



Wisconsin TAX BULLETIN

New Tax Laws to Be Addressed in Special Issue

The Governor introduced his Budget Bill for 1994-95, Senate Bill 690, on February 1, 1994. This bill includes several provisions affecting Wisconsin taxes. Additional bills which affect Wisconsin taxes have also been introduced.

The Wisconsin Legislature was scheduled to complete its 1994 legislative session by late March 1994. If any bills affecting Wisconsin taxes become law, a special issue of the *Wisconsin Tax Bulletin* explaining the new laws will be published later this spring. ☐

Are You Correctly Reporting Use Tax?

Failure to report use tax is the most common error on sales and use tax returns. Before you file your return, make sure your use tax is correctly reported on lines 17-23 of the return.

The Wisconsin use tax is a 5% tax (plus ½% county tax, where applicable) imposed on the purchase price of tangible personal property or taxable services that are used, stored, or otherwise consumed within Wisconsin, upon which a sales tax is not imposed or paid.

Failure to report use tax may result in penalties of as much as 50% of the use tax not reported. ☐



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. ☐

Milwaukee Grocers Charged in Cigarette Sting

Nine Milwaukee grocers were arrested in February 1994, as the result of a special operation conducted by agents of the Department of Revenue's Alcohol and Tobacco Enforcement Section and the Milwaukee Police Department. The operation, targeting neighborhood stores and gas stations, was the culmination of a three-month undercover investigation.

The nine arrests were for conspiracy to receive stolen property, a ten-year felony, or attempting to receive stolen property, a five-year felony. Several additional charges are pending, including felony possession of untaxed cigarettes. Those arrested were: Mohamud Yessin, 50; Edgar Smith, 33; Mohammed Ghaffar, 38; Nathaniel Paden, 43; Modher Sigh, 34; Balwinder Dhillon, 38; Husein A. Ali, 28; Allal Ali Taki, 41; and Shakil Ahmad, 42.

In the sting operation, undercover agents received almost \$16,000 cash in exchange for thousands of cartons of cigarettes, which were represented as being stolen and were "sold" to those arrested for a fraction of the normal wholesale price. In addition, agents confiscated more than 1,300 cartons of improperly stamped cigarettes from other targeted stores that had been searched.

In This Issue

	Page		Page
New Tax Laws to Be Addressed in Special Issue . . .	1	Topical and Court Case Index Available	4
Are You Correctly Reporting Use Tax?	1	1994 Estimated Tax Requirements for Individuals, Estates, and Trusts	4
Need a Speaker?	1	Question and Answer	5
Milwaukee Grocers Charged in Cigarette Sting	1	Filing Wisconsin Fiduciary and Estate Tax Returns . . .	6
Oconto County Adopts County Tax	3	Farmers Receive Over \$43 Million in Tax Credits . . .	7
Federal Extensions for Exempt Organization Returns Apply for Wisconsin	3	Administrative Rules in Process	7
Recycling Surcharge Rates Unchanged	3	Recently Adopted Rules Summarized	8
Extensions of Time to File Tax Returns	3	Report on Litigation	14
Annual Bulletin Index Available	4	Tax Releases	22
Information or Inquiries? . . .	4	Private Letter Rulings	29
		Sales/Use Tax Report	33
		Order Blank	35

In January 1994, dentist Frederick G. Kriemelmeyer, 44, 1120 Caledonia St., LaCrosse, was charged with failure to file tax returns by LaCrosse County Circuit Court Judge Dennis Montabon. The charges were for failure to file Wisconsin income tax returns for 1990, 1991, and 1992.

The criminal complaint indicated that Kriemelmeyer, who has been a Wisconsin resident since 1988 and has filed no Wisconsin tax returns, had income of \$111,000 in 1990,

\$112,000 in 1991, and \$39,000 in 1992. He refused to provide any information regarding his income, claiming he is a nonresident alien and also claiming an objection under the 4th, 5th, 8th, 9th, 10th, 13th, and 14th Amendments to the U.S. Constitution.

Citing federal copyright law, Kriemelmeyer refused to be fingerprinted or photographed during his booking and spent one night in the county jail, before agreeing to the booking procedures. If convicted on all three income tax counts, he faces up to 27 months imprisonment and \$30,000 in fines.

Five additional charges of failure to file Wisconsin income tax returns were filed in January and February, 1994.

