



# Wisconsin TAX BULLETIN



## Surrendering Seller's Permit

See page 2.

## Some Taxpayers Will Receive a Postcard Instead of Forms

Certain taxpayers will not receive 1993 Wisconsin income tax booklets. Instead, they will receive a postcard which contains a removable name and address label.

After studying methods used by the Internal Revenue Service and other states to cut waste in the distribution of tax forms, the department decided to send postcards to certain individuals. The postcard recipients will be the approximately 250,000 individuals who used a paid preparer in filing a 1992 return which contained a federal Schedule C and/or F. These are the same individuals to whom the Internal Revenue Service sends postcards.

The postcard will include a tear-off order blank which can be mailed back to the department to request a booklet, if the recipient needs a tax booklet.

Use of the postcard is expected to reduce the number of tax booklets printed and decrease mailing costs. □

## Forms Changes for 1993

Following is a brief description of the major changes to the Wisconsin individual income tax forms for 1993.

- Check boxes are added to Form WI-Z to indicate whether filing status is "Single" or "Married filing joint return." Prior to 1993, only single persons could file Form WI-Z. Because married persons can now file Form WI-Z, the filing status check boxes are needed.
- A line is added to Form WI-Z (line 5) for claiming the married couple credit. A schedule for computing the credit is added to page 2 of Form WI-Z. These changes are needed because married persons can now file Form WI-Z.
- Line 2 of Schedule 3 of Form 1 (also Schedule 1 of Form 1NPR) is revised to reflect the Wisconsin law change which eliminated the \$1,200 limitation on the amount of "other interest" which can be used in computing the Wisconsin itemized deduction credit.

Proof copies of the 1993 Forms WI-Z, 1A, 1, and 1NPR, as well as the homestead credit and farmland preservation credit claim forms, Schedule H and Schedule FC, are on pages 35 to 48 of this Bulletin. The copies are subject to further revision. □

## Law Firms May Owe Use Tax

Although there is no sales tax on legal services provided by law firms, many purchases by law firms may be subject to use tax.

Use tax, which is often overlooked, applies to purchases of taxable tangible personal property and taxable services, upon which no sales or use tax is paid to the seller.

Examples of purchases which may be subject to use tax include:

- Computers and related equipment such as printers, modems, etc.
- Software (excluding custom software)
- Office furniture and equipment, including built-in bookcases, cabinets, and counters
- Research materials and reference books
- Paper and other office supplies
- Gifts and promotional items

If the law firm holds a seller's permit, it should report use tax owed on its sales and use tax return, Form ST-12. If the firm is not required to hold a seller's permit and regularly makes purchases subject to use tax, it should apply for a consumer use tax registration certificate. If a law firm is not required to have such a permit or certificate, but makes infrequent purchases subject to use tax, the use tax may be reported on a consumer's use tax return, Form UT-5.

## In This Issue

	Page		Page
Some Taxpayers Will Receive a Postcard Instead of Forms	1	Bulk Order of Tax Forms	6
Forms Changes for 1993	1	Tax Publications Available	6
Law Firms May Owe Use Tax	1	IRS 1993 Mileage Rate Applies for Wisconsin	7
Adams County Adopts County Sales Tax	2	Magnetic Media Filing Re- quired for Some Forms	7
Requirement to Surrender Seller's Permit Eliminated	2	PartnerCare Enrollment Cards Mailed	7
New Sales and Use Tax Laws Explained	2	Over 1.7 Million Refunds Issued	8
Focus on Forms: Married Couples May File Form WI-Z for 1993	3	Endangered Resources Con- tributions Decrease to \$610,000	8
Educational Assistance Pay- ments May Be Taxable Wag- es	3	Taxpayers Designate \$378,824 to State Election Campaign Fund	8
Information or Inquiries?	4	Administrative Rules in Pro- cess	8
Annual Bulletin Index Avail- able	4	Recently Adopted Rules Summarized	10
Topical and Court Case Index Available	4	Report on Litigation	12
Need a Speaker?	4	Tax Releases	16
Department Does Business Electronically	5	Private Letter Rulings	32
1993 Package WI-X Will Be Available	6	Proof Copies of Forms	35
		Publication 509	49
		Sales and Use Tax Report	51
		Order Blank	55

Consumer's use tax returns and appli-  
cations for seller's permits and use  
tax registration certificates are avail-  
able from any Department of Revenue  
office. ☐

### Wisconsin Tax Bulletin

*Published quarterly by*  
Wisconsin Department of Revenue  
Income, Sales, and

Excise Tax Division  
P.O. Box 8933  
Madison, WI 53708-8933

*Subscriptions available from*  
Wisconsin Department of  
Administration

Document Sales  
P.O. Box 7840  
Madison, WI 53707-7840

*Annual cost \$7.00*

## Adams County Adopts County Sales Tax

Effective January 1, 1994, the county  
sales and use tax will be adopted by  
Adams County. This brings to 44 the  
number of counties that have adopted  
the ½% county tax.

The December 1992 *Sales and Use  
Tax Report*, a copy of which appeared  
in *Wisconsin Tax Bulletin* 80 (January  
1993), pages 45 to 48, explains how  
the county tax applies to retailers and  
other persons. It includes a listing of  
the counties that currently have the  
county tax. ☐

## Requirement to Surrender Seller's Permit Eliminated

The sale of tangible personal property  
(other than inventory held for sale)  
previously used by a seller to conduct  
its business at a location, is exempt  
from Wisconsin sales and use tax as  
an occasional sale if it meets the  
following condition:

- The sale of tangible personal prop-  
erty occurs after the seller ceases  
actively operating as a seller of  
tangible personal property or  
taxable services at that location.

This exemption applies to sales of  
tangible personal property meeting  
the above condition if the last sale of  
that property occurs after August 12,  
1993, regardless of whether the seller  
ceased actively operating the business  
before or after August 12, 1993.

Under prior law, the seller was also  
required to deliver its seller's permit  
to the department for cancellation  
within 10 days after the last sale of  
tangible personal property at that  
location to qualify for the occasional  
sale exemption. ☐

## New Sales and Use Tax Laws Explained

The Wisconsin Legislature enacted  
many changes to Wisconsin tax laws  
in 1993, as described in *Wisconsin  
Tax Bulletin* 83, dated August 1993.  
The September *Sales and Use Tax  
Report* gives explanations of the  
major changes to the sales and use tax  
laws. See pages 51 to 54 of this  
Bulletin for a copy of the Report,  
which was sent in September to all  
active sales and use tax registrants. ☐

## Focus on Forms: Married Couples May File Form WI-Z for 1993

Married couples who file their 1993 federal income tax return on federal Form 1040EZ may file their Wisconsin income tax return on Form WI-Z.

1993 is the first year in which married persons may file federal Form 1040EZ. Several changes have been made to Wisconsin Form WI-Z so that these same persons may file on Form WI-Z.

A check box has been added to Form WI-Z to indicate whether filing status is "Single" or "Married

filing joint return." (See Form WI-Z inserts below.)

In addition, line 5 has been added to Form WI-Z for claiming the married couple credit. A schedule for computing the married couple credit is included on page 2 of Form WI-Z.

These changes will allow more than 24,000 married couples to use the Form WI-Z rather than the more complex Form 1 or 1A. A complete copy of the 1993 Form WI-Z is included on pages 35 and 36 of this Bulletin.

### WI-Z Wisconsin income tax

# 1993

Filing status  
(check only  
one box)

- ☐ Single  
☐ Married filing joint return (even if only one had income)

5 Married couple credit. Complete schedule on reverse side .....5

#### SCHEDULE - MARRIED COUPLE CREDIT WHEN BOTH SPOUSES ARE EMPLOYED

	Yourself	Your Spouse
1. Wages* ..... 1a	1b	
2. Fill in smaller of line 1a or 1b. If more than \$15,000, fill in \$15,000 ..... 2		
3. Rate of credit is .02 (2%) ..... 3		x .02
4. Multiply line 2 by line 3. Do not fill in more than \$300 ..... 4		

\* Include wages, salaries, and tips from line 2 of federal Form 1040EZ. Do not include taxable scholarships and fellowships (unless they were reported on your W-2) or interest income.

## Educational Assistance Payments May Be Taxable Wages

### Wisconsin Doesn't Follow IRC Section 127

For the tax year 1993, Wisconsin's individual income tax law prohibits the use of Internal Revenue Code (IRC) section 127. This IRC section provides an exclusion from 1993

federal taxable income for up to \$5,250 of benefits an employee receives under an employer's educational assistance program.

### Effect of Not Following Federal Law

For Wisconsin, educational assistance payments do not qualify for the \$5,250 exclusion under IRC section 127. As a result, for Wisconsin purposes employers must treat educa-

tional assistance payments made in the tax year 1993 as additional wages to the employee, unless the payment qualifies as a "working condition fringe benefit," as explained below.

Employees who receive educational assistance benefits treated as wages must include the amount of the benefit in taxable income on their 1993 Wisconsin income tax returns.

### Working Condition Fringe Benefit Not Treated as Wages

IRC section 132(d) defines a "working condition fringe benefit" as property or services provided to an employee which, if paid for by the employer, would be deductible by the employee as a trade or business expense. Educational expenses of employees are generally deductible as trade or business expenses if they (1) maintain or improve skills required in the employee's current employment, or (2) are required by the employer or by law as a condition of retaining the employee's job, status, or salary. However, educational expenses are not deductible if they are for education that (1) is needed to meet the minimum requirements for the job, or (2) are part of a program of study which leads to a new trade or business.

For example, payments for review courses to prepare for the bar examination or the certified public accountant (CPA) examination, and courses required as part of an apprenticeship program, do not qualify as a "working condition fringe benefit." Expenses for these courses are not deductible as a trade or business expense because the courses qualify the person for a new profession (in the case of the bar and CPA examination courses), or are needed to meet the minimum requirements for the job (in the case of the apprenticeship program).

Employer-provided educational assistance benefits which qualify as a "working condition fringe benefit" are *not* treated as wages to employees. This applies regardless of whether the employer pays the expenses directly to the educational organization or reimburses the expenses to the employee.

### Notify Employee On W-2 Wage Statements

Employer educational assistance payments made during 1993, which represent additional wages to an employee for Wisconsin purposes, can be reported to employees by either (1) including the amount which is taxable for Wisconsin purposes (but not taxable for federal purposes) in Box 17 of Form W-2, or (2) providing employees with a supplemental "Wisconsin only" W-2 with the taxable educational assistance benefits shown in Box 17.

The employee is required to include taxable educational assistance payments in taxable income on his or her 1993 Wisconsin income tax return. If the employee receives such payments and the taxable amount is different for Wisconsin and federal, the employee should use Wisconsin Schedule I (titled "Adjustments To Convert 1993 Federal Adjusted Gross Income And Itemized Deductions To The Amounts Allowable Under The December 31, 1992 Internal Revenue Code").

Employees may have questions as to why educational assistance benefits are taxable for Wisconsin and not for federal. It may be helpful to provide additional information (e.g., a flyer) with the W-2 to explain the difference between the Wisconsin and federal treatment of educational assistance benefits during 1993. ☐

### 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 Available

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* 82 (July 1993), pages 36 to 58, and includes information for issues 1 (October 1976) to 80 (January 1993). ☐

### Topical and Court Case Index Available

Are you looking for a convenient way to locate reference material so you can research a particular Wisconsin tax question? The *Wisconsin Topical and Court Case Index* will 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, 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 a supplement published in May.

To order your copy, complete the order blank that appears on page 55 of this Bulletin. The order blank may also be used for subscribing to the *Wisconsin Tax Bulletin* and for ordering the Wisconsin Administrative Code. ☐



### Need a Speaker?

Are you planning a monthly meeting or training program? The Wisconsin Department of Revenue provides speakers to business, community, and educational organizations.

Department representatives are available to speak on a variety of topics that can be targeted toward your group's particular areas of interest, including:

- New income and corporate tax laws.
- How sales tax affects contractors, landscapers, manufacturers, non-profit organizations, or businesses in general.
- What to expect in an audit.
- Common errors discovered in audits.
- Homestead credit.
- Farmland preservation credit.

To arrange for a speaker, please write to Wisconsin Department of Revenue, Speakers Bureau, P.O. Box 8933, Madison, WI 53708-8933, or call (608) 266-1911. □

## Department Does Business Electronically

The Wisconsin Department of Revenue (WDOR) is moving to the future in the way it receives and processes returns and payments. January 1993 marked the start of the department's expanded Wisconsin federal/state electronic filing program, while October 1993 marks the beginning of the electronic funds transfer program for withholding tax. Both of these applications offer the ease and accuracy of doing business electronically.

### Electronic Filing of Income Tax Returns

In a pilot project last filing season, electronic filing was expanded to include 277 preparers, to accept balance due returns, and to add direct deposit of Wisconsin electronic return refunds. Wisconsin's electronic filing program is piggy-backed on the federal program.

In the 1994 filing season (1993 returns), the department will accept an unlimited number of returns from participants. All interested federal electronic filers will be eligible. Wisconsin returns with extensions of time to file through August 15, 1994, will also be able to be filed electronically.

The process of filing electronically is:

1. You prepare the return and obtain the taxpayer's signature(s) on both federal and state signature documents.
2. You transmit both returns to the IRS Service Center in Austin, Texas.
3. IRS checks the federal return data to see if the return is acceptable and performs consistency checks between the state and federal returns (e.g. to make sure the two returns are for the same name, social security number, etc.)
4. When the IRS gives you an acknowledgement that the federal return is accepted, they also make the Wisconsin return file available for WDOR to retrieve.
5. After WDOR retrieves the Wisconsin return, it is edited to determine if there are entries for all necessary data fields. WDOR furnishes to the transmitter an acknowledgment of acceptance or rejection (including the reason for rejection) for each Wisconsin electronic return retrieved.
6. WDOR processes the return and either direct deposits or mails refund checks, if applicable, in about 4 to 10 days after retrieval from the IRS.
7. When you receive the Wisconsin acknowledgement of acceptance, you mail in the Wisconsin signa-

ture document and its attachments. Attachments may include Forms W-2, 1099R, or a copy of the taxpayer's extension of time to file.

Advantages to participating in the Wisconsin federal/state electronic filing program include the elimination of paper copying and sorting, speedier refunds for your customers (4-6 days for direct deposits and 7-10 days for paper checks), and improved accuracy.

### Electronic Funds Transfers

Beginning with withholding tax deposit reports, Forms WT-6, due after October 1, 1993, employers may voluntarily pay withholding tax by electronic funds transfer (EFT). All employers who file Forms WT-6 are eligible to use EFT. Employers who would like more information or who wish to participate in EFT should contact Carolyn Larson at the address or telephone number shown at the end of this article. A request to participate should be made at least 30 days before the deposit report is due.

EFT is a commonly accepted method of paying business obligations by an electronic transaction which flows through the automated clearing house (ACH) system. EFT is a simple process used instead of completing Form WT-6, writing a check for the amount due, and mailing them to the state's depository bank.

