipts for purposes of imposing Wisconsin sales tax include personal property taxes of leased property if ABC Company pays the taxes directly to the municipality?

Ruling

1. The lessor is correct in imposing Wisconsin sales tax on the charge to ABC Company for personal property taxes paid by the lessor on computer equipment being leased to ABC Company.

2. If the personal property tax is assessed and levied against the lessor by the taxing agency, ABC Company's payment of the tax is includable in the lessor's gross receipts, regardless of whether ABC Company pays the tax to the lessor or directly to the taxing agency. However, if the tax is assessed and levied against ABC Company, it is not includable in the lessor's gross receipts for purposes of computing its Wisconsin sales tax liability.

Analysis

Section 77.52(1), Wis. Stats. (1989-90), imposes a 5% sales tax on a retailer's gross receipts from the sale, lease, or rental of tangible personal property sold, leased, or rented at retail in Wisconsin.

Section 77.51(4)(a)(intro.) and 2, Wis. Stats. (1989-90), provides that "gross receipts" means the total amount of the sale, lease, or rental price from sales at retail of tangible personal property without any deduction for the cost of the materials used, labor or service cost, interest paid, or any other expense.

Under sec. 77.51(14)(j), Wis. Stats. (1989-90), "sale at retail" includes the lease of tangible personal property.

The personal property taxes paid by the lessor and passed on to the lessee or paid directly to the taxing agency by the lessee are an "expense" that may not be deducted from a lessor's lease price.

If the personal property taxes were assessed and levied on ABC Company, the tax paid by ABC Company does not fall within the definition of gross receipts of the lessor for purposes of imposing Wisconsin sales or use tax.

This position has been published in a tax release which appeared in *Wisconsin Tax Bulletin* 22, page 9, issued in April 1981. □

✵ **W9224009,** March 19, 1992

Type Tax: Fiduciary

Issue: Nonresident trusts — jurisdiction

Statutes: Section 71.14(1), (2) and (3), Wis. Stats. (1989-90)

This letter responds to the request for a private letter ruling regarding the income tax impact of changing the corporate trustee of the referenced trusts from Florida to Wisconsin.

Facts

There are presently the following trusts:

Trust No. 1: ABC Trust f/b/o GHI.

Primary Beneficiary: GHI, a resident of Florida.

Trust No. 2: ABC Trust f/b/o JKL.

Primary Beneficiary: JKL, a Wisconsin resident.

Trust No. 3: ABC Trust f/b/o MNO.

Primary Beneficiary: MNO, a Wisconsin resident.

Trust No. 4: DEF Residual Trust f/b/o GHI.

Primary Beneficiary: GHI, a resident of Florida.

Trust No. 5: DEF Residual Trust f/b/o JKL.

Primary Beneficiary: JKL, a Wisconsin resident.

Trust No. 6: DEF Residual Trust f/b/o MNO.

Primary Beneficiary: MNO, a Wisconsin resident.

The above trusts were created by ABC and DEF who, prior to their deaths, were Florida residents. The trusts were revocable at creation but became irrevocable on the decedents' deaths. Each trust specifically provides that it be construed and regulated by the laws of the State of Florida.

The corporate trustee or co-trustee of all the above trusts is XYZ Bank of Florida. Presently all decisions, administration, and records are in the state of Florida. The decedents' daughter, PQR, a Wisconsin resident,

is co-trustee of her mother's three trusts.

It is presently planned to change the corporate trustee, and UVW Trust Company of Wisconsin, is being considered as the new trustee.

Request

On behalf of the trusts, the request asks for a determination of the income tax impact if the Florida trusts are moved to a Wisconsin corporate trustee for administration and investment.

Ruling

A trust administered in Wisconsin, without regard to where or how initially created, is subject to Wisconsin income tax.

Analysis

Section 71.14, Wis. Stats. (1989-90), establishes income situs for estates and trusts. Section 71.14(1), Wis. Stats., provides that an estate is resident in the state where the decedent was domiciled. Section 71.14(2), Wis. Stats., as amended in 1989, pertains to trusts created by decedents. More specifically, the 1989 amendment clarifies that sub. (2) pertains only to trusts created by a Wisconsin resident decedent. The trust created by a Wisconsin decedent is considered resident in Wisconsin until it is transferred by the court having jurisdiction under sec. 72.27, Wis. Stats. (1989-90). Section 71.14(3), Wis. Stats., provides that all other trusts are resident where the trust is being administered.

The trusts, here under review, were created by Florida decedents and are presently administered in Florida. Under sec. 71.14(3), Wis. Stats., Wisconsin lacks nexus to tax the trusts. If and when the trusts are administered in Wisconsin, without regard to when created or where located, the trusts will be subject to Wisconsin income tax under sec. 71.14(3), Wis. Stats. □