In January, attorney Clifton G. Owens, 52, 1812 W. Kneeland St., Milwaukee, was charged in Dane County Circuit Court with two counts

of failure to file 1990 and 1991 returns. The criminal complaint charges that Owens had income of \$30,000-\$40,000 in 1990 and about \$41,000 in 1991. His law license was suspended for 60 days in 1992, for failure to file Wisconsin income tax returns over an extended period of time, and failing to cooperate with the investigation into his misconduct.

In February, Allen L. Bakke, 41, a carpenter whose address is 1315 E. Racine St., Janesville, was charged by the Rock County District Attorney's office with three counts of failure to file 1990, 1991, and 1992 returns. The criminal complaint alleges that Bakke had income of \$27,000 in 1990, \$21,000 in 1991, and \$46,000 in 1992, and a Wisconsin tax liability of over \$6,000 for those three years. He allegedly has filed no Wisconsin income tax returns since becoming a Wisconsin resident in 1983.

Failure to file Wisconsin income tax returns is a crime punishable by up to nine months in prison and up to \$10,000 in fines for each count.

In February 1994, Kenneth J. Weber, 26, 27037 S. Elm Lane, Wind Lake, was charged by the Milwaukee County District Attorney's office with two counts of income tax evasion, for filing fraudulent Wisconsin income tax returns for 1991 and 1992. According to the criminal complaint, he failed to report income of \$17,000 in 1991 and \$20,000 in 1992, from unreported sales of scrap metal. Weber was also charged in July 1993, with theft of enough aluminum scaffolding to fill eight semitrailers, from his former employer.

If convicted on both income tax evasion charges, Weber faces up to ten years in prison and up to \$20,000 in fines. □

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

Oconto County Adopts County Tax

Effective July 1, 1994, the county sales and use tax will be adopted by Oconto County. This brings to 46 the number of counties that have adopted the ½% county tax. Adams County adopted the tax effective January 1, 1994, and Dodge County adopted the tax effective April 1, 1994.

The March 1994 *Sales and Use Tax Report*, a copy of which appears on pages 33 and 34 of this Bulletin, includes a listing of the counties that have adopted the county tax. □

Federal Extensions for Exempt Organization Returns Apply for Wisconsin

For federal purposes, the due date for filing the 1993 Form 990-T, Exempt Organization Business Income Tax Return, has been extended to the later of the 15th day of the 5th month after the end of the organization's taxable year or July 15, 1994.

This same treatment applies for Wisconsin purposes. Wisconsin law provides that any extension of time granted by law or by the Internal Revenue Service for filing the federal return extends the time for filing the Wisconsin Form 4T, Exempt Organization Business Franchise or Income Tax Return.

An extension for filing the return doesn't extend the time to pay franchise or income tax. Interest will be charged on tax not paid by the original due date. □

Recycling Surcharge Rates Unchanged

The temporary recycling surcharge rates remain unchanged for taxable

years beginning on or after January 1, 1994, and before January 1, 1995.

Wisconsin law requires the Department of Revenue annually, in December, to establish annual recycling surcharge rates for taxable years beginning on or after the following January 1 to generate sufficient revenue to fund the appropriations from the recycling fund for the following fiscal year. The annual surcharge rates must be approved by the Legislature's Joint Committee on Finance.

As a result of this process, the following surcharge rates will continue to apply for taxable years that begin during 1994:

- Corporations (except tax-option (S) corporations), insurance companies, and exempt organizations taxable as corporations: The greater of \$25 or 5.5% of gross tax liability, but not more than \$9,800.
- Tax-option (S) corporations: The greater of \$25 or 0.4345% of Wisconsin net income, but not more than \$9,800.
- Partnerships, except partnerships engaged only in farming: The greater of \$25 or 0.4345% of "net business income" as allocated or apportioned to Wisconsin, but not more than \$9,800.
- Individuals, estates, trusts, and exempt trusts, except those entities engaged only in farming: The greater of \$25 or 0.4345% of "net business income" as allocated or apportioned to Wisconsin, but not more than \$9,800.
- Partnerships, individuals, estates, trusts, and exempt trusts engaged in farming: \$25, provided the entity has a net farm profit of \$1,000 or more. □

Extensions of Time to File Tax Returns

Individuals

Extensions of time provided by federal law or granted by the Internal Revenue Service (IRS) for filing a federal income tax return are available to extend the time for filing a Wisconsin individual income tax return. All that is required to obtain the Wisconsin extension is that a copy of the federal extension application be attached to the Wisconsin return when filed.

For example, assume that you file federal Form 4868 to apply for the automatic 4-month extension of time to file your federal return. You will also be allowed a 4-month extension of time to file your Wisconsin return if you attach a copy of your completed Form 4868 to your Wisconsin return when you file that return.