There are two types of EFT transactions:

1. **Credit** transactions are usually initiated by large employers using personal computers, modems, and software that can initiate ACH credits. The employer sends all the necessary reporting and payment information to its financial institution. The employer's bank account is charged for the amount

of payment and those funds, along with the return information, are routed electronically to the state's depository bank.

2. **Debit** transactions are initiated by contacting the state's data collection service and providing the return and payment information. The contact can be made by personal computer and modem, by touch tone telephone, or by calling a toll-free number and speaking to a data collection center operator. The data collection service sends a transaction through the ACH system to take the funds out of (debit) the employer's bank account. The funds and the reporting information are passed back through the ACH system to the state's depository bank.

You must initiate EFT transactions one banking day before the due date of a withholding tax deposit report. The funds transfer always occurs on the next banking day. You don't have to worry about slow mail delivery causing late charges to be assessed.

Other advantages of EFT include immediate proof of filing, no manual process of producing a paper check and entering it into your computer system, no physical handling of paper, and fewer errors.

In the future, corporation estimated tax, motor fuel, and other business taxes will be included in Wisconsin's EFT program.

#### For Additional Information

Find out how doing business electronically can streamline your business operations, provide proof of filing, and reduce your cost of doing business. For more information, or to participate in either electronic filing or electronic funds transfers, contact:

Carolyn Larson  
Wisconsin Department of Revenue  
PO Box 8903  
Madison WI 53708

Phone: (608) 264-6886

FAX: (608) 264-6884



### 1993 Package WI-X Will Be Available

The department will again be offering Package WI-X, which will contain actual size copies of most 1993 Wisconsin individual and fiduciary income tax, corporation franchise and income tax, partnership, estate tax, motor fuel tax, sales and use tax, and withholding tax forms.

Package WI-X should be available by January 31, 1994. 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 1993 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 1993 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 1993 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 1992 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. □

### Tax Publications Available

The Department of Revenue publishes over 35 publications that are available, free of charge, to taxpayers or practitioners. To order any of the publications, write or call Shipping and Mailing Section, Wisconsin Department of Revenue, P.O. Box 8903, Madison, WI 53708-8903 (telephone (608) 266-1961).

#### Number Title of Publication

- |     |  |
|-----|--|
| 102 | Wisconsin Tax Treatment of Tax-Option (S) Corporations and Their Shareholders    |
| 103 | Reporting Capital Gains and Losses for Wisconsin by Individuals, Estates, Trusts |
| 104 | Wisconsin Taxation of Military Personnel   |

109	Tax Information for Married Persons Filing Separate Returns and Persons Divorced	501	Field Audit of Wisconsin Tax Returns
111	How to Get a Private Letter Ruling From the Wisconsin Department of Revenue	502	Directory of Free Publications
112	Wisconsin's Individual Estimated Tax and Corporation Estimated Tax Programs	503	Wisconsin Farmland Preservation Credit
113	Federal and Wisconsin Income Tax Reporting Under the Marital Property Act	504	Directory for Wisconsin Department of Revenue
114	Wisconsin Taxpayer Bill of Rights	505	A Taxpayer's Appeal Rights of an Office Audit Adjustment
117	Guide to Wisconsin Information Returns	506	Taxpayers' Appeal Rights of Field Audit Adjustments
200	Sales and Use Tax Information for Electrical Contractors	507	How to Appeal to the Tax Appeals Commission
201	Wisconsin State and County Sales and Use Tax Information	508	Wisconsin Tax Requirements Relating to Nonresident Entertainers
202	Sales and Use Tax Information: Motor Vehicle Sales, Leases and Repairs	509	Filing Wage Statements and Information Returns on Magnetic Media
203	Sales and Use Tax Information for Manufacturers	600	Wisconsin Taxation of Lottery Winnings
205	Do You Owe Wisconsin Use Tax? (Individuals)	601	Wisconsin Taxation of Pari-Mutuel Wager Winnings
206	Sales Tax Exemption for Nonprofit Organizations	700	Speakers Bureau presenting ...
207	Sales and Use Tax Information for Contractors	W-166	Wisconsin Employer's Withholding Tax Guide <input type="checkbox"/>
210	Sales and Use Tax Treatment of Landscaping		
211	Sales and Use Tax Information for Cemetery Monument Dealers		
212	Businesses: Don't Forget About Use Tax		
213	Travelers: Don't Forget About Use Tax		
214	Do You Owe Wisconsin Use Tax? (Businesses)		
400	Wisconsin's Temporary Recycling Surcharge		
500	Tax Guide for Wisconsin Political Organizations and Candidates		

### IRS 1993 Mileage Rate Applies for Wisconsin

The optional standard mileage rate specified by the IRS for computing business automobile expenses for 1993 also applies for Wisconsin.

The IRS kept the 1993 rate the same as for 1992, 28¢ per mile for all business miles driven. 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 1993, the same as for 1992. However, no portion of the 28¢ per mile rate is considered to be depreciated

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 1993, also applies for Wisconsin.

For both federal and Wisconsin purposes, a rate of 9¢ per mile is used in 1993 to calculate automobile expenses for medical and moving expense deductions. ☐

### Magnetic Media Filing Required for Some Forms

Persons who are required to file federal wage statements and information returns on magnetic media with the Internal Revenue Service or Social Security Administration may also be required to file those forms on magnetic media with the Wisconsin Department of Revenue. Wisconsin Publication 509, *"Filing Wage Statements and Information Returns on Magnetic Media,"* describes what forms must be filed on magnetic media for Wisconsin, the magnetic media requirements, and when and where to file on magnetic media. A copy of Publication 509 is reproduced on pages 49 and 50 of this Bulletin. ☐

### PartnerCare Enrollment Cards Mailed

In October 1993, the department is mailing PartnerCare enrollment cards and an explanatory flyer to approximately 27,000 individuals. The mailing is based on a listing of 1992 homestead credit claimants and their spouses age 65 or older, whose household income for 1992 did not exceed \$19,154, and who were not mailed a PartnerCare card by the department in 1992.

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, expired December 31, 1992). The cards mailed out beginning October 1992, however, are "permanent" cards, with no expiration date. Individuals will no longer be issued a new card each year; the 125,000 persons who were mailed a card in October 1992 will not receive one this year.

To enable more eligible persons to receive a PartnerCare card, the homestead credit claim, Schedule H, includes 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 is 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 1,723,000 income tax refunds during the period July 1, 1992, to June 30, 1993, for an average refund of \$309. The average refund for the prior year was \$304.

There were 2,522,000 Wisconsin individual income tax returns filed during the 12 months ending June 30, 1993. This compares to 2,535,000 income tax returns filed for the prior 12 months. The 2,522,000 returns,

which included joint tax returns, were filed by 3,619,000 individuals.

An itemized deduction credit was claimed by 24% of the taxpayers on their 1992 returns. The average credit allowed was \$322, compared to an average credit of \$342 for the prior year.

There were 239,000 homestead credit claims and 24,500 farmland preservation credit claims filed during the year. This compares to 249,000 homestead credit claims and 25,000 farmland preservation credit claims filed for the prior year.

Homestead credit refunds averaged \$439 per claimant, an increase from the average refund of \$424 issued last year. About 49% 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 \$1,182 was issued to each claimant. The average payment for the prior year was \$1,188. ☐

### Endangered Resources Contributions Decrease to \$610,000

The 1992 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 1992 Wisconsin income tax returns filed, 56,574 taxpayers contrib-

uted \$609,549 to the Endangered Resources Fund. This compares with 1991 income tax returns, where 60,977 taxpayers contributed \$655,941. ☐

### Taxpayers Designate \$378,824 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, 1992, to June 30, 1993 (primarily 1992 tax returns), taxpayers designated \$378,824 to the election campaign fund on their Wisconsin tax returns. This compares to \$407,179 for the prior 12 months ending June 30, 1992. ☐

### Administrative Rules in Process

Listed below are proposed new administrative rules and changes 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, 1993, or at the stage in which action occurred during the period from July 2, 1993, to October 1, 1993.

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

9.67 Cigarette tax credit-R&R



# Rules Sent to Revisor of Statutes for Publication of Notice

- 11.04 Constructing buildings for exempt entities-A
- 11.27 Warranties-R&R
- 11.82 Mailing lists and mailing services-A

# Rules Sent to Legislative Committees

- 3.095 Income tax status of interest and dividends from municipal, state and federal obligations received by individuals and fiduciaries-R&R

# Rule Adopted But Not Yet Effective

- 2.07 Earned income tax credit-NR
- 2.13 Moving expenses-R
- 2.14 Aggregate personal exemptions-R
- 2.15 Methods of accounting for corporations-R
- 2.16 Change in method of accounting for corporations-R
- 2.165 Change in taxable year-R
- 2.19 Installment methods of accounting for corporations-R
- 2.20 Accounting for acceptance corporations, dealers in commercial paper, mortgage discount companies and small loan companies-R
- 2.21 Accounting for incorporated contractors-R
- 2.22 Accounting for incorporated dealers in securities-R
- 2.24 Accounting for incorporated retail merchants-R
- 2.25 Corporation accounting generally-R
- 2.26 "Last in, first out" method of computing inventory for corporations-R
- 2.51 Rent received by corporations from Wisconsin real estate-R
- 2.53 Stock dividends and stock rights received by corporations-R
- 2.56 Insurance proceeds received by corporations-R

- 2.57 Annuity payments received by corporations-R
- 2.60 Dividends on stock sold "short" by corporations-R
- 2.63 Dividends accrued on stock-R
- 2.65 Interest received by corporations-R
- 2.70 Gain or loss on capital assets of corporations; basis of determining-R
- 2.72 Exchanges of property by corporations generally-R
- 2.721 Exchanges of property held for productive use or investment by corporations-R
- 2.73 Involuntary conversion by corporations-R
- 2.75 Recoveries by corporations-R
- 2.76 Refunds of taxes to corporations-R
- 2.80 Improvements on leased real estate, income to corporate lessor-R
- 2.81 Damages received by corporations-R
- 2.83 Requirements for written elections as to recognition of gain in certain corporation liquidations-R
- 2.86 Income to corporations from cancellation of government contracts-R
- 3.01 Rents paid by corporations-R
- 3.05 Profit-sharing distributions by corporations-R
- 3.07 Bonuses and retroactive wage adjustments paid by corporations-R
- 3.08 Retirement and profit-sharing payments by corporations-R
- 3.09 Exempt compensation of military personnel-R
- 3.12 Losses on account of wash sales by corporations-R
- 3.14 Losses from bad debts by corporations-R
- 3.17 Corporation losses, miscellaneous-R
- 3.35 Depletion, basis for allowance to corporations-R
- 3.36 Depletion of timber by corporations-R

- 3.37 Depletion of mineral deposits by corporations-R
- 3.38 Depletion allowance to incorporated mines and mills producing or finishing ores of lead, zinc, copper or other metals except iron-R
- 3.43 Amortization of trademark or trade name expenditures — corporations-R
- 3.45 Bond premium, discount and expense — corporations-R
- 3.48 Deductions for research or experimental expenditures — corporations-R
- 3.52 Automobile expenses — corporations-R
- 3.54 Miscellaneous expenses — corporations-R
- 3.81 Occupational taxes paid by corporations-R
- 3.82 Evasion of tax through affiliated interests-R
- 5.01 Filing reports-R
- 11.67 Service enterprises-A
- 17.01 Administrative provisions-R
- 17.02 Eligibility-R
- 17.03 Application and review-R
- 17.04 Repayment of loan-R

# Rules Adopted and in Effect (including date of adoption)

- 11.15 Containers and other packaging and shipping materials-A (8/1/93)
- 11.66 Telecommunications and CATV services-R&R (10/1/93)

# Emergency Rules (including effective date)

- 9.67 Cigarette tax credit-R&R (9/1/93)

# Rules Withdrawn From Promulgation (including date withdrawn)

- 11.675 Janitorial services-NR (7/23/93)
- 11.68 Construction contractors-A (8/16/93)

□

## Recently Adopted Rules Summarized

Listed below is a summary of recent revisions to administrative rules. In addition to the summary, substantive changes and new text are reproduced. In the amendments, material lined through (~~lined through~~) represents deleted text, and underscored (underscored) material represents new text.

This issue includes information about sec. Tax 9.67, repealed and recreated as an emergency rule effective September 1, 1993, sec. Tax 11.15, amended effective August 1, 1993, and sec. Tax 11.66, repealed and recreated effective October 1, 1993.

**Tax 9.67 Cigarette tax credit.** Tax 9.67 is repealed and recreated as an emergency rule, to: 1) reflect the deletion of the term "meter impression" in the definition of "stamp" as a result of 1993 Wisconsin Act 16; 2) reflect the repeal of the requirement that the secretary prescribe rules describing security requirements, as a result of 1993 Wisconsin Act 16; 3) reflect a change in the required payment date for credit extended by the department; and 4) update language and style. The definitions of "cigarette tax stamp" and "cigarette tax stamp purchase" in the rule are deleted since they are either a repeat of statutory language or are unnecessary. The text of Tax 9.67 is as follows:

**Tax 9.67 Cigarette tax credit.** (s. 139.32(6), Stats.) (1) PAYMENT FOR CIGARETTE TAX STAMPS. Under s. 139.32(6), Stats., manufacturers and distributors having obtained a permit from the secretary of revenue may purchase cigarette tax stamps on credit. The credit extended by the department for any cigarette tax stamp purchase shall become due and payable upon the earlier of:

(a) Formal demand by the department.

(b) Fifteen days after the close of the month in which the indicia were received by the manufacturer or distributor.

(2) INVESTIGATION. The department may investigate the financial stability of the applicant and may deny credit to any permittee when there is any question of ability to pay as required in this section.

(3) CANCELLATION OR REVOCATION OF PRIVILEGE. The privilege granted to any distributor of making cigarette tax stamp purchases on credit may be canceled or revoked at any time at the discretion of the department.

**Tax 11.15 Containers and other packaging and shipping materials.** Tax 11.15 (title) is amended, to include previously omitted statutory references; (2)(k) and (2)(l) are renumbered (2)(j) and (2)(k), to provide for proper alphabetic order; and (7) is amended and (7)(b) is created, to clarify the department's position regarding charges for packaging materials in connection with the sale of tangible personal property, and to address the sales and use tax treatment of packaging materials returned by customers. The text of Tax 11.15 (title), (7), and (7)(b) is as follows:

**Tax 11.15 Containers and other packaging and shipping materials.** (ss. 77.51(4)(a) and (b) and (14)(intro.) and (j), 77.52(1) and (2)(a)10 and 77.54(3m) and (6)(b), Stats.)

(7) CONTAINERS SOLD. (a) If a ~~separate~~ charge is made by a seller or lessor of tangible personal property to a customer for packaging materials used in connection with the shipment of the property, the charge for packaging materials becomes a part of the selling price or rental charge ~~and is subject to~~

~~the tax. If the sale of the property shipped is not subject to or is exempt from tax, the charge for packaging materials is not subject to or is exempt from tax. If the sale of the property shipped is subject to tax, the charge for packaging materials is subject to tax. This paragraph is applicable to the taxation of packaging materials regardless of whether the charge for packaging materials is separately stated or not separately stated.~~

(7)(b) Any credit given by a seller or lessor to a customer for packaging materials used in connection with the shipment of property which the customer returns to the seller or lessor shall reduce the seller's or lessor's gross receipts subject to tax in the reporting period during which the materials are returned, if the seller or lessor included the selling price of the packaging materials in the gross receipts subject to tax, and the seller or lessor returns the tax to the customer.

**Tax 11.66 Telecommunications and CATV services.** Tax 11.66 is repealed and recreated, to reflect the creation of sec. 77.51(17m) and (21m), Wis. Stats. (1991-92), the amendment to sec. 77.52(2)(a)5, Wis. Stats. (1991-92), and the repeal of sec. 77.51(13p) and (14m), Wis. Stats. (1991-92), pursuant to 1991 Wisconsin Act 39, and to define private line service. The text of Tax 11.66 is as follows; examples and notes appearing in the rule are not reproduced here:

**Tax 11.66 Telecommunications and CATV services.** (ss. 77.51(17m) and (21m), 77.52(2)(a)5 and 12 and (am) and 77.54(24), Stats.) (1) DEFINITIONS. In this section:

(a) "Private line" means a dedicated local or interexchange channel provided for communication between 2 points without use of the

local or toll switching network, for the exclusive use of one or several customers.

(b) "Service address" has the same meaning as in s. 77.51(17m), Stats.

(2) GENERAL. The sale of telecommunications services, not including services paid for by the insertion of coins in a coin-operated telephone, is subject to Wisconsin sales or use tax if both of the following occur:

(a) The service originates in Wisconsin.

(b) The service is charged to a service address in Wisconsin, regardless of the location where that charge is billed or paid. These charges include:

1. Telephone calls or transmissions placed via dial 1 equal access systems in which the service provider identifies the telephone number of the line from which the call originates and the charge for that call is added to the account of the person responsible to pay that charge.

2. Telephone calls made from a location in Wisconsin other than the caller's own telephone for which the caller instructs the operator to charge the call to the caller's own telephone located in Wisconsin.

3. Telephone calls made from any location in Wisconsin by use of a credit card where the service provider issuing the credit card is also the dial 1 equal access service provider for the customer's telephone in Wisconsin and the charge for the call is made to the customer's account.

4. Telephone calls made from any location in Wisconsin by use of a credit card where the service provider issuing the credit card is

not the cardholder's dial 1 equal access service provider, but where the cardholder's telephone is in Wisconsin.

5. Service which originates in a local exchange in Wisconsin that does not provide dial 1 equal access.

(3) TAXABLE TELECOMMUNICATIONS SERVICES. Telecommunications services which are subject to Wisconsin sales or use tax include:

(a) Local and toll service and Wide-Area Telecommunications Service, or WATS, including intrastate private line service.

(b) Channel services.

(c) Telegraph services.

(d) Cable television system services, including installation charges.

(e) Teletypewriter services.

(f) Computer exchange services.

(g) Cellular mobile telecommunications services.

(h) Specialized mobile radio services and any other form of mobile one-way or two-way communications service.

(i) Stationary two-way radio services.

(j) Paging services.

(k) Facsimile, or FAX, transmission services.

(L) Teleconferencing services.

(m) Any other transmission of messages or information by electronic or similar means between or among points by wire, cable, fiber optics, laser, microwave, radio, satellite or similar facilities.

(4) NONTAXABLE SERVICES. Gross receipts from the sale or charge for the following services are not taxable:

(a) Interstate or international telecommunications service if the

service originates from another state or country or if the service originates in Wisconsin but is charged to a service address in another state or country.

(b) Basic or sophisticated emergency telephone system services provided by a telecommunications utility for which charges are levied pursuant to a county ordinance under s. 146.70(3), Stats.

(c) Access services, Measured Toll Service, or MTS, and Wide-Area Telecommunications Service, or WATS, services resellers purchase, repackage, and resell to customers.

(d) Interstate private line service, including tie lines and foreign exchange service, charged on a flat rate periodic basis.

(e) Nonmechanical telephone answering services.

(f) Transfers of services, commonly called "access services" to an interexchange carrier which permit the origination or termination of telephone messages between a customer in this state and one or more points in another telephone exchange.

(5) PURCHASES BY PERSONS PROVIDING SERVICE. Persons engaged in the business of providing communications services are consumers, not retailers, of the tangible personal property used in providing those services. The tax applies to the sale of property to them. However, s. 77.54(24), Stats., exempts "apparatus, equipment and electrical instruments, other than station equipment, in central offices of telephone companies, used in transmitting traffic and operating signals." □



## 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:

### Withholding Taxes

Withholding — personal liability

*Dean O. Chapman* (p. 12)

### Corporation Franchise and Income Taxes

Allocation of income — business income

Statute of limitations

*Port Affiliates, Inc.* (p. 13)

Apportionment — factors

Dividends — deductible dividends

Foreign source income

*NCR Corporation* (p. 13)

### Sales and Use Taxes

Occasional sales — business assets

*James M. Duex* (p. 13)

Occasional sales — business assets

*Reginald Licht* (p. 14)

Service enterprises — pet sitting

*Pet Vacations, Ltd.* (p. 15)

## WITHHOLDING TAXES

— Withholding — personal liability. *Dean O. Chapman vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission,

May 25, 1993). The issue in this case is whether the taxpayer is personally liable for unpaid withholding taxes of Creatiform Plastics Corp. for April 1987 and January through September 1989.

The taxpayer, as president and general manager who ran the day-to-day corporate operations, voluntarily entered into a "trust indenture" which purportedly transferred bill paying decision authority to the "trustee," even though the taxpayer continued to deposit funds in the corporate account and write checks therefrom to pay other creditors, including corporate employees, and ultimately sold all corporate assets to a third party, all while relying on allegedly fraudulent representations by the trustee, and all to the exclusion of corporate withholding tax payments due to the department.

The Commission concluded that the taxpayer is personally liable for the unpaid withholding taxes of Creatiform Plastics Corp.

The Commission has repeatedly held that, for the statutory penalty to be assessed against a person responsible for the payment of corporate taxes, the department must prove three elements: (1) authority to pay; (2) duty to pay; and (3) intentional breach of that duty.

**Authority.** This element is satisfied because, in spite of the taxpayer's claim that the trustee prevented him from paying the corporation's Wisconsin tax obligations, he continued to exercise his authority as a corporate officer to receive and deposit

monies into the corporate checking account and to sign checks drawn on it.

**Duty.** This element is satisfied because the taxpayer continued throughout the period under review to function as president and general manager of the corporation and, as such, was responsible for monitoring the trust indenture he had entered into and duty-bound to assure that corporate withholding tax obligations, both past and present, whether or not covered by the indenture, were satisfied according to law.

**Intentional Breach.** This element is satisfied because the taxpayer, as president and general manager, signed corporate checks and thereby participated in the decision to pay other creditors, including employees, while knowing that taxes were owing to the department. Consistent interpretations of both state and federal officer liability statutes have held that all that is necessary for intent to be proved is to show that there was a decision to use corporate funds to pay other creditors with knowledge of taxes being due.

As to the taxpayer's claim that the trust indenture relieved him of his authority or duty in connection with payment of the taxes in question, the Commission embraced the department's citation of *Collins v. U.S.A.*, 92-2 USTC ¶50351, at p. 85,144, citing *Moore v. Credit Information Corporation of America*, 673 F. 2d 208 (8th Cir. 1982), in support of the axiom that a debtor may not escape a debt by assigning it to another without the consent of the creditor. Here, there was no showing or even

any indication of the department's consent to the trust indenture.

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

## CORPORATION FRANCHISE AND INCOME TAXES

— **Allocation of income — business income; Statute of limitations.** *Port Affiliates, Inc., vs. Wisconsin Department of Revenue* (Circuit Court for Milwaukee County, May 11, 1993). This is a review of a decision of the Wisconsin Tax Appeals Commission (Commission). For a summary of the Commission's decision, see *Wisconsin Tax Bulletin* 78 (July 1992), page 6.

Three issues were decided by the Commission.

- A. Was the department's assessment against the taxpayer for 1984 barred by the four year statute of limitations, where the taxpayer received notice and assessment four years and two days after the department received the taxpayer's return? The Commission concluded that the assessment was not barred because notice was mailed by the department within the time allowed.
- B. Was the taxpayer's 1984-87 "investment" portfolio income, generated in larger part while the CEO responsible for the activities spent most of his time in Florida, apportionable? The Commission concluded that such income was apportionable.
- C. Were the taxpayer's 1984-87 office building losses from the atrium building apportionable? The Commission concluded that such losses were apportionable.

The Circuit Court concluded as follows:

- A. The undisputed record shows that the department gave timely notice by mailing the assessment on the last day permitted under the statute of limitations. The Commission's conclusion that the department's assessment is not barred by the statute of limitations is affirmed.
- B. There is sufficient evidence to support the Commission's finding of a minimum connection between the state and the taxpayer. The case *Allied-Signal, Inc., v. Director, Division of Taxation*, 112 S.C. 2251 (1992), must be distinguished from this case for the principal reason that due process prohibits a state from taxing a nondomiciled corporation for profits derived from activities conducted outside of the state. The department's conclusion that the investment arm was an integral part of the taxpayer's business is supported by credible evidence and meets the requirements of law to make its income apportionable under the applicable statute. The Commission's conclusion that the "investment" portfolio income is apportionable is affirmed.
- C. The comprehensive nature of the business activity of the taxpayer in creating, developing, and maintaining the atrium building make it an integral part of the whole operation. The Commission's conclusion that the 1984-87 rental losses were apportionable is affirmed.

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

— **Apportionment — factors; Dividends — deductible dividends; Foreign source income.** *Wisconsin Department of Revenue vs. NCR Corporation* (Circuit Court for Dane County, April 30, 1993). See *Wisconsin Tax Bulletin* 82 (July 1993), page 21, for a summary of the Circuit Court's decision.

The appeal status was unknown on the date the July 1993 *Wisconsin Tax Bulletin* was printed. Since that date, both the department and the taxpayer have appealed the Circuit Court's decision to the Court of Appeals. The department appealed the decision with respect to the issue of deductible dividends, and the taxpayer appealed the decision with respect to the inclusion of foreign-source interest and royalties in apportionable income. □

## SALES AND USE TAXES

— **Occasional sales — business assets.** *James M. Duex vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, June 29, 1993). This case was before the Commission on a motion for summary judgment filed by the department. The issue in this case is whether the taxpayer owes sales tax on his sale of business assets.

In September 1983, the taxpayer applied for and received a seller's permit for the Indianhead Motel located at 501 Summit Avenue, Chippewa Falls, Wisconsin. The taxpayer has owned and operated the Indianhead Motel continuously from August 1983, to the present.

In August 1987, the taxpayer applied for a seller's permit for Dixie's, a tavern located at 3 East Spring Street, Chippewa Falls, Wisconsin. The department issued the seller's permit in September 1987.

Dixie's tavern was operated under the taxpayer's ownership from August 1987 continuously until he sold that business operation on July 1, 1991.

On October 28, 1991, the taxpayer executed the final sales and use tax return and disposition of assets report, along with a cover letter, and mailed them to the department.

On November 18, 1991, the department mailed a copy of the disposition of assets report back to the taxpayer, requesting that he fill in certain information that he had omitted when originally preparing the report. On November 27, 1991, the taxpayer mailed to the department the disposition of assets report on which he reported a value of \$50,000 for the tangible personal property that was transferred to the purchaser when he sold the business assets of Dixie's tavern on July 1, 1991.

The taxpayer never notified the department of the sale of the personal property that comprised part of the business assets of Dixie's tavern prior to October 28, 1991. The taxpayer never notified the department that he had divested himself of ownership of Dixie's tavern and would no longer be operating as a retail seller at that location, prior to October 28, 1991. The taxpayer never sent a letter to or otherwise notified the department requesting cancellation of his seller's permit for Dixie's tavern, and the taxpayer never surrendered his seller's permit for Dixie's tavern to the department for cancellation.

The Commission concluded that the sale of the tangible personal property of Dixie's tavern on July 1, 1991, is subject to sales tax. The taxpayer does not qualify for the occasional sale exemptions under secs. 77.54(7) and 77.51(9)(a) and (am), Wis. Stats., since he did not surrender his seller's permit and did not even notify the department that he was out of

business until he filed his final sales and use tax return/disposition of assets report on or about October 28, 1991, more than three months after the transfer involved.

The taxpayer has not appealed this decision. ☐

**■ Occasional sales — business assets.** *Reginald Licht vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, June 29, 1993). The issue in this case is whether the taxpayer's sale of business assets qualified for exemption from sales tax as an "occasional sale," as defined in sec. 77.51(9)(am), Wis. Stats. (1991-92).

Upon application, the department granted a seller's permit to the taxpayer for the business he operated in Wausau, Wisconsin.

On April 10, 1989, the taxpayer, as the seller, and Peter Tangle, on behalf of Sterling Water, Inc., as the purchaser, entered into an agreement to purchase the taxpayer's business assets.

The written terms of the agreement established April 28, 1989, as the initial closing date for sale of the business. Additionally, the agreement provided for the proration of billing responsibilities, prepayments on services, and accounts receivable between the seller and the purchaser as of the closing date. The agreement terms placed closing on the sale contingent upon the purchaser successfully obtaining financing by the closing date.

The taxpayer ceased operating its business on April 30, 1989, and transferred possession of the business assets on May 1, 1989, at which date Sterling Water, Inc., began operating the business in its own right and not as an agent of the taxpayer.

The taxpayer and the purchaser entered into successive second and third written agreements to purchase dated June 26, 1989, and February 26, 1990, respectively. Each of these agreements comprised restatements of the prior existing agreements to purchase which were in effect as of the date each subsequent agreement was executed. The restated agreements to purchase were deemed necessary because of difficulties experienced by the purchaser in obtaining necessary financing. Both parties stipulate that the financing difficulties directly contributed to the inability of the parties to close the purchase under the contingent terms originally agreed upon, although the restated agreements of June 26, 1989, and February 26, 1990, omitted entirely the financing contingency clause contained in the original agreement to purchase.

Identical terms contained in the second and third agreements to purchase required both the taxpayer and the purchaser to maintain property and liability insurance in order to protect the respective interests of each party in the property of the business to be sold. Further, each of the restated agreements provided for the reversion of possession and operation of the business to the taxpayer in the event the sale transaction was not consummated on the closing dates contained in the agreements.

From May 1, 1989, through February 26, 1990, the purchaser maintained possession and operation of the business. The taxpayer maintained property and casualty insurance on the business property according to the requirements of the modified purchase agreements.

On February 26, 1990, the taxpayer and the purchaser signed a closing statement for the sale of the business. The taxpayer received from the purchaser payment of the sale price on

closing in the form of cash, purchaser payments to creditors, and a business note payable to the taxpayer signed by the purchaser.

Title to the business assets was conveyed to the purchaser at the February 26, 1990, closing along with a bill of sale and assignment of contract rights.