Extensions available under federal law may be used for Wisconsin purposes, even though an individual does not need an extension to file his or her federal return. A statement must be attached to the Wisconsin return when filed, indicating which federal extension provision is being used (e.g., automatic 4-month extension) or a copy of the federal extension application form must be attached with only the name, address, and signature areas completed.

Certain taxpayers outside the United States and Puerto Rico on April 15 are allowed an automatic 2-month extension of time to file their federal return. Since no federal form is required for this extension, a statement must be attached to the Wisconsin return, explaining how the taxpayer meets the qualifications for this extension.

Corporations

An extension allowed by the IRS for filing the federal return automatically extends the due date for filing the Wisconsin franchise or income tax return, provided a copy of the federal extension is attached to the Wisconsin return.

A corporation which is not requesting a federal extension but needs additional time to file the Wisconsin return may request a 30-day extension by submitting an Application for Extension of Time to File (Wisconsin Form IC-830) to the department on or before the due date of the return.

Certain corporations may request a Wisconsin extension in excess of 30 days. A foreign corporation having no office or place of business in the United States may request a 3-month Wisconsin extension. A cooperative or a domestic international sales corporation may request a 6-month extension.

Additional Information

For further information on extensions of time for filing Wisconsin franchise or income tax returns, see the tax release titled "Extension of Time to File Franchise and Income Tax Returns" in *Wisconsin Tax Bulletin* 85 (January 1994), page 23. □

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). □

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

tion franchise and income, withholding, sales and use, gift, inheritance and estate, cigarette, tobacco products, beer, intoxicating liquor and wine, and motor vehicle fuel, alternate 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 an addendum published in May.

To order your copy, complete the order blank that appears on page 35 of this Bulletin. The order blank may also be used for subscribing to the *Wisconsin Tax Bulletin* and for ordering the Wisconsin Administrative Code. □

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, corpora-

1994 Estimated Tax Requirements for Individuals, Estates, and Trusts

Estimated income tax payments are tax deposits made during the year to prepay the income tax (including alternative minimum tax) and temporary recycling surcharge that will be due when an income tax return is filed. Every individual, married couple filing jointly, estate, or trust (except certain estates and trusts, as explained below) is required to pay 1994 Wisconsin estimated tax if they expect to owe \$200 or more on a 1994 Wisconsin income tax return. Form 1-ES, 1994 Wisconsin Estimated Tax Voucher, is filed with each estimated tax payment.

For calendar year taxpayers, the first estimated tax payment is due on April 15, 1994. Installment payments are also due on June 15, 1994, September 15, 1994, and January 17, 1995. For fiscal year taxpayers, installment payments are due on the 15th day of the 4th, 6th, and 9th months of the fiscal year and the 1st month of the following fiscal year.

Estates and grantor trusts which are funded on account of a decedent's death are only required to make estimated tax payments for taxable

years which end two or more years after the decedent's death. For example, an individual died on March 25, 1994. A grantor trust which was funded on account of the individual's death is not required to make estimated tax payments for any taxable year ending before March 25, 1996.

A trust which is subject to tax on unrelated business income is generally required to pay 1994 Wisconsin estimated tax if it expects to owe \$500 or more on a 1994 Wisconsin franchise or income tax return

(Form 4T). A 1994 Form 4-ES, Wisconsin Corporation Estimated Tax Voucher, is filed with each estimated tax payment. Installment payments for such trusts are due on the 15th day of the 3rd, 6th, 9th, and 12th months of the taxable year.

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

Question and Answer

Q We are a nonprofit association organized and operated exclusively for educational purposes. No part of the profit inures to the benefit of any individual member. We don't operate any business which is unrelated to our exempt purpose. For federal purposes, we must file Form 990, Return of Organization Exempt From Income Tax. Are we required to file either an application for exemption from Wisconsin franchise and income taxes or a Wisconsin franchise or income tax return?

A No. A religious, scientific, educational, benevolent, or other corporation or association not organized or conducted for pecuniary profit is not required to apply for an exemption from Wisconsin franchise and income taxes. Such an organization is not required to file a Wisconsin franchise or income tax return if it doesn't operate a business unrelated to its exempt purpose. Note: A nonprofit organization that must file federal Form 990-T, Exempt Organization Business Income Tax Return, because it has at least \$1,000 of gross income from an unrelated trade or business, must file Wisconsin Form 4T, Exempt Organization Business Franchise or Income Tax Return.

Q My landlord indicated "2" as the number of occupants on the rent certificate he filled out for my homestead credit claim. I rent an apartment, and my son, age 25, lives with me. The lease is in my name, and I pay all the rent. My son and I each pay

for half of the food, utilities, and other supplies. May I claim all of the rent shown on my rent certificate, since I pay all of the rent, and only my name is on the lease?

A No. Since there are two occupants in your homestead, and the second occupant is not your spouse or minor child, the rent on your homestead credit claim must be only the portion that reflects the percentage of the total "shared living expenses" that *you* paid. Shared living expenses include rent, food, utilities, supplies, and other items directly related to the occupancy of the homestead. The following chart provides an example of how to compute each occupant's share of rent, assuming Occupant A paid all the rent and they each paid half of the other expenses.

	Occupant A	Occupant B	Total
Rent	\$4,000	\$ 0	\$4,000
Food	1,300	1,300	2,600
Utilities	600	600	1,200
Other	100	100	200
Total	<u>\$6,000</u>	<u>\$2,000</u>	<u>\$8,000</u>

In this example, the total shared living expenses were \$8,000. Occupant A paid \$6,000, or 75%, of the shared living expenses, and Occupant B paid \$2,000, or 25%. Therefore, Occupant A may claim only \$3,000 of rent (75% of \$4,000), and Occupant B may claim \$1,000 of rent (25% of \$4,000), even though A paid all of the rent and B did not pay any of the rent. □

Filing Wisconsin Fiduciary and Estate Tax Returns

Wisconsin Fiduciary Returns

Who Must File

Every personal representative or special administrator of the estate of a Wisconsin decedent and every trustee of a Wisconsin trust must file a Wisconsin fiduciary income tax return (Form 2) if the gross income of the estate or trust exceeds \$600. Nonresident estates and trusts must file Wisconsin fiduciary returns if they have gross income in excess of \$600 from Wisconsin sources.

Trusts must file on a calendar-year basis, and the due date is the following April 15. (Exception: a limited number of charitable trusts may still file on a fiscal basis.) Estates can choose any fiscal year, but the first return may not cover more than a 12-month period and the taxable year must end the last day of a month. The due date for fiduciary returns for estates is 3½ months after the close of the fiscal year.

Closing Certificates

Every executor, administrator, personal representative, or trustee applying to a court in Wisconsin having jurisdiction for discharge must obtain a Closing Certificate for Fiduciaries from the department. Before the certificate will be issued, all required income, gift, sales, use, and withholding tax returns and reports, with the exception of the final income tax return of the estate or trust, must be filed.

With the next-to-final fiduciary return, estates must submit a copy of the probate inventory and a copy of the decedent's will. Trustees must submit a statement as to why the trust is closing, a schedule of assets held by the trust, and a copy of the trust agreement (or will creating such trust) if not submitted with a prior return.

If an estate or trust has less than \$600 of income and needs a Closing Certificate for Fiduciaries, the top one-third of the Form 2 should be completed. At line 1, "No 1041 Required" should be inserted. Any required documents must be attached to the Form 2 filed.

The department shall determine that all income, withholding, sales, use, gift, and delinquent taxes are paid. A Closing Certificate for Fiduciaries will then be issued. This does not relieve the executor, administrator, personal representative, or trustee from filing the final fiduciary income tax return. If a probate final account is filed with the court, a copy must be attached to the final return.

For the fiscal year ending June 30, 1993, the department issued nearly 17,000 Closing Certificates for Fiduciaries.

Wisconsin Estate Tax Returns

Filing Requirement

An estate is required to file a Wisconsin estate tax return (Form W706) if it is required to file a federal estate tax return. An estate is required to file a federal estate tax return (Form 706) if the gross estate at date of death plus gifts in excess of \$10,000 made to each donee per calendar year since December 31, 1976, exceeds \$600,000.

The Wisconsin estate tax is equal to the credit for state death taxes allowed on the federal estate tax return (line 15 of federal Form 706). This credit is computed under section 2011 of the Internal Revenue Code. Estates owning property both within and outside Wisconsin owe a percentage of the credit to Wisconsin based on gross Wisconsin property divided by gross total property.

Due Date

The personal representative, special administrator, trustee, or distributee must file the Wisconsin estate tax return by the due date, which is 9 months after the date of death or the extended due date allowed by the Internal Revenue Service (IRS).

If the return is filed after the due date, there is a penalty equal to 5% of the tax, with a minimum of \$25 and a maximum of \$500.

Payment of Tax

The tax is due 9 months after the decedent's date of death, even if an extension has been obtained to file the return.