In a February 26, 1990, letter to the department, the taxpayer's representative, noted that the taxpayer had ceased the operation of its business on April 30, 1989, and that the sale of the business was closed as of the date of the letter. The letter also disclosed that Sterling Water, Inc. was the new owner of the business, and noted the taxpayer's surrender of its seller's permits effective as of 12:01 a.m. on February 26, 1990.

The department contends that the statutory language of sec. 77.51(14r), Wis. Stats., dictates the deemed completion of a sale of tangible personal property at the time and place where possession of the property is transferred by the seller to the purchaser. Possession of the taxpayer's business assets was transferred by the taxpayer to Sterling Water, Inc. on May 1, 1989. Because the taxpayer did not surrender his seller's permits until February 26, 1990, the department argues the taxpayer is not eligible for the occasional sales exemption for failure to surrender his seller's permits within the 10-day limitation period.

The Commission concluded that the taxpayer's "last sale" of its business assets took place on the date of the close of the sale, February 26, 1990, according to the statutory definitions found in secs. 77.51(9)(am) and 77.51(14), Wis. Stats. (1989-90).

The taxpayer's gross receipts from its sale of business assets are not subject

to state and county sales tax, as the transaction qualifies as an exempt occasional sale under sec. 77.54(7), Wis. Stats. (1989-90).

The issue of whether the seller surrendered his seller's permits "within 10 days after the last sale at that location of that personal property other than inventory held for sale" is resolved by a simple substitution of the statutory definition of "sale" found in sec. 77.51(14), Wis. Stats., for the occurrence of that word in the pertinent part of sec. 77.51(9)(am), Wis. Stats. The taxpayer's surrender of the seller's permits on February 26, 1990, was contemporaneous with the occurrence of the *last* of "any one or all of the following: the transfer of the ownership of, title to, possession of, or enjoyment of tangible personal property," as title and ownership of the taxpayer's business assets were transferred to the purchaser on that very day.

The department has not appealed this decision but has adopted a position of nonacquiescence in regard to the decision. The effect of the nonacquiescence is that the decision is not binding in other cases. □

— **Service enterprises — pet sitting.** *Pet Vacations, Ltd. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, May 24, 1993). The issue in this case is whether the taxpayer's pet sitting service is subject to sales tax.

On November 1, 1984, the taxpayer began operating a pet sitting service, arranging the placement of pets with pre-screened "sitters" in private homes. The taxpayer charged the pet owner a daily fee, some of which was in turn paid to the sitter. The daily fee covered no service other than sitting, although some sitters would walk the pets. Any food, food dishes,

litter box, scratching post, etc., were furnished by the pet owner, not by the sitter.

On November 1, 1988, the taxpayer applied for and received a seller's permit and began collecting and remitting sales taxes on its gross receipts. On March 18, 1992, the taxpayer was assessed sales tax on its gross receipts for the period from November 1, 1984 to October 31, 1988.

The department's position is that the taxpayer's pet sitting service constituted the "maintenance of ... tangible personal property" within the meaning of sec. 77.52(2)(a)10, Wis. Stats., and is therefore taxable. In addition, the department's assessment states that providing boarding services is taxable pursuant to sec. Tax 11.61(1)(b), Wis. Adm. Code.

The taxpayer argues that pet sitting is not "maintenance," that the language of the tax imposition statute is not sufficiently specific to include pet sitting, and that sec. Tax 11.61(1)(b), Wis. Adm. Code, cannot apply because no boarding services were provided.

The Commission concluded that the taxpayer's pet sitting service was not the sale of a service for the "maintenance of ... tangible personal property" within the meaning of the sales tax imposition statute, sec. 77.52(2)(a)10, Wis. Stats., and was not a taxable boarding service within the meaning of sec. Tax 11.61(1)(b), Wis. Adm. Code.

The department has not appealed this decision but has adopted a position of nonacquiescence in regard to the decision. The effect of the nonacquiescence is that the decision is not binding in other cases. □



## Tax Releases

*"Tax releases" are designed to provide answers to the specific tax questions covered, based on the facts indicated. In situations where the facts vary from those given herein, the answers may not apply. Unless otherwise indicated, tax releases*

*apply for all periods open to adjustment. All references to section numbers are to the Wisconsin Statutes unless otherwise noted.*

The following tax releases are included:

### Individual Income Taxes

1. Effect of Wisconsin Marital Property Law Where Spouses Have Separate Domiciles (p. 16)
2. Wisconsin Tax Treatment of Designated Settlement Funds (p. 17)

### Farmland Preservation Credit

3. Farmland Preservation Credit Eligibility and Paybacks for Transferred Property (p. 17)

### Corporation Franchise and Income Taxes

4. Accelerated Cost Recovery System (ACRS) Deductions (p. 18)
5. Making or Withdrawing an Election Not to Be a Tax-Option (S) Corporation for Wisconsin (p. 20)

6. Wisconsin Tax Treatment of Safe Harbor Leases (p. 22)

### Sales and Use Taxes

7. Credit for Tax Paid on Leased Vehicle Brought Into Wisconsin (p. 25)
8. Credit for Wisconsin Sales or Use Tax Paid on Tangible Personal Property Sold at Retail by Contractors (p. 26)
9. Effect of Motor Fuel Tax Refund on Computation of Gross Receipts and Sales Price (p. 27)
10. Machinery and Equipment Used to Convert Used Motor Oil to Heat (p. 29)
11. Manufacturing Exemptions As They Apply to Dental Labs (p. 29)

Reporting Under the Marital Property Act, for more information on marital income.)

During any period in which the husband and wife are not both domiciled in Wisconsin, income subject to Wisconsin tax is reported based on title and ownership under the common law property system.

**Example:** The wife is a full-year Wisconsin resident and the husband is a full-year Iowa resident for 1992. The wife earned wages of \$10,000 from employment in Wisconsin. The husband was self-employed in Iowa and had self-employment income of \$30,000. These types of income would generally be marital property income reportable half (\$20,000) by each spouse. However, because one spouse is a nonresident, the marital property law doesn't apply. The husband and wife may file a joint return (Form 1NPR) for Wisconsin or the wife may file a separate Wisconsin return (Form 1). The husband is not required to file a separate Wisconsin return. Regardless of whether the joint or separate return is filed, only the wife's wages of \$10,000 from her employment in Wisconsin are reportable to Wisconsin. (Note: If both spouses are nonresidents of Wisconsin, Form 1NPR is filed regardless of whether a joint or separate return is filed.)

**Facts and Question:** The facts are the same as in the above example except that the husband is a full-year resident of Arizona, which is a community property state. Does the fact that the nonresident spouse is a resident of a community property state have any affect on the amount of

## INDIVIDUAL INCOME TAXES

### 1 Effect of Wisconsin Marital Property Law Where Spouses Have Separate Domiciles

**Statutes:** Section 71.10(6)(d), Wis. Stats. (1991-92)

**Background:** Section 71.10(6)(d), Wis. Stats. (1991-92), provides that for Wisconsin income tax purposes, marital property law applies only for the period of time during which both spouses are domiciled in Wisconsin.

During any period that both husband and wife are domiciled in Wisconsin, income subject to Wisconsin tax is reported under marital property law. If separate Wisconsin income tax returns are filed, each spouse would report half of the combined marital property income, deductions, and credits and all of his or her own individual income deductions and credits. (See Publication 109, Tax Information for Married Persons Filing Separate Returns and Persons Divorced in 1992, or Publication 113, Federal and Wisconsin Income Tax



income taxable to Wisconsin by the resident spouse?

**Answer:** No. The fact that the non-resident spouse is a resident of a community property state has no effect on the amount of income taxable to Wisconsin by the Wisconsin resident spouse. In the above example, only the wife's wages of \$10,000 are taxable by Wisconsin, regardless of whether the husband is a resident of Iowa (a non-community property state) or Arizona (a community property state). □

## 2 Wisconsin Tax Treatment of Designated Settlement Funds

**Statutes:** Sections 71.01(5), 71.22(1), and 71.23, Wis. Stats. (1991-92)

**Background:** For federal income tax purposes, a "designated settlement fund" means any fund:

- established pursuant to a court order for the purpose of completely extinguishing a taxpayer's tort liability with respect to claims arising out of personal injury, death, or property damage;
- established for the principal purpose of resolving and satisfying present and future claims against a taxpayer, or any related person, arising out of personal injury, death, or property damage;
- administered by persons a majority of whom are independent of the taxpayer;
- funded only by transfers of qualified payments;
- in which the taxpayer, or any related person, has no beneficial interest in the income or corpus of the fund; and

- for which the taxpayer has made an election under sec. 468B of the Internal Revenue Code.

A designated settlement fund is taxed as a separate entity at the maximum federal rate applicable to trusts. The gross income of a designated settlement fund includes income from the investment of the fund's assets, but not "qualified payments" made to the fund. The only deductions allowed to the fund are administrative costs, including state and local taxes, and other incidental expenses of the fund, including legal, accounting, and actuarial expenses. To be deductible, the expenses must be incurred in connection with the operation of the fund and must be deductible in determining the taxable income of a corporation.

A designated settlement fund reports its income, deductions, and tax on federal Form 1120-DF, U.S. Income Tax Return for Designated Settlement Funds (Under Section 468B). For purposes of the administration of the federal income tax laws, a designated settlement fund is treated as a corporation.

**Facts and Question:** Wisconsin law does not specifically address the treatment of a designated settlement fund. There is no provision in the statutes to treat a designated settlement fund as a corporation.

What is the Wisconsin income tax treatment of a designated settlement fund?

**Answer:** For Wisconsin income tax purposes, a designated settlement fund is treated as a fiduciary, a trust. Therefore, the filing requirements, Wisconsin income computation, and administrative provisions for fiduciaries also apply to a designated settlement fund. The fund calculates its Wisconsin income tax using the rates applicable to fiduciaries in sec.

71.06(1), Wis. Stats. (1991-92). A designated settlement fund reports its Wisconsin net income and tax on Wisconsin Form 2, Fiduciary Income Tax Return.

Subchapters I and II of Chapter 71 of the Wisconsin Statutes provide for the taxation of individuals and fiduciaries. Under sec. 71.01(5), Wis. Stats. (1991-92), "fiduciary" has the same meaning as in the Internal Revenue Code. For federal income tax purposes, a fiduciary is a "guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person." □

## FARMLAND PRESERVATION CREDIT

### 3 Farmland Preservation Credit Eligibility and Paybacks for Transferred Property

**Statutes:** Sections 71.58(8) and 71.59(1)(b)(intro.) and 2 and (2)(a), Wis. Stats. (1991-92)

**Background:** Beginning with the 1991 taxable year, a farmland preservation credit claim may be filed any time up to four years after the unextended due date of the corresponding tax return. Section 71.59(2)(a), Wis. Stats. (1991-92). The computation of a farmland preservation credit is based in part on a claimant's property taxes accrued. Property taxes accrued are taxes levied on farmland and improvements owned by the claimant or the claimant's household during the year to which the claim relates. Section 71.58(8), Wis. Stats. (1991-92). One of the qualifications for receiving farmland preservation credit is that the property taxes for the year prior to the year to which the claim relates must be paid. Section 71.59(1)(b)(intro.) and 2, Wis. Stats. (1991-92).

Farmland preservation credit may be based either on farmland subject to exclusive agricultural use zoning, or on farmland subject to a farmland preservation agreement or a transition area agreement. If farmland is rezoned or an agreement is relinquished, secs. 91.19(7) and (8) and 91.77(2), Wis. Stats. (1991-92), provide that under certain circumstances a lien may be recorded against the property, for the total amount of farmland preservation credits received by all owners of the farmland during the last 10 years the land was eligible for the credits.

**Facts:** Farmer A owns farmland subject to exclusive agricultural use zoning in 1991. He has not paid his 1990 property taxes but otherwise qualifies for farmland preservation credit for 1991. In 1992 Farmer A sells the farmland to Farmer B, and Farmer B pays the delinquent 1990 taxes. In 1998, Farmer B has the land rezoned.

**Question 1:** After Farmer B pays the 1990 property taxes in 1992, may Farmer A file a 1991 farmland preservation credit claim, even though the prior year's taxes were paid by somebody else, and even though Farmer A no longer owns the property?

**Answer 1:** Yes. Since the requirement that the 1990 property taxes be paid has now been met and Farmer A meets all the other filing requirements, he may claim a 1991 credit any time before the filing deadline. There is no requirement that Farmer A must be the one to have paid the 1990 property taxes or that he must be the owner of the property at the time of filing the claim.

**Question 2:** After the land is rezoned, is Farmer B subject to the lien provisions, even though he never received any farmland preservation credits, and at the time he purchased

the farmland there were no credits previously allowed on the farmland?

**Answer 2:** Yes. The lien provisions apply to the owner of the farmland at the time an agreement is relinquished or land is rezoned, regardless of who received the farmland preservation credits, and regardless of whether any credits had been allowed on the land at the time of its purchase. □

## CORPORATION FRANCHISE AND INCOME TAXES

### 4 Accelerated Cost Recovery System (ACRS) Deductions

**Statutes:** Sections 71.01(4)(g)7 to 10, 71.02(1)(c)8 to 11, and 71.04(15), Wis. Stats. (1985-86), and secs. 71.26(2) and (3)(y), 71.365(1m), and 71.45(2)(a)7, Wis. Stats. (1991-92)

**Note:** This tax release applies to all corporations, other than certain public utilities, required to file a Wisconsin franchise or income tax return. It does not apply to telegraph, pipeline, gas, electric, steam, and telephone companies (as defined under sec. 76.02(4), Wis. Stats. (1983-84), and secs. 76.02(5b), 76.28(1)(e)1, 3, and 4, and 76.38(1)(c), Wis. Stats. (1985-86), except for specialized common carriers).

**Background:** Section 71.04(15)(b), Wis. Stats. (1985-86), provided in part that property located outside Wisconsin, and first placed in service on or after January 1, 1983, shall be depreciated under the Internal Revenue Code as amended to December 31, 1980, or under the Code as applicable to the determination of net income for 1972, at the option of the corporation. This applies to all corporations, including regular (C) corporations, insurance companies, tax-option (S) corporations, regulated

investment companies, and real estate investment trusts.

Sections 71.26(3)(y), 71.365(1m), and 71.45(2)(a)7, Wis. Stats. (1991-92), provide in part that property first placed in service between January 1, 1983, and December 31, 1986, that was depreciated under sec. 71.04(15)(b), Wis. Stats. (1985-86), must continue to be depreciated under the Code as amended to December 31, 1980.

Section 71.26(2)(a), Wis. Stats. (1991-92), provides in part that, in determining Wisconsin net income, federal net income must be adjusted (plus or minus) for an amount equal to the difference between the federal basis and Wisconsin basis of any asset sold, exchanged, abandoned, or otherwise disposed of in a taxable transaction during the taxable year.

These statutes specifically disallowed accelerated cost recovery system ("ACRS") deductions on certain property located outside Wisconsin.

In its decision in *Beatrice Cheese, Inc. vs. Wisconsin Department of Revenue* (February 24, 1993), the Wisconsin Tax Appeals Commission ruled that sec. 71.04(15)(b), Wis. Stats. (1985-86), and sec. 71.26(3)(y), Wis. Stats. (1991-92), discriminate against interstate commerce by providing a direct commercial advantage to businesses whose depreciable property is located in Wisconsin, in violation of the Commerce Clause of the United States Constitution.