If the tax is not paid within 9 months of the decedent's death, interest is imposed at 1% per month from the date of death.

Examples:

1. Decedent Able died February 15, 1993. An extension of time to file the federal estate tax return was obtained from the IRS. The Wisconsin estate tax return and payment of the tax were submitted on November 30, 1993, which was within the extension period. Tax of \$1,200 was due. The total amount due is \$1,314, computed as follows:

Tax	\$1,200
Interest (1% x 9½ months)	<u>114</u>
Total amount due	<u>\$1,314</u>

2. Decedent Body died February 15, 1993 and did not obtain an extension to file from the IRS. The Wisconsin estate tax return was filed November 30, 1993, and showed no tax due. This estate owes the minimum penalty of \$25.

Certificate Determining Estate Tax

Upon receipt of the Wisconsin estate tax return and review for correctness, the department will issue a Certificate Determining Estate Tax. If the IRS increases or decreases the federal estate tax, the person entitled to the refund or liable for the additional tax is required to notify the department within 30 days. □

Farmers Receive Over \$43 Million in Tax Credits

More than \$43 million in direct benefits were distributed to Wisconsin farmers in 1993 through two state programs, the farmland preservation credit program and the farmland tax relief credit program. About 23,700 Wisconsin farmers claimed farmland preservation credits amounting to \$27.7 million in the fiscal year ending June 30, 1993, and 61,300 farmers received farmland tax relief credits totalling \$15.5 million for 1992.

Farmland Preservation Credit

Benefits averaging \$1,169 per claimant were distributed through the farmland preservation credit program, which is intended to help protect farmland through local land use planning and soil conservation practices.

To qualify for a benefit under this program, farmland must be zoned for exclusive agricultural use or be subject to a farmland preservation agreement between the farmer and the state. About 78% of the claims for the fiscal year ending June 30, 1993, were for land under zoning and 22% were for land covered by agreements.

Farmland Tax Relief Credit

Farmland tax relief credits averaging \$252 were paid to farmers statewide for 1992. These credits equal 10% of

the first \$10,000 of property taxes on qualifying farmland, exclusive of improvements. This program, which is in addition to the farmland preservation credit, provides direct benefits to virtually all farmers in the state. □

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 April 1, 1994, or at the stage in which action occurred during the period from January 2, 1994, to April 1, 1994.

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 Sent to Legislative Council Rules Clearinghouse

- ch. 4 (title) MOTOR VEHICLE AND GENERAL AVIATION FUEL TAXATION-A
- 4.01 Portable motor equipment-A
- 4.02 Resellers' personal claims for refund-A
- 4.03 Public highways closed to public travel-A
- 4.04 No printing on back of original invoice-R
- 4.05 Taxicabs-A
- 4.10 Motor vehicle fuel tax liability-NR
- 4.11 Tax exemption for dyed or marked diesel fuel-NR
- 4.12 Uncollected motor vehicle fuel taxes and repossessions-NR
- 4.50 Assignment, use and reporting of document number-A
- 4.51 Measuring withdrawals-A
- 4.52 Separate schedules-A
- 4.53 Certificate of authorization-A

- 4.54 Security requirements-A
- 4.55 Ownership and name changes-A
- 4.65 Motor vehicle fuel tax refunds to vendors and tax credits to suppliers-NR
- 4.75 Payment of motor vehicle fuel tax-NR

Rules Sent to Revisor of Statutes for Publication of Notice

- 11.04 Constructing buildings for exempt entities-A

Rules Adopted But Not Yet Effective

- 11.05 Governmental units-A
- 11.19 Printed material exemptions-A
- 11.34 Occasional sales exemption for sale of a business or business assets-A
- 11.56 Printing industry-A
- 11.61 Veterinarians and their suppliers-A
- 11.68 Construction contractors-A

Rules Adopted and in Effect (including date of adoption)

- 3.095 Income tax status of interest and dividends received from government and other securities by individuals and fiduciaries-R&R (2/1/94)
- 9.67 Cigarette tax credit-R&R (3/1/94)
- 11.27 Insurance and warranties-R&R (2/1/94)
- 11.82 Mailing lists and mailing services-A (2/1/94)

Emergency Rule (effective April 1, 1994)

Chapter Tax 4 (title) and all sections — see listing under "Rules Sent to Legislative Council Rules Clearinghouse" above. □

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 (examples and notes appearing in the rules are not reproduced here). In the amendments, material lined through (~~lined through~~) represents deleted text, and underscored (underscored) material represents new text.

This issue includes information about the following rules: sec. Tax 3.095, repealed and recreated effective February 1, 1994; ch. Tax 4, including amendments to the title and ten of the eleven sections, the repeal of one section, and the creation of five new sections, all as an emergency rule effective April 1, 1994; sec. Tax 9.67, repealed and recreated effective March 1, 1994; sec. Tax 11.27, repealed and recreated effective February 1, 1994; and sec. Tax 11.82, amended effective February 1, 1994. For a list of the sections in ch. Tax 4, see the section titled "Rules Sent to Legislative Council Rules Clearinghouse" in the preceding article ("Administrative Rules in Process").

Tax 3.095 Income tax status of interest and dividends received from government and other securities by individuals and fiduciaries. Tax 3.095 is repealed and recreated, to more closely reflect in the title the types of securities listed in the rule, to improve readability, to set forth previously stated definitions in a separate Section, and to reflect the statutory provisions of the taxability or exemption of interest or dividends from the listed securities. In addition, nine securities not previously listed are included. The text of Tax 3.095 is as follows:

Tax 3.095 Income tax status of interest and dividends received from government and other secu-

rities by individuals and fiduciaries. (s. 71.05(6)(a)1 and (b)1, Stats.) (1) PURPOSE. This section lists federal, state, municipal and other government securities, and certain nongovernment securities, and specifies whether interest and dividends payable on those securities are exempt from or subject to the Wisconsin income tax on individuals and fiduciaries. The lists are not all-inclusive.

(2) DEFINITIONS. In this section:

(a) "CHAP" means "Community Housing Alternatives Program."

(b) "Federal securities" means only securities which are direct and primary obligations of the United States and securities the interest on which federal law prohibits states from taxing. Federal securities do not include securities for which the United States is merely a guarantor and, therefore, has an obligation which is secondary and contingent to that of the issuer of the security.

(c) "Public housing agency" means any state, county, municipality or other governmental entity or public body, or agency or instrumentality thereof, which is authorized to engage in or assist in the development or operation of lower income housing, under 42 U.S.C. § 1437a(b)(6).

(d) "WHEDA" means "Wisconsin Housing and Economic Development Authority."

(3) GENERAL. (a) Under s. 71.05(6)(a)1, Stats., interest income which is subject to the Wisconsin income tax on individuals and fiduciaries, but which is not included in federal adjusted gross income, shall be added to federal adjusted gross income in computing Wisconsin taxable income.

(b) Under s. 71.05(6)(b)1, Stats., interest and dividend income which is included in federal adjusted gross income but which is by federal law exempt from state income taxation, shall be subtracted from federal ad-

justed gross income in computing Wisconsin taxable income.

(4) EXEMPT SECURITIES. Interest and dividends payable on the following securities shall be exempt from the Wisconsin income tax on individuals and fiduciaries:

(a) *Exempt state, municipal and other government securities.* 1. District of Columbia general obligation bonds issued on or prior to January 28, 1987, where the interest from the bonds qualifies for exemption from federal income taxation for a reason other than or in addition to s. 103 of the internal revenue code.

2. Higher education bonds issued by the state of Wisconsin, s. 71.05(6)(a)1, Stats.

3. Public housing agency bonds issued on or prior to January 28, 1987, by agencies located outside Wisconsin where the interest from the bonds qualifies for exemption from federal income taxation for a reason other than or in addition to s. 103 of the internal revenue code.

4. Public housing authority bonds issued by municipalities located in Wisconsin, s. 66.40(14)(a), Stats.

5. Redevelopment authority bonds issued by municipalities located in Wisconsin, s. 66.431(5)(a)4.c, Stats.

6. Stripped general obligation bond certificates attributable to certain District of Columbia general obligation bonds issued on or prior to January 28, 1987, where the interest from the bonds qualifies for exemption from federal income taxation under s. 1286 of the internal revenue code and D.C. Code Ann. § 47-332.

7. Virgin Island Housing Authority bonds issued on or prior to January 28, 1987, where the interest from the bonds qualifies for exemption from federal income taxation for a reason other than or in addition to s. 103 of the internal revenue code.

8. WHEDA bonds issued on or prior to January 28, 1987, except business development revenue bonds, economic development revenue bonds and CHAP housing revenue bonds issued by WHEDA.

9. WHEDA bonds issued to fund a loan under s. 234.935, Stats.

10. WHEDA bonds issued under s. 234.65, Stats., to fund an economic development loan to finance construction, renovation or development of property that would be exempt under s. 70.11(36), Stats.