The Commission stated that the effect of this differential treatment is to impose a higher franchise tax burden on a business solely because some or all of its depreciable property is located outside Wisconsin rather than in Wisconsin. It further stated this is clearly facial discrimination against

interstate commerce. The department has not appealed this decision.

Accordingly, a taxpayer may claim deductions under ACRS on assets located outside Wisconsin and placed in service in any year that ACRS is allowable under the Internal Revenue Code. However, if any years during which another depreciation method was utilized for Wisconsin franchise or income tax purposes are closed to adjustment by the statute of limitations, the difference between the federal and Wisconsin basis of an asset may not be accounted for until the asset is disposed of in a taxable transaction.

A taxpayer is not required to claim a deduction under ACRS. The depreciation method originally claimed, assuming it was properly determined, may be continued until the asset is fully depreciated, or is no longer in service.

**Facts and Question 1:** Corporation A filed its Wisconsin returns for the years 1983 through 1991 and claimed deductions under ACRS on all out-of-state property. The years 1983 through 1988 are closed to adjustment pursuant to sec. 71.77(2), Wis. Stats. (1991-92).

What does Corporation A need to do as a result of the *Beatrice Cheese Co.* decision?

**Answer 1:** No adjustments to Corporation A's returns are necessary. Although Corporation A filed its returns without complying with the provisions of sec. 71.04(15)(b), Wis. Stats. (1985-86), and sec. 71.26(3)(y), Wis. Stats. (1991-92), these sections were ruled to be unconstitutional by the Wisconsin Tax Appeals Commission. Therefore, Corporation A may continue to claim ACRS deductions on the property.

**Facts and Questions 2:** Corporation A filed its Wisconsin returns for the years 1983 through 1991 and claimed deductions under ACRS on all out-of-state property. All of the years are open to adjustment by a written agreement pursuant to sec. 71.77(5), Wis. Stats. (1991-92).

What adjustments, if any, will the department make to correct the old taxpayer's depreciation deduction upon completion of its audit?

**Answer 2:** The department will make no adjustments to place the taxpayer in compliance with sec. 71.04(15)(b), Wis. Stats. (1985-86), and sec. 71.26(3)(y), Wis. Stats. (1991-92), since these sections have been declared unconstitutional. However, the department could adjust a depreciation deduction to the extent it is not computed in compliance with the provisions of the Internal Revenue Code.

**Facts and Question 3:** Corporation A filed its Wisconsin returns for the years 1983 through 1991 and claimed deductions under ACRS on all out-of-state property. The years 1983 through 1990 were audited by the department and adjustments were made to the depreciation claimed in order to put the taxpayer in compliance with sec. 71.04(15)(b), Wis. Stats. (1985-86), and sec. 71.26(3)(y), Wis. Stats. (1991-92). The assessment for the years 1983 through 1986 was paid, without appeal, on April 30, 1989. The assessment for the years 1987 through 1990 was issued April 15, 1992, and was paid, without appeal, on May 31, 1992. The taxpayer filed returns for the years 1991 and 1992, making the adjustments to depreciation in accordance with sec. 71.26(3)(y), Wis. Stats. (1991-92).

What are the taxpayer's options as the result of the *Beatrice Cheese* decision?

**Answer 3:** The years 1983 through 1986 are closed to refund pursuant to sec. 71.75(2), Wis. Stats. (1991-92). The years 1987 through 1990 are open to refund claims until April 15, 1994, pursuant to sec. 71.75(5), Wis. Stats. (1991-92). The years 1991 and 1992 are open to refund claims pursuant to sec. 71.75(2), Wis. Stats. (1991-92).

The refund claims for the years 1987 through 1990 are limited to the deductions disallowed as part of the prior field audit. The asset basis differences, resulting from unclaimed or disallowed depreciation due to the difference between ACRS depreciation and the method allowed, will not be allowed as a deduction, or taken into income, until such time that the assets are sold, exchanged, abandoned, or otherwise disposed of in a taxable transaction.

The taxpayer's 1991 and 1992 adjustments to federal net income for differences in Wisconsin and federal depreciation may be reversed if the taxpayer elects to file amended returns for these years.

In the alternative, the taxpayer may elect to continue its present method of depreciation until the assets are fully depreciated or disposition occurs.

**Facts and Question 4:** Corporation B filed its returns for the years 1983 through 1992 in accordance with sec. 71.04(15)(b), Wis. Stats. (1985-86), and sec. 71.26(3)(y), Wis. Stats. (1991-92). The taxpayer was audited for all years 1983 through 1990 with an assessment issued January 13, 1992, and paid March 1, 1992. The department made no adjustments to depreciation.

What are the options available to Corporation B?

**Answer 4:** Since no depreciation adjustments were made by the depart-

ment upon field audit, the years 1983 through 1990 are closed to refund claims pursuant to sec. 71.75(4), Wis. Stats. (1991-92).

The taxpayer may file amended returns for 1991 and 1992 to reverse its adjustments for depreciation made as a result of sec. 71.26(3)(y), Wis. Stats. (1991-92). However, the differences in federal and Wisconsin basis at the end of 1990, due to adjustments for depreciation, may not be recovered until the assets are sold, exchanged, abandoned, or otherwise disposed of in a taxable transaction.

As an alternative, the taxpayer may continue its current depreciation method for future years until the assets are fully depreciated or disposed of in a taxable transaction.

**Facts and Question 5:** Corporation B filed its returns for the years 1983 through 1992 in accordance with sec. 71.04(15)(b), Wis. Stats. (1985-86), and sec. 71.26(3)(y), Wis. Stats. (1991-92). The years 1983 through 1990 are still open to adjustment under a written agreement pursuant to sec. 71.77(5), Wis. Stats. (1991-92).

What are the taxpayer's options?

**Answer 5:** The taxpayer may file amended returns for all years (1983 through 1992) revising the adjustments for differences in federal and Wisconsin depreciation and basis due to the different depreciation methods. The years 1983 through 1988 are open for filing refund claims since the written agreement permits a taxpayer to file for a refund as well as permitting the department to make adjustments.

If the taxpayer wishes to continue its present method of depreciation, it would have that option.

**Facts and Question 6:** Corporation B filed its returns for the years 1983

through 1992 in accordance with sec. 71.04(15)(b), Wis. Stats. (1985-86), and sec. 71.26(3)(y), Wis. Stats. (1991-92). The taxpayer was audited for the years 1983 through 1988 with an assessment issued January 13, 1992, and paid March 1, 1992. The department made no adjustments to depreciation.

What are the taxpayer's options?

**Answer 6:** The taxpayer may continue to claim depreciation under sec. 71.26(3)(y), Wis. Stats. (1991-92), and account for basis differences upon the taxable disposition of the assets, pursuant to sec. 71.26(2), Wis. Stats. (1991-92).

The taxpayer's alternative is to file amended returns for the years 1989 through 1992 reversing the adjustments for the differences in Wisconsin and federal net income due to the different depreciation methods. The basis differences created by adjustments for years 1983 through 1988 will be taken into account in computing net income only at the time of disposition of the assets in a taxable transaction. □

## 5 Making or Withdrawing an Election Not to Be a Tax-Option (S) Corporation for Wisconsin

**Statutes:** Section 71.365(4), Wis. Stats. (1991-92)

**Note:** This tax release supersedes the tax release titled "Withdrawal of Election Not to Be a Tax-Option (S) Corporation for Wisconsin," which was published in *Wisconsin Tax Bulletin* 57 (July 1988), page 16.

**Background:** Beginning with the 1987 taxable year, a corporation that is an S corporation for federal income tax purposes may elect not to be a tax-option (S) corporation for Wis-

consin franchise or income tax purposes. This "opt-out" election requires the consent of persons who hold more than 50% of the shares of the tax-option (S) corporation on the day on which the "opt-out" election is made.

The election is made by filing Wisconsin Form 5E, "Election by an S Corporation Not to Be Treated as a Tax-Option (S) Corporation," on or before the due date or extended due date of the corporation's Wisconsin franchise or income tax return for the first year affected by the election. Once the election is completed, the corporation or its successor may not claim Wisconsin tax-option status for the next 4 taxable years after the taxable year to which the "opt-out" election first applies. Corporations which make the "opt-out" election are treated as regular (C) corporations for Wisconsin and must file Wisconsin Form 4 or 5 rather than Form 5S.

**Facts and Question 1:** Corporation X, a calendar year S corporation, files a properly completed Form 5E with the department on February 1, 1993, for the 1992 taxable year. It has not yet filed its 1992 Wisconsin corporation franchise or income tax return, which is due March 15, 1993.

May Corporation X withdraw the "opt-out" election prior to the date that it files its Wisconsin corporation franchise or income tax return?

**Answer 1:** Yes. An "opt-out" election is not completed until the filing of a Wisconsin corporation franchise or income tax return for the first taxable year affected by the "opt-out" election. To withdraw the election, Corporation X should send a letter to the department requesting the withdrawal. The letter must contain the signatures of shareholders who hold more than 50% of the shares of the corporation.

Except as indicated in Answers 2 and 3 below, once a Wisconsin corporation franchise or income tax return has been filed in accordance with the "opt-out" election, the election is completed and remains effective for the corporation and its successors for at least the next 4 taxable years after the taxable year to which the election first applies.

**Facts and Question 2:** The facts are the same as in Question 1 except that Corporation X filed its 1992 Wisconsin corporation franchise or income tax return on February 1, 1993, as a regular (C) corporation.

May Corporation X withdraw the "opt-out" election prior to the March 15, 1993, due date of its Wisconsin corporation franchise or income tax return?

**Answer 2:** Yes. Although a Wisconsin corporation franchise or income tax return was filed in accordance with the "opt-out" election, Corporation X may withdraw the "opt-out" election prior to the March 15, 1993, due date of its Wisconsin return.

To withdraw the election, Corporation X must take the following action on or before March 15, 1993:

- Send a letter, signed by shareholders holding more than 50% of the corporation's stock, to the department requesting the withdrawal of the election, and
- File an amended Wisconsin franchise or income tax return, Form 5S, as a tax-option (S) corporation.

**Note:** After the due date for filing the Wisconsin return has passed, the "opt-out" election cannot be withdrawn, and it remains effective for the corporation and its successors for at least the next 4 taxable years after

the taxable year to which the election first applies.

**Facts and Question 3:** The facts are the same as in Question 1 except that Corporation X receives a federal extension until September 15, 1993, to file its 1992 federal income tax return, and this extension also applies for Wisconsin. On June 1, 1993, Corporation X files its Wisconsin corporation franchise or income tax return as a regular (C) corporation.

May Corporation X withdraw the "opt-out" election prior to the September 15, 1993, extended due date of its Wisconsin corporation franchise or income tax return?

**Answer 3:** Yes. Although a Wisconsin corporation franchise or income tax return was filed in accordance with the "opt-out" election, Corporation X may withdraw the "opt-out" election prior to the September 15, 1993, extended due date of its Wisconsin return.

To withdraw the election, Corporation X must take the following action on or before September 15, 1993:

- Send a letter, signed by shareholders holding more than 50% of the corporation's stock, to the department requesting the withdrawal of the election, and
- File an amended Wisconsin franchise or income tax return, Form 5S, as a tax-option (S) corporation.

**Note:** After the extended due date for filing the Wisconsin return has passed, the "opt-out" election cannot be withdrawn, and it remains effective for the corporation and its successors for at least the next 4 taxable years after the taxable year to which the election first applies.

**Facts and Question 4:** Corporation Y, a calendar year S corporation, files its 1992 Wisconsin franchise or income tax return as a tax-option (S) corporation on February 1, 1993.

May Corporation Y elect to opt out of Wisconsin tax-option status for the 1992 taxable year prior to the March 15, 1993, due date of its Wisconsin corporation franchise or income tax return?

**Answer 4:** Yes. The "opt-out" election must be made by the due date or extended due date of the corporation's Wisconsin franchise or income tax return for the first year affected by the election.

To make the election, Corporation Y must take the following action on or before March 15, 1993:

- File Wisconsin Form 5E, "Election by an S Corporation Not to Be Treated as a Tax-Option (S) Corporation," and
- File an amended Wisconsin franchise or income tax return, Form 4 or 5, as a regular (C) corporation.

Once a Wisconsin return has been filed in accordance with the "opt-out" election, the election is completed and remains effective for the corporation and its successors for at least the next 4 taxable years after the taxable year to which the election first applies.

**Facts and Question 5:** The facts are the same as in Question 4 except that Corporation Y receives a federal extension of time until September 15, 1993, to file its 1992 federal income tax return, and this extension also applies for Wisconsin. On May 15, 1993, Corporation Y files its Wisconsin corporation franchise or income tax return as a tax-option (S) corporation.

May Corporation Y elect to opt out of Wisconsin tax-option status for the 1992 taxable year prior to the September 15, 1993, extended due date of its return?

**Answer 5:** Yes. The "opt-out" election must be made by the extended due date of the corporation's Wisconsin franchise or income tax return for the first year affected by the election.

To make the election, Corporation Y must take the following action on or before September 15, 1993:

- File Wisconsin Form 5E, "Election by an S Corporation Not to Be Treated as a Tax-Option (S) Corporation," and
- File an amended Wisconsin franchise or income tax return, Form 4 or 5, as a regular (C) corporation.

Once a Wisconsin return has been filed in accordance with the "opt-out" election, the election is completed and remains effective for the corporation and its successors for at least the next 4 taxable years after the taxable year to which the election first applies. □

## 6 Wisconsin Tax Treatment of Safe Harbor Leases

**Statutes:** Sections 71.01(4)(g)5-10, 71.02(1)(a)6-11, and 71.04(15)(b), Wis. Stats. (1985-86) and section 3047(1)(b), 1987 Wisconsin Act 27

**Note:** This tax release modifies the tax release with the same title which was published in *Wisconsin tax Bulletin* 38 (July 1984), page 17, to the extent that the positions taken in that tax release were invalidated by the Dane County Circuit Court decision in *Wisconsin Department of Revenue vs. International Paper Company* (December 28, 1992) and the Wis-

consin Tax Appeals Commission decision in *U.S. Oil Co., Inc. vs. Wisconsin Department of Revenue* (July 18, 1990). For summaries of these decisions, see *Wisconsin Tax Bulletins* 81 (April 1993), page 12, and 69 (October 1990), page 13.

### Background:

**Federal Law:** The federal Economic Recovery Tax Act of 1981 (ERTA) added Internal Revenue Code sec. 168(f)(8), which provided "safe harbor" leasing rules for qualifying property placed into service on or after January 1, 1981. Under these rules, certain transactions were treated as leases for federal income tax purposes whether or not they would have qualified as leases under the pre-ERTA federal guidelines. If a transaction met the safe harbor requirements, the lessor in the agreement was treated as the property owner for federal income tax purposes and was entitled to cost recovery deductions under the Accelerated Cost Recovery System (ACRS) and investment credits. The non-safe harbor leasing rules continued to apply for transactions not meeting the safe harbor requirements or when safe harbor leasing treatment was not elected.

The federal Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) substantially modified the safe harbor leasing rules for agreements entered into or property placed in service between July 1, 1982, and January 1, 1984, with certain exceptions. In addition, TEFRA repealed safe harbor leasing treatment for transactions entered into on or after January 1, 1984, and provided new finance lease rules for leases with economic substance entered into on or after that date. Before the finance lease rules went into effect, the federal Tax Reform Act of 1984 generally postponed their effective date for four years until 1988 and the federal Tax Reform Act of 1986 completely re-

pealed them. Thus, the pre-ERTA common law again governs the treatment of lease transactions.

**Wisconsin Law:** The Wisconsin corporation franchise and income tax law did not recognize the safe harbor leasing rules in IRC sec. 168(f)(8). For the 1981 through 1986 taxable years, the computation of net income for regular corporations and tax-option (S) corporations was not federalized; income and deductions were computed under Wisconsin law rather than under the Internal Revenue Code. Although Wisconsin depreciation deductions generally were computed under the Internal Revenue Code, for taxable year 1981 and thereafter, the Internal Revenue Code did not include sec. 168(f)(8). Section 71.04(15)(b), Wis. Stats. (1985-1986).

Insurance companies, regulated investment companies, and real estate investment trusts computed their net income for Wisconsin purposes under the Internal Revenue Code; however, for taxable year 1981 and thereafter, sec. 168(f)(8) was specifically excluded from the Internal Revenue Code. Sections 71.01(4)(g)5-10 and 71.02(1)(a)6-11, Wis. Stats. (1985-86).

With the enactment of 1987 Wisconsin Act 27, Wisconsin adopted the Internal Revenue Code, with modifications, for computing a regular corporation's and a tax-option (S) corporation's net income for taxable years 1987 and thereafter. However, the federal safe harbor leasing rules were not adopted since they were not part of the Internal Revenue Code as amended to December 31, 1986. Section 3047(1)(b) of this Act provided that leases to which IRC sec. 168(f)(8) (before its repeal) applies and any differences between the federal and state treatment of income, loss, or deduction arising from those leases do not apply for Wisconsin

purposes. As a result, corporations must continue making adjustments to reverse the amount of rental expense or income, interest expense or income, and depreciation expense reportable for federal income tax purposes under the safe harbor leasing rules.

In the tax release published in *Wisconsin Tax Bulletin* 38, the department had taken the position that the initial payment made by the purchaser/lessor to the seller/lessee, representing the purchase price of the tax benefits, was income to the seller/lessee subject to tax. However, in the *International Paper* decision, the court determined that the cash received from the sale of federal tax benefits under safe harbor leases was not income to the seller/lessee but the sale of one of the rights in its property. Therefore, the initial payment should be accounted for as a reduction in the seller/lessee's basis in the property.

The department had also taken the position that the purchaser/lessor could not deduct the cost of the tax benefits. However, pursuant to the *U.S. Oil* decision, if the purchaser/lessor sells the property back to the seller/lessee, the purchaser/lessor may recognize a gain or loss on the transaction.

The following example illustrates the Wisconsin treatment of safe harbor leasing transactions as a result of the *International Paper* and *U.S. Oil* decisions.

**Example:** In taxable year 1981, Seller/Lessee Corporation purchased equipment from a manufacturer for \$1,000,000 and then "sold" (but did not transfer title to) the equipment to Purchaser/Lessor Corporation. The selling price was \$200,000 in cash plus an \$800,000 nonrecourse note receivable from Purchaser/Lessor Corporation bearing interest at the

market rate. The note was payable over nine years in equal annual principal and interest payments of \$168,000. The \$200,000 was the agreed upon price of Seller/Lessee Corporation's tax benefits, consisting of its ACRS depreciation deductions and investment tax credit on the equipment.

Purchaser/Lessor Corporation simultaneously "leased" the equipment back to Seller/Lessee Corporation for nine years (90% of its useful life). The annual rental payments of \$168,000 were due on the same date and exactly offset the principal and interest payments Purchaser/Lessor Corporation was required to make to Seller/Lessee Corporation under the note. The only money changing hands between Seller/Lessee Corporation and Purchaser/Lessor Corporation was the \$200,000 payment in 1981 for the tax benefits. Seller/Lessee Corporation used the \$200,000 as a downpayment to the equipment manufacturer and financed the remaining \$800,000 with a financial institution.

The Wisconsin treatment of this transaction is as follows:

A. *Sale of equipment by Seller/Lessee Corporation.* Sale is not recognized.

B. *Initial \$200,000 Payment by Purchaser/Lessor Corporation to Seller/Lessee Corporation.*

- (1) The transfer of federal tax benefits for \$200,000 is considered to be the sale of such benefits.

Seller/Lessee Corporation must decrease the basis of the equipment by the \$200,000 received in 1981. Under the *International Paper* decision, this payment constitutes a reduction of the underlying asset account.

Therefore, Seller/Lessee Corporation's basis for depreciation purposes is \$800,000. (Prior to the *International Paper* decision, the department had stated that the \$200,000 payment was taxable as income in 1981 and that Seller/Lessee Corporation's basis in the equipment for depreciation purposes was \$1,000,000.)

- (2) Purchaser/Lessor Corporation may not deduct the \$200,000 cost of these benefits since the law contains no provision for such deduction. However, if Purchaser/Lessor Corporation were to sell the assets back to Seller/Lessee Corporation, Purchaser/Lessor Corporation may recognize a gain or loss on that transaction. The cost basis is \$200,000 minus any federal tax benefits (such as depreciation and investment tax credits) already realized, as provided in the *U.S. Oil* decision.

C. *Depreciation of Equipment.* Seller/Lessee Corporation deducts depreciation using a basis of \$800,000.

D. *Rental Expense/Income.* Neither Seller/Lessee Corporation nor Purchaser/Lessor Corporation recognizes rental expense or income.

E. *Interest Expense/Income.* Seller/Lessee Corporation may deduct interest it pays to the financial institution on the \$800,000 loan. However, neither Seller/Lessee Corporation nor Purchaser/Lessor Corporation recognizes interest income or expense on the \$800,000 nonrecourse note that the two parties executed.

- F. *Apportionment Basis Taxpayers — Effect Upon Property and Sales Factors.* Seller/Lessee Corporation includes the equipment in the property factor at its \$800,000 net cost. Rental payments under the safe harbor agreement are not considered rental payments for purposes of the property factor.

Purchaser/Lessor Corporation may not include the property in its property factor.

The manufacturer includes \$1,000,000 in its sales factor. However, Seller/Lessee Corporation may not include the \$1,000,000 in its sales factor.

- G. *Wisconsin Sales or Use Tax.* The sale of equipment by the manufacturer to Seller/Lessee Corporation is a taxable sale unless a specific exemption applies to the transaction, such as the farming or manufacturing exemptions in sec. 77.54(3), (3m), or (6)(a), Wis. Stats. Seller/Lessee Corporation may not give the manufacturer a resale certificate since there is not an actual resale to Purchaser/Lessor Corporation.

The \$200,000 received by Seller/Lessee Corporation is not taxable for sales tax purposes because it represents proceeds from the sale of intangible tax benefits associated with the purchase of this equipment.

Other offsetting principal, interest, and rental amounts recognized for federal income tax purposes have no Wisconsin sales or use tax consequences.

- H. *Nexus Issues.* Purchaser/Lessor Corporation will not have nexus with Wisconsin for franchise or income tax purposes if its only

"activity" in Wisconsin is the safe harbor "rental" property located in Wisconsin.

The presence of this property in Wisconsin, however, will cause the Seller/Lessee Corporation to have Wisconsin nexus for franchise and income tax and sales and use tax purposes.

**Facts and Question 1:** Assume that the Seller/Lessee Corporation in the example above had followed the department's instructions in *Wisconsin Tax Bulletin 38* and reported the initial \$200,000 payment as income. It has been using the entire \$1,000,000 cost of the equipment as its basis for depreciation purposes. All of the years affected by the safe harbor leasing transaction are still open under the statute of limitations due to net business loss carryforwards and/or pursuant to a written agreement between the department and Seller/Lessee Corporation.

May the Seller/Lessee Corporation file a claim for refund of the tax paid on the initial \$200,000 payment which had been reported as income?

**Answer 1:** Yes, in this situation the Seller/Lessee Corporation may file a claim for refund to exclude the initial \$200,000 payment from its taxable income, provided it reduces its basis for depreciation by the \$200,000 payment received and recomputes its depreciation deductions using the \$800,000 basis in that property for each of the succeeding years. Net business loss carryforwards may be adjusted as long as the income year against which the loss is used is open to adjustment and refunds may be issued for open years.

**Note:** If any of the years affected by the safe harbor leasing transaction are closed under the statute of limitations, no refund of the tax paid on the initial payment will be permitted.

**Facts and Question 2:** Assume that the Seller/Lessee Corporation in the example above had followed the department's instructions in *Wisconsin Tax Bulletin 38* and reported the initial \$200,000 payment as income. It has been using the entire \$1,000,000 cost of the equipment as its basis for depreciation purposes. The year in which the initial payment was reported as income (1981) is closed under the statute of limitations. However, several of the years in which the property is being depreciated are still open under the statute of limitations.

Must the Seller/Lessee Corporation file amended returns to reduce its basis in the property to \$800,000 and recompute its depreciation deductions for the years that are still open to adjustment?

**Answer 2:** No, in this situation the Seller/Lessee Corporation is not required to file amended returns to reduce its depreciation deductions for the years that are still open under the statute of limitations. Since the year in which the initial \$200,000 payment was reported as income is closed, the Seller/Lessee Corporation may continue to claim depreciation on its entire \$1,000,000 basis in the property, including the amount attributable to the federal tax benefits. □

## SALES AND USE TAXES

**Note:** The following tax releases interpret the Wisconsin sales and use tax law as it applies to the 5% state sales and use tax. The ½% county sales and use tax may also apply. For information on sales or purchases that are subject to the county sales and use tax, refer to the December 1992 issue of the *Sales and Use Tax Report*. A copy can be found in *Wisconsin Tax Bulletin 80* (January 1993), page 45.



## 7 Credit for Tax Paid on Leased Vehicle Brought Into Wisconsin

**Statutes:** Section 77.51(4)(c)5 and (14)(j), Wis. Stats. (1991-92)

**Facts and Question 1:** In January 1990, Individual A, a resident of New Jersey, began leasing a motor vehicle from Company B. The term of the lease is four years. Lease payments are \$300 per month.

The sale of the motor vehicle by Vendor C to Company B was subject to New Jersey sales tax. Company B paid Vendor C sales tax on the selling price of the motor vehicle (\$10,000). (Note: Under New Jersey's sales and use tax law, the lessor of tangible personal property is subject to New Jersey sales tax on the purchase price of the property leased or the total lease payments, whichever is less. New Jersey sales and use tax law does not impose sales tax on the individual lease payments made by a lessee.)

In January 1992, Individual A became a resident of Wisconsin. Under sec. 77.51(14)(j), Wis. Stats. (1991-92), a lease is a continuing sale. Therefore, Company B is subject to Wisconsin sales tax on the individual lease payments made by Individual A, beginning when Individual A became a resident of Wisconsin.

Company B files its Wisconsin sales and use tax returns on an annual basis.

Is Company B allowed a credit for Wisconsin sales and use tax purposes for the sales tax it paid to Vendor C on the purchase of the motor vehicle it leases to Individual A, where the individual lease payments are subject to Wisconsin sales or use tax?

**Answer 1:** Company B may offset its lease receipts subject to Wisconsin sales or use tax by the amount previously taxed by New Jersey on its purchase of the motor vehicle it leases to Individual A, until such lease receipts equal the amount subject to New Jersey sales tax.

Section 77.51(4)(c)5, Wis. Stats. (1991-92), provides that if a lessor of tangible personal property reimbursed the vendor for sales tax on the sale of the property by the vendor to the lessor, the tax due from the lessor on the rental receipts may be offset by a credit equal to but not exceeding the tax otherwise due on the rental receipts from this property for the reporting period.

The lease receipts from the lease of the motor vehicle by Company B to Individual A subject to Wisconsin sales or use tax are computed as follows:

	1990	1991	1992	1993
Lease payments	\$3,600	\$3,600	\$3,600	\$3,600
Amount subject to New Jersey sales tax	<u>3,600</u>	<u>3,600</u>	<u>2,800</u>	<u>0</u>
Amount subject to Wisconsin sales tax	<u>\$ 0</u>	<u>\$ 0</u>	<u>\$ 800</u>	<u>\$3,600</u>

Lease payments received by Company B from Individual A are not subject to Wisconsin sales or use tax until the lease receipts exceed the amount on which New Jersey sales tax was computed (\$10,000).

**Facts and Question 2:** Will the credit against gross receipts under sec. 77.51(4)(c)5, Wis. Stats. (1991-92), apply if the lessor paid a use tax to the vendor on the purchase of the motor vehicle it leases to Individual A?

**Answer 2:** Yes. Sales tax, for purposes of the credit against gross receipts under sec. 77.51(4)(c)5, Wis. Stats. (1991-92), includes a use or excise tax imposed on the sale of tangible personal property by another state in which the sale occurred.

**Note:** If the sales, use, or excise tax paid did not reimburse the vendor on the sale of the motor vehicle by the vendor to the lessor, the credit under sec. 77.51(4)(c)5, Wis. Stats. (1991-92), does not apply.

**Example:** Assume the same facts as in Facts and Question 1, except that Vendor C did not impose sales tax on the sale of the motor vehicle to Company B. Company B paid the tax owing on its purchase of the motor vehicle directly to the State of New Jersey.

Company B is not allowed to offset its lease receipts by the amount subject to tax that it paid directly to the State of New Jersey. Section 77.51(4)(c)5, Wis. Stats. (1991-92), provides that for the offset to apply, the lessor (Company B) must have reimbursed the vendor (Vendor C) for the sales tax on the sale of the motor vehicle. □

## 8 Credit for Wisconsin Sales or Use Tax Paid on Tangible Personal Property Sold at Retail by Contractors

**Statutes:** Section 77.51(2), Wis. Stats. (1991-92)

**Wis. Adm. Code:** Section Tax 11.68(7), December 1992 Register

**Background:** Section 77.51(2), Wis. Stats. (1991-92), provides that a contractor engaged primarily in real property construction activities may use resale certificates only with respect to purchases of property which the contractor has sound reason to believe he will sell to customers for whom the contractor will not perform real property construction activities involving the use of such property.

However, some construction contractors, who also sell construction supplies at retail, do not know when they purchase these supplies whether they will be consumed in real property construction or resold to others. In these instances, sec. Tax 11.68(7), Wis. Adm. Code, provides that a construction contractor may do one of the following at the time of making purchases:

- A. Give a resale certificate to suppliers and purchase the property without Wisconsin sales or use tax. If the contractor later sells the property at retail, the contractor must collect and remit the Wisconsin sales tax on the sales to customers. If the property is used in real property construction, the contractor must pay a Wisconsin use tax on its purchase price of the property.
- B. Pay sales tax to suppliers on all property purchased. If the prop-

erty is later consumed in real property construction, the tax obligation has been satisfied. If the property is sold at retail, the contractor must collect and remit Wisconsin sales tax on these retail sales, but may take as a credit against the sales tax any Wisconsin sales or use tax paid on the purchase of the property.