11. Wisconsin Housing Finance Authority bonds, 42 U.S.C. § 1437i(b).

(b) *Exempt federal securities.*

1. Armed Services Housing Mortgage Insurance debentures, 12 U.S.C. § 1748b(f).

2. Bank for Cooperative debentures, 12 U.S.C. § 2134.

3. Bank repurchase agreements for U.S. Government treasury bills, notes and bonds, if interest is paid by the federal government directly to the taxpayer.

4. Commodity Credit Corporation bonds, 15 U.S.C. § 713a-5.

5. Commonwealth of Puerto Rico public improvement bonds, 48 U.S.C. § 745.

6. Farm Credit System Financial Assistance Corporation notes, bonds and debentures, 12 U.S.C. § 2278b-10(b).

7. Federal Deposit Insurance Corporation bonds, 12 U.S.C. § 1825.

8. Federal Farm Credit Banks Consolidated Systemwide Securities, 12 U.S.C. § 2055.

9. Federal Home Loan Bank bonds, debentures and notes, 12 U.S.C. § 1433.

10. Federal Housing Authority debentures, 12 U.S.C. §§ 1710(d) and 1747g(g).

11. Federal Intermediate Credit Bank debentures, 12 U.S.C. § 2079.

12. Federal Land Bank Association bonds, notes and debentures, 12 U.S.C. § 2055.

13. Federal Land Bank bonds, 12 U.S.C. § 2055.

14. Federal Reserve Bank dividends, 12 U.S.C. § 531.

15. Federal Savings and Loan Insurance Corporation bonds, 12 U.S.C. § 1725(e).

16. Financial Assistance Corporation bonds, notes and debentures, 12 U.S.C. § 2278b.

17. Financing Corporation obligations, 12 U.S.C. § 1441.

18. General Insurance Fund debentures issued to acquire housing projects, 12 U.S.C. § 1747g(g).

19. General Insurance Fund debentures issued under the War Housing Insurance Law, 12 U.S.C. § 1739(d).

20. General Services Administration Public Building Trust Participation certificates, 31 U.S.C. § 3124.

21. Guam bonds, 48 U.S.C. § 1423a.

22. Industrial Development bonds of East Samoa, 48 U.S.C. § 1670.

23. Panama Canal Zone bonds, 31 U.S.C. §§ 743-745.

24. Production Credit Association debentures, 12 U.S.C. § 2098.

25. Proprietary zero-coupon certificates, 31 U.S.C. § 3124.

26. Puerto Rico Aqueduct and Sewer Authority revenue bonds, 48 U.S.C. § 745.

27. Puerto Rico Electric Power Authority electric revenue bonds, 48 U.S.C. § 745.

28. Puerto Rico Electric Power Authority power revenue bonds, 48 U.S.C. § 745.

29. Puerto Rico Highway Authority revenue bonds, 48 U.S.C. § 745.

30. Puerto Rico Industrial Development Company bonds, 48 U.S.C. § 745.

31. Puerto Rico Municipal Finance Agency 1974 Series A bonds, 48 U.S.C. § 745.

32. Puerto Rico Ports Authority revenue bonds, 48 U.S.C. § 745.

33. Puerto Rico Public Buildings Authority public education and health facility bonds, 48 U.S.C. § 745.

34. Puerto Rico Public Buildings Authority revenue bonds, 48 U.S.C. § 745.

35. Puerto Rico Telephone Authority revenue bonds, 48 U.S.C. § 745.

36. Puerto Rico Water Resource Authority Series B debentures, 48 U.S.C. § 745.

37. Resolution Funding Corporation bonds, 12 U.S.C. § 1441b(f)(7).

38. Student Loan Marketing Association obligations, 20 U.S.C. § 1087-21.

39. Tennessee Valley Authority bonds, 16 U.S.C. § 831n-4(d).

40. Territory of Hawaii bonds.

41. Territory of Puerto Rico bonds, 48 U.S.C. § 745.

42. United States Postal Service bonds, 39 U.S.C. § 2005.

43. United States savings bonds, 31 U.S.C. § 3124.

44. United States Treasury bills and notes, 31 U.S.C. § 3124.

45. University of Puerto Rico university system revenue bonds, 48 U.S.C. § 745.

46. Virgin Islands general obligation bonds, 48 U.S.C. § 1574(b)(ii)(A).

47. Virgin Islands Public Improvement bonds, 48 U.S.C. § 1574(b)(i).

(5) **TAXABLE SECURITIES.** Interest and dividends payable on the following securities shall be subject to the Wisconsin income tax on individuals and fiduciaries:

(a) *Taxable state and municipal government securities.* 1. District of Columbia Development Land Agency bonds, 42 U.S.C. § 1452.