**Facts and Question 1:** Contractor ABC pays Wisconsin sales tax to suppliers on all property purchased. Contractor ABC files sales and use tax returns on a monthly basis.

In June 1992, Contractor ABC purchased 10,000 feet of electrical wire from a supplier for \$1,000 and paid sales tax of \$50. In June 1992, Contractor ABC sold the 10,000 feet of wire to Company DEF at retail for \$1,500. Contractor ABC charged Wisconsin sales tax of \$75 on the sale of the wire to Company DEF.

Contractor ABC had total gross receipts from sales of tangible personal property of \$20,000 in June 1992. For that same period, Contractor ABC had sales for resale of \$5,000 and sales subject to other exemptions of \$3,000.

How does Contractor ABC claim a credit for the \$50 of sales tax it paid on the purchase of 10,000 feet of wire from its supplier?

**Answer 1:** Contractor ABC must claim the \$1,000 deduction from gross receipts on line 9 of its sales and use tax return (Form ST-12) for the period in which the sale of the wire occurs, regardless of when it purchased the wire. Because the retail sale of the wire occurred in June 1992, Contractor ABC must claim the deduction from gross receipt on its June 1992 Form ST-12.

The computation is made on the June 1992 Form ST-12 as follows:

Gross receipts (line 1)	\$20,000*
Resale certificate sales (line 2)	\$5,000
Exemption certificate sales (line 3)	3,000
Other (line 9)	<u>1,000</u>
Total deductions (line 10)	<u>9,000</u>
State taxable receipts (line 11)	<u>\$11,000</u>

\*includes the \$1,500 sale of wire

**Facts and Question 2:** Contractor XYZ sold wire at retail in June 1992. Contractor XYZ reported the sale on its sales and use tax return for the quarter ending June 30, 1992 (Form ST-12) and remitted the proper sales tax. In August 1992, Contractor XYZ realizes that it paid Wisconsin sales tax on its purchase of the wire that it sold in June 1992.

How does Contractor XYZ claim a credit for the \$50 of sales tax it paid on the purchase of the 10,000 feet of wire it sold at retail in June 1992?

**Answer 2:** Contractor XYZ must amend its Form ST-12 for the quarter ending June 30, 1992, because this is the period in which the retail sale of the wire occurred. Contractor XYZ should include its purchase price of the wire on line 9 of its amended sales and use tax return (Form ST-12X).

**Facts and Question 3:** In March 1992, Contractor GHI purchased 10,000 feet of electrical wire from an out-of-state supplier for \$1,000. The out-of-state supplier did not charge Wisconsin sales or use tax on the sale. Therefore, Contractor GHI reported the purchase price of the wire (\$1,000) on line 17 and use tax

of \$50 on line 21 of its March 1992 sales and use tax return (Form ST-12) for the purchase of the wire.

In June 1992, Contractor GHI sold the 10,000 feet of wire to Company JKL at retail for \$1,500. Contractor GHI charged Wisconsin sales tax of \$75 on the sale of wire to Company JKL.

Contractor GHI files sales and use tax returns on a monthly basis. In June 1992 Contractor GHI had total gross receipts from sales of tangible personal property of \$20,000, sales for resale of \$5,000, and sales subject to other exemptions of \$3,000.

How does Contractor GHI claim a credit for the \$50 of use tax it paid on the purchase of 10,000 feet of wire from its supplier?

**Answer 3:** Contractor GHI must claim a deduction from gross receipts on line 9 of its sales and use tax return (Form ST-12) for the period in which the sale of the wire occurs, regardless of when it purchased the wire. Because the retail sale of the wire occurred in June 1992, Contractor GHI must claim the deduction from gross receipts on its June 1992 Form ST-12.

The computation is made on the June 1992 Form ST-12 as follows:

Gross receipts (line 1)	\$20,000*
Resale certificate sales (line 2)	\$5,000
Exemption certificate sales (line 3)	3,000
Other (line 9)	<u>1,000</u>
Total deductions (line 10)	<u>9,000</u>
State taxable receipts (line 11)	<u>\$11,000</u>

\*includes the \$1,500 sale of wire

## 9 Effect of Motor Fuel Tax Refund on Computation of Gross Receipts and Sales Price

**Statutes:** Section 77.51(4)(a) and (b) and (15)(a) and (b), Wis. Stats. (1991-92)

**Background:** Section 77.51(4)(a), Wis. Stats. (1991-92), provides that gross receipts, for purposes of imposing Wisconsin sales tax, means the total amount of the sale of tangible personal property whether received in money or otherwise. Gross receipts includes the federal and Wisconsin motor fuel taxes.

Section 77.51(4)(b), Wis. Stats. (1991-92), provides that gross receipts does not include such part of the sale price as is refunded in cash or credit as a result of adjustments in the sales price after the sale has been completed.

Section 77.51(15), Wis. Stats. (1991-92), provides that sales price, for purposes of imposing Wisconsin use tax, means the total amount for which tangible personal property is sold, without any deduction for the federal and Wisconsin motor fuel taxes.

There is no provision in the definition of "sales price," the measure used in computing use tax, that allows the purchaser to reduce the sales price subject to use tax by a partial refund.

**Facts and Question 1:** Company A sells motor fuel to Company B. The amount of the sale of the motor fuel includes the federal motor fuel tax. Company A charges Company B Wisconsin sales tax on the total amount of the sale of the motor fuel, including the federal motor fuel tax.

Company B, subsequent to the sale of the motor fuel, files a claim for refund with the Internal Revenue Ser-

vice (IRS) for the federal motor fuel tax it paid to Company A. The claim for refund is made using federal Form 843. Company A becomes aware of the motor fuel tax refund made by the IRS to Company B.

May Company A file a claim for refund of the sales tax it paid to the department on that part of its gross receipts that represents the federal excise tax refunded by the IRS to Company B?

**Answer 1:** No. The refund of federal motor fuel tax to Company B does not reduce the gross receipts subject to Wisconsin sales tax from the sale of the motor fuel by Company A to Company B.

The definition of gross receipts in sec. 77.51(4)(a) and (b), Wis. Stats. (1991-92), does not provide a reduction in the computation of a retailer's gross receipts for a refund to the purchaser by a third party. The amount received by Company A from the sale of motor fuel to Company B has not changed as a result of the refund by the IRS and, therefore, the gross receipts subject to Wisconsin sales or use tax remain the same.

**Facts and Question 2:** Assume the same facts as in Facts and Question 1, except that Company B claims a credit on its federal corporate income tax return using federal Form 4136 for the federal motor fuel tax it paid to Company A on the purchase of motor fuel.

May Company A file a claim for refund of the sales tax it paid to the department on that part of its gross receipts that represents the federal motor fuel tax allowed as a credit to Company B?

**Answer 2:** No. The same answer as given to Facts and Question 1 applies.

**Facts and Question 3:** Company A sells motor fuel to Company B. The amount of the sale of the motor fuel includes the Wisconsin motor fuel tax. Company A charges Company B Wisconsin sales tax on the total amount of the sale of the motor fuel, including the Wisconsin motor fuel tax.

Company B, subsequent to the sale of the motor fuel, files a claim for refund with the Wisconsin Department of Revenue for the Wisconsin motor fuel tax it paid to Company A. The claim for refund is made using Wisconsin Form 3, Claim for Motor Fuel Tax Refund. Company A becomes aware of the motor fuel tax refund made by the Wisconsin Department of Revenue to Company B.

May Company A file a claim for refund of the sales tax it paid to the department on that part of its gross receipts that represents the Wisconsin excise tax refunded by the Wisconsin Department of Revenue to Company B?

**Answer 3:** No. The same answer as given to Facts and Question 1 applies.

**Facts and Question 4:** Company C sells motor fuel to Company D. The amount of the sale of the motor fuel includes the federal and Wisconsin motor fuel taxes. Company C does not charge Company D Wisconsin sales tax on the sale of the motor fuel. Company D reports Wisconsin use tax on its Wisconsin sales and use tax return for the purchase of the motor fuel. Company D includes the federal and Wisconsin motor fuel taxes in the amount on which use tax is computed.

Company D, subsequent to reporting Wisconsin use tax on the motor fuel purchased, files claims for refund with the IRS and the Wisconsin Department of Revenue for the federal and Wisconsin motor fuel taxes it

paid to Company C. The claims for refund are made using federal Form 843 and Wisconsin Form 3.

May Company D file a claim for refund of the use tax it paid to the department on that part of the purchase price for the motor fuel that represents the federal and Wisconsin motor fuel taxes refunded by the IRS and the Wisconsin Department of Revenue to Company D?

**Answer 4:** No. The refund of federal and Wisconsin motor fuel taxes to Company D does not reduce the sales price subject to Wisconsin use tax from the sale of the motor fuel by Company C which is stored, used, or consumed in Wisconsin by Company D.

There is no provision in the definition of sales price in sec. 77.51(15)(a) and (b), Wis. Stats. (1991-92), that allows the purchaser to reduce the sales price subject to use tax by a partial refund from the IRS or the department of the federal or state motor fuel taxes paid on the sale.

**Facts and Question 5:** Assume the same facts as in Facts and Question 4, except that Company D claims a credit on its federal corporate income tax return using federal Form 4136 for the federal motor fuel tax it paid to Company C on the purchase of motor fuel.

May Company D file a claim for refund of the use tax it paid to the department on that part of the sales price that represents the federal motor fuel tax allowed as a credit by the IRS on Company D's federal corporate income tax return?

**Answer 5:** No. The same answer as given to Facts and Question 4 applies.

**Facts and Question 6:** Company E sells motor fuel to Company F. The

amount of the sale of the motor fuel includes the federal and Wisconsin motor fuel taxes. Company E does not charge Company F Wisconsin sales tax on the sale of the motor fuel. Company F does not report Wisconsin use tax on its Wisconsin sales and use tax return for the purchase of the motor fuel.

Subsequent to the sale of the motor fuel by Company E, Company F files claims for refund with the IRS and the Wisconsin Department of Revenue for the federal and Wisconsin motor fuel tax it paid on the motor fuel purchased from Company E. The claims for refund are made using federal Form 843 and Wisconsin Form 3.

Company F is audited by the department. It is determined that Company F should have reported Wisconsin use tax on its purchase of motor fuel from Company E.

Is the measure of use tax used in making an assessment the total amount paid to Company E for the motor fuel, including the federal and Wisconsin motor fuel taxes that were later refunded by the IRS and the Wisconsin Department of Revenue to Company F?

**Answer 6:** Yes. The measure of use tax used in making the assessment is the sales price of the motor fuel, which includes the federal and Wisconsin motor fuel taxes.

The definition of sales price in sec. 77.51(15)(a) and (b), Wis. Stats. (1991-92), does not provide a reduction in the computation of sales price for a refund to the purchaser by a third party. The amount received by Company E for the sale of motor fuel to Company F has not changed and, therefore, the sales price subject to Wisconsin use tax remains the same. □

## 10 Machinery and Equipment Used to Convert Used Motor Oil to Heat

**Statutes:** Section 77.54(26m), Wis. Stats. (1991-92)

**Background:** Section 77.54(26m), Wis. Stats. (1991-92), provides a sales and use tax exemption for the gross receipts from the sale of and the storage, use, or other consumption of waste reduction or recycling machinery and equipment which is used exclusively and directly for waste reduction or recycling activities which reduce the amount of solid waste generated, reuse solid waste, recycle solid waste, compost solid waste, or recover energy from solid waste.

"Solid waste," for purposes of sec. 77.54(26m), Wis. Stats. (1991-92), is defined as garbage, refuse, sludge, or other materials or articles, whether these materials or articles are discarded or purchased, including solid, semisolid, liquid, or contained gaseous materials, or articles resulting from industrial, commercial, mining, or agricultural operations or from domestic use or from public service activities.

**Facts and Question:** Company A purchases a system which burns used motor oil. The resultant heat produced is used to heat a building or to heat water. The system cannot be adapted to burn regular fuel oil. Is the sale of the system to Company A subject to Wisconsin sales or use tax?

**Answer:** No. The sale of this system is exempt from Wisconsin sales or use tax under sec. 77.54(26m), Wis. Stats. (1991-92). The system is used exclusively in waste reduction or recycling activities which recover energy from solid waste. The used motor oil is solid waste under the definition in sec. 77.54(26m), Wis. Stats. (1991-92). □

## 11 Manufacturing Exemptions As They Apply to Dental Labs

**Statutes:** Section 77.54(2), (6)(a), (6m), and (6r), Wis. Stats. (1991-92)

**Wis. Adm. Code:** Section Tax 11.39(4)(d), July 1987 Register

### Law

Section 77.54(2), Wis. Stats. (1991-92), provides an exemption from Wisconsin sales or use tax for gross receipts from the sale of or the storage, use, or consumption of tangible personal property becoming an ingredient or component part of an article of tangible personal property or which is consumed or destroyed or loses its identity in the manufacture of tangible personal property in any form destined for sale.

Section 77.54(6)(a), Wis. Stats. (1991-92), provides an exemption from Wisconsin sales or use tax for gross receipts from the sale of and the storage, use, or consumption of machines and specific processing equipment used exclusively and directly by a manufacturer in manufacturing tangible personal property.

Manufacturing, for purposes of the above exemptions, is defined in sec. 77.54(6m), Wis. Stats. (1991-92), as the production by machinery of a new article with a different form, use, and name from existing materials by a process popularly regarded as manufacturing. This definition is to be strictly construed pursuant to sec. 77.54(6r), Wis. Stats. (1991-92).

### Administrative Rule

Section Tax 11.39, Wis. Adm. Code, provides that dental labs are not manufacturers within the definition of sec. 77.54(6m), Wis. Stats. This position was taken shortly after the enactment of the Wisconsin general

sales and use tax law effective September 1, 1969, and was based on the operation and scope of dental labs at that time.

**Department of Revenue Position** (Effective for all prior years open to adjustment and prospectively)

Based on a review of various dental labs and court decisions addressing whether an operation is manufacturing, the department has determined that a dental lab **may** be engaged in manufacturing when it produces crowns, bridges, partials, etc. Section Tax 11.39 is being revised to reflect this change in position.

**Caution:** All dental labs are not automatically considered to be manufacturers. Like any other business, to be considered a manufacturer, a dental lab must produce by machinery a new article with a different form, use, and name from existing materials by a process popularly regarded as manufacturing.

Facts and Questions 1 through 3 that follow give examples of dental labs engaged in manufacturing. Facts and Question 4 gives an example of a dental lab that is not engaged in manufacturing.

**Facts and Question 1:** Company ABC is a full-service dental laboratory located in Wisconsin. Company ABC produces crowns, dentures, partials, bridges, and orthodontic appliances for dentists who in turn transfer them to customers in providing dental services.

A summary of the production process of crowns and bridges, in general, is as follows:

- A. An impression of a patient's mouth is received from a dentist, logged in, and sterilized.
- B. A model of the patient's mouth is made from raw materials and is trimmed.

- C. A drilling machine drills holes in the model to enable model parts to be secured to a base.
- D. Pins are glued into the drilled holes. When dry, plastic sleeves are attached to the pins to allow the pins to be removed from the base.
- E. A preformed base is filled with stone and the pinned model is set in the base and the base is trimmed.
- F. A coping saw is used to separate the working dies from the base of the model.
- G. The bite of the working model and opposing model is recreated by applying wax to the working model.
- H. A plaster base, model, and base top are applied to articulators.
- I. The die is marked and undercut to give the technicians the finished line that the doctor has prepared in the patient's mouth.
- J. Molten wax is applied to the working die in various steps.
- K. A wax or plastic vent is attached between the wax pattern and spue base.
- L. The waxed model is put into a stone mold.
- M. The mold is heated to a certain temperature which eliminates the wax, leaving a hollow area.
- N. Molten material, such as gold, is centrifugally cast into the hollow area of the mold.
- O. The item produced is finished by removing bulk, contouring, and shining.

This production of crowns and bridges accounts for 60% of Company ABC's business. Production of the

dentures, partials, and orthodontic appliances is somewhat similar.

In addition to various hand tools, Company ABC uses the following machinery in its production operation:

- A. Saws.
- B. Grinders.
- C. Casting machines.
- D. Ovens.
- E. Gas powered torches.

Company ABC has annual sales of approximately \$2 million and employs 100 people in its production area. The production area is organized in an assembly line manner.

Is Company ABC engaged in manufacturing, as defined in sec. 77.54(6m), Wis. Stats. (1991-92)?

**Answer 1:** Yes. Company ABC's production process, as described above, meets the definition of manufacturing for the following reasons:

- A. Company ABC uses various machinery to produce tangible personal property.
- B. The property produced (dentures, crowns, bridges, partials, and orthodontic appliances) has a different form, name, and use than the raw materials used to produce the tangible personal property (wax, stone, acrylic, metal, glass, stains, etc.).
- C. The production process of Company ABC is considered by the department to be popularly regarded as manufacturing.

**Facts and Question 2:** Assume the same facts as in Facts and Question 1, except that:

- A. Company ABC is not a full service dental lab. Company ABC produces only bridges, porcelains, and crowns.

- B. Company ABC employs 14 people in its dental laboratory who perform the same activities as provided in items A through O of Facts and Question 1.

- C. Company ABC's facility is about 1/10 the size of the facility described in Facts and Question 1.

- D. Company ABC's equipment is not as sophisticated as described in Facts and Question 1; however, the equipment performs the same operations.

Is Company ABC engaged in manufacturing, as defined in sec. 77.54(6m), Wis. Stats. (1991-92)?

**Answer 2:** Yes. Company ABC's production process, as described above, meets the definition of manufacturing for the following reasons:

- A. Company ABC uses various machinery to produce tangible personal property.
- B. The property produced (crowns, porcelains, and bridges) has a different form, name, and use than the raw materials used to produce the tangible personal property (wax, stone, metal, stains, etc.).
- C. The production process of Company ABC is considered by the department to be popularly regarded as manufacturing.

**Facts and Question 3:** Assume the same facts as in Facts and Question 1, except that:

- A. Company ABC is not a full service dental lab. Company ABC produces only crowns and porcelains.
- B. Company ABC employs 5 people in its dental laboratory who perform the same activities as provided in items A through O of Facts and Question 1.

C. Company ABC's facility is about 1/20 the size of the facility described in Facts and Question 1.

D. Company ABC's equipment is not as sophisticated as described in Facts and Question 1; however, the equipment performs the same operations.

Is Company ABC engaged in manufacturing, as defined in sec. 77.54(6m), Wis. Stats. (1991-92)?

**Answer 3:** Yes. Company ABC's production process, as described above, meets the definition of manufacturing for the following reasons:

- A. Company ABC uses various machinery to produce tangible personal property.
- B. The property produced (crowns and porcelains) has a different form, name, and use than the raw materials used to produce the tangible personal property (wax, stone, metal, stains, etc.).
- C. The production process of Company ABC is considered by the department to be popularly regarded as manufacturing.

**Facts and Question 4:** Company DEF is a dental laboratory. Company DEF produces only dentures. Company DEF employs one person part-time. Company DEF uses primarily hand tools, rather than machinery.

The process of producing dentures includes receiving a model from the dentist and making a bite rim from the model which is sent back to the dentist for a more accurate model to be made. Wax is molded into the bite plate received from the dentist. The wax from the resulting mold is boiled away and replaced with acrylic by using a hand press. Teeth purchased from a supplier are inserted into the acrylic while still pliable and fixed into a position considering the fit to

the patient's mouth. Most of the activities are performed by the same person.

Is Company DEF engaged in manufacturing, as defined in sec. 77.54(6m), Wis. Stats. (1991-92)?

**Answer 4:** No. Company DEF is not engaged in a process popularly regarded as manufacturing for the following reasons:

- A. Company DEF does not use an assembly line process typically used by manufacturers.
- B. The scope of the operation, which includes primarily hand held tools, one part-time employee, and a small number of items produced daily, does not resemble what is popularly thought of as a manufacturing operation.

**Question 5:** What are items that Company ABC in Facts and Questions 1 through 3 may purchase without Wisconsin sales or use tax because it is engaged in manufacturing?

**Answer 5:** Company ABC may purchase without Wisconsin sales or use tax the following, **provided it gives its supplier a properly completed manufacturer's exemption certificate:**

- A. Machinery and equipment used exclusively and directly in manufacturing (sec. 77.54(6)(a), Wis. Stats. (1991-92)).

"Manufacturing" includes all of the following:

- 1. Conveyance of raw materials from inventory to the work point.
- 2. Assembly of finished units, including testing or inspection throughout the production cycle.

- 3. Packaging when the package or container becomes a component part of the tangible personal property as such unit is customarily offered for sale.

- 4. Conveyance of finished products to the point of first storage at the business location.

Examples of machinery and equipment that qualify for exemption when used exclusively and directly in manufacturing by a dental lab include (this list is not all-inclusive):

- Hand tools
- Stain brushes
- Casting machines
- Ovens
- Grinding machines and grinding wheels
- Drills and drill bits
- Saws

- B. Tangible personal property becoming an ingredient or component part of an article of tangible personal property or which is consumed or destroyed or loses its identity in manufacturing tangible personal property destined for sale (sec. 77.54(2), Wis. Stats. (1991-92)).

Examples of tangible personal property that can qualify for this exemption include (this list is not all-inclusive):

- Clay
- Acrylic
- Wax
- Hardener
- Metal
- Stone
- Glass
- Stains

□



## 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:

this plan under a salary reduction agreement, and your employer also made contributions to the plan on your behalf. All contributions ceased as of December 1989, when you voluntarily terminated your employment to move to Wisconsin. You became a legal resident of Wisconsin on February 1, 1990.

At the time of termination, you had the option of withdrawing the fund balance or leaving it on deposit with the retirement plan until a future date of your choosing. You elected to leave the funds on deposit.

In 1993, you withdrew the funds due to financial necessity. Under federal Internal Revenue Code (IRC) provisions, these funds will be taxable on your 1993 federal income tax return due in 1994.

### Ruling Request

You request a ruling that the proceeds from the retirement fund be exempt from Wisconsin state income tax.

### Ruling

Section 71.04(1)(a), Wis. Stats. (1991-92), provides that all income or loss of resident individuals shall follow the residence of the individual. Based on the facts in this case, you were a legal resident of Wisconsin at the time you received the distribution from the retirement plan, and thus the distribution is taxable for Wisconsin income tax purposes.

### Analysis

Section 71.04(1)(a), Wis. Stats. (1991-92), provides that all income or

#### Individual Income Taxes

Retirement pay — situs of income  
W9329003, April 28, 1993  
(p. 32)

#### Corporation Franchise and Income Taxes

Exempt organizations — filing requirements  
W9337004, June 23, 1993  
(p. 33)

#### Sales and Use Taxes

Waste reduction and recycling —  
freon recovery  
W9317002, February 1, 1993  
(p. 34)



W9329003, April 28, 1993

**Type Tax:** Individual Income Taxes

**Issue:** Retirement pay — situs of income

**Statutes:** Section 71.04(1)(a), Wis. Stats. (1991-92)

This letter is in response to your request for a private letter ruling regarding the taxability of retirement benefits which were based on employ-

ment during a period in which you were not a legal resident of Wisconsin.

#### Facts

From 1938 to February 1, 1990, you were a legal resident of the state of Florida. From July 1979 through December 1989, you were employed in Florida. During your employment, you were enrolled in a retirement plan. This plan was qualified under sec. 503(b)[sic] of the Internal Revenue Code. You made contributions to



loss of resident individuals shall follow the residence of the individual. This statute is further interpreted in Wisconsin Administrative Code sec. Tax 3.085. This administrative rule provides that employee annuity, pension, profit-sharing or stock bonus plan distributions including self-employed retirement plan distributions and distributions from qualified deferred compensation plans under the Internal Revenue Code received by a person while a resident of Wisconsin shall be subject to the Wisconsin income tax, regardless of whether any of these distributions may be attributable to personal services performed outside Wisconsin.

Therefore, even though none of your funds came from earnings, employment, or any other source within Wisconsin, your retirement plan distribution is taxable to Wisconsin.

You are correct in that, if you had withdrawn the funds upon termination of employment while you were still a resident of Florida, the distribution would not have been subject to Wisconsin tax. However, this is not the case. Because you received your retirement plan distribution while you were a Wisconsin resident, your distribution is subject to Wisconsin tax.

Wisconsin generally follows the federal Internal Revenue Code. Therefore, the amount of the distribution from your retirement plan which will be taxable on your 1993 federal income tax return will also be taxable on your 1993 Wisconsin income tax return (sec. 71.01(6), Wis. Stats. (1991-92)). □

✱ W9337004, June 23, 1993

**Type Tax:** Corporation Franchise and Income Taxes

**Issue:** Exempt organizations — filing requirements

**Statutes:** Section 71.26(1)(a) and (3)(p), Wis. Stats. (1991-92)

This letter responds to your request for a private letter ruling regarding the Wisconsin franchise and income tax return filing requirements.

#### Facts

ABC Cooperative, Inc. (ABC), was incorporated in 1953 as a cooperative under Chapter 185, Wisconsin Statutes. The Articles of Incorporation provide that it is organized without capital stock. The members of the cooperative are all persons or other entities which purchase telephone services from the cooperative. Upon dissolution, after all debts and liabilities of the cooperative have been paid, and all capital furnished through patronage has been retired, and all membership fees have been repaid, the remaining property and assets of the cooperative shall be distributed among the members and former members in the proportion which the aggregate patronage of each bears to the total patronage of all members.

In the taxable years prior to 1990, the taxpayer was considered an exempt organization under sec. 501(c)(12) of the Internal Revenue Code, and it filed federal Form 990. In December 1990, the Internal Revenue Service issued a Technical Advice Memorandum (TAM 9111001) in connection with an examination of an unrelated telephone cooperative. That TAM held that certain billing and collection revenues which cooperatives received from other telephone companies were not considered member source income. Based on this new interpretation, the requirement of sec. 501(c)(12) that 85% or more of income consists of amounts collected from members would not be satisfied.

Starting with the 1990 taxable year, the taxpayer has filed federal Form 1120.

Even though the taxpayer's tax status has changed for federal tax purposes, there has not been any change in the organization of the cooperative. It is still organized as a Chapter 185 cooperative with the same articles of incorporation.

#### Request

You have requested a ruling that the taxpayer is exempt from Wisconsin franchise and income tax.

#### Ruling

ABC is exempt from Wisconsin franchise and income taxation pursuant to sec. 71.26(1)(a), Wis. Stats. (1991-92).

#### Analysis

Section 71.26(1)(a), Wis. Stats. (1991-92), provides in part that the income of corporations organized under Chapter 185 of the Wisconsin Statutes is exempt from Wisconsin franchise and income taxation.

In addition, sec. 71.26(3)(p), Wis. Stats. (1991-92), provides that, for purposes of computing the income of a corporation, secs. 501 to 511 and 513 to 528 of the Internal Revenue Code, relating to exempt organizations, are excluded, except as they pertain to the definitions of unrelated business taxable income in sec. 512, and replaced by the treatment of exemptions under sec. 71.26(1).

Since the taxpayer is organized as a Chapter 185 cooperative, it is exempt from Wisconsin franchise and income taxation, regardless of whether it is an exempt organization under sec. 501(c)(12) of the Internal Revenue Code. □

✱ W9317002, February 1,  
1993

**Type Tax:** Sales and Use Taxes

**Issue:** Waste reduction and recycling  
— freon recovery

**Statutes:** Section 77.54(26m), Wis.  
Stats. (1991-92)

This letter responds to your request for a private letter ruling regarding the Wisconsin sales or use tax treatment of a freon recovery unit.

**Facts**

You purchased a freon recovery unit (FRU) in July 1992 from an Illinois supplier. The FRU is used by you in servicing and installing air conditioning units. The FRU is attached to the air conditioning unit to recapture freon from the air conditioning unit. Once the unit reaches maximum capacity, the unit is taken to a distributor who recycles the freon and resells it. Such equipment is required by state and federal law.

The Illinois supplier did not charge Wisconsin state or county sales or use

tax on the sale of the equipment to you. However, you reported and paid Wisconsin use tax on your purchase of the equipment on your Wisconsin sales and use tax return for the quarter ending September 1992.

**Request**

You ask whether you are entitled to a refund of Wisconsin use tax paid on your purchase of the FRU.

**Ruling**

Your purchase of the FRU is subject to Wisconsin use tax and, therefore, you are not entitled to a refund of Wisconsin use tax paid on your purchase of the FRU.

**Analysis**

Section 77.53(1) and (2), Wis. Stats. (1991-92), imposes a use tax on a purchaser for the storage, use, or consumption of tangible personal property, where the Wisconsin sales or use tax has not been previously paid.

Section 77.54(26m), Wis. Stats. (1991-92), provides an exemption

from Wisconsin sales or use tax for the sale of and the storage, use, or consumption of waste reduction or recycling machinery and equipment exclusively and directly used for waste reduction or recycling activities which reduce the amount of solid waste generated, reuse solid waste, recycle solid waste, compost solid waste, or recover energy from solid waste.

In the case of *Wisconsin Department of Revenue vs. Parks-Pioneer Corporation* (6/25/92), the Court of Appeals, District IV, held that lugger boxes used to collect and transport recyclable materials were not used directly in recycling solid waste. Therefore, the exemption from sales and use tax under sec. 77.54(26m), Wis. Stats., did not apply to the lugger boxes.

Since the FRU is used for collection and storage of freon and does not recycle the freon, it is not used directly in recycling solid waste. Therefore, the exemption under sec. 77.54(26m), Wis. Stats. (1991-92), does not apply to use tax paid on your purchase of the FRU. □