2. District of Columbia general obligation bonds issued after January 28, 1987, D.C. Code § 47-33.

3. Municipal bonds.

4. Public housing agency bonds issued after January 28, 1987, and by agencies located outside Wisconsin. Public housing agency bonds issued on or prior to January 28, 1987, by agencies located outside Wisconsin where the interest from the bonds qualifies for exemption from federal income taxation solely because of s. 103 of the internal revenue code.

5. Robert F. Kennedy Stadium bonds, D.C. Code § 2-1720 et seq.

6. Transit bonds of the Washington Metropolitan Area Transit Authority.

7. Wisconsin Health Education Assistance Loan revenue obligation bonds, s. 39.374, Stats.

8. WHEDA bonds issued after January 28, 1987, and all business development revenue bonds, economic development revenue bonds and CHAP housing revenue bonds issued by WHEDA, regardless of when issued, unless specifically exempt by law, ch. 234, Stats.

(b) *Other taxable securities.* 1. Asian Development Bank bonds, 22 U.S.C. § 290i-9.

2. College Construction Loan Insurance Association obligations, 20 U.S.C. § 1132.

3. Environmental Financing Authority obligations, 33 U.S.C. § 1281.

4. Export-Import Bank of the United States debentures, 12 U.S.C. § 635.

5. Farmer's Home Administration insured notes, 7 U.S.C. §§ 1928 and 1929.

6. Federal Assets Financing Trust participation certificates, 12 U.S.C. § 1717(c).

7. Federal Financing Bank bonds, 12 U.S.C. § 2288.

8. Federal Home Loan Bank dividends, 12 U.S.C. §§ 1426 and 1436.

9. Federal Home Loan Mortgage Corporation obligations, 12 U.S.C. § 1455.

10. Federal National Mortgage Association certificates, 12 U.S.C. § 1718.

11. Federal National Mortgage Association dividends, 12 U.S.C. § 1719.

12. Government National Mortgage Association, or "Ginnie Mae," bonds, 12 U.S.C. §§ 1720 and 1721.

13. HUD/New Communities Program obligations, 42 U.S.C. § 4514.

14. Insured Merchant Marine bonds, 46 U.S.C. § 1273.

15. Inter-American Development Bank bonds, 22 U.S.C. § 283.

16. Interest paid on deposits in any federal bank or agency.

17. International Bank for Reconstruction and Development bonds, also known as World Bank bonds, 22 U.S.C. § 286.

18. Rural Telephone debentures, 7 U.S.C. § 947(a).

19. Small Business Administration notes, 15 U.S.C. § 633.

20. Small Business Investment Company debentures, 15 U.S.C. §§ 683 and 687.

21. Tennessee Valley Authority bonds, 16 U.S.C. § 831n-3.

22. Virgin Islands Housing Authority bonds issued after January 28, 1987, 48 U.S.C. § 1408(a).

23. World Bank bonds, also known as International Bank for Reconstruction and Development bonds, 22 U.S.C. § 286.

Ch. Tax 4 MOTOR VEHICLE AND GENERAL AVIATION FUEL TAXATION. The title of ch. Tax 4 is amended as indicated above, to reflect that general aviation fuel taxation is covered by this chapter. Tax 4.01, 4.02, 4.03, 4.05, 4.50, 4.51, 4.52, 4.53, 4.54(1), (2)(a)(intro.), (2)(a)3, (2)(b), (3)(b), (4)(a)(intro.), (5)(b), (5)(c), and (5)(d)3, 4, and 5, and 4.55(2)(title)

and (2)(b) are amended, to reflect proper grammar, punctuation, and style, and to reflect statutory changes in the terms "motor fuel" and "special fuel" to "motor vehicle fuel" and "alternate fuel," respectively. Tax 4.04 is repealed as it is obsolete because double-face carbon invoices are no longer used. Tax 4.10, 4.11, 4.12, 4.65, and 4.75 are created and Tax 4.50(1) and 4.54(1) are amended, to reflect statutory changes as follows: Tax 4.10 clarifies the motor vehicle fuel tax liability; Tax 4.11 clarifies the tax exemption for dyed diesel fuel; Tax 4.12 clarifies the supplier's recovery of uncollectible motor vehicle fuel tax; Tax 4.50(1) reflects the change in the point at which a document number is assigned; Tax 4.54(1) reflects changes in limitations on security requirements; Tax 4.65 explains motor vehicle fuel tax refunds to vendors and credits to suppliers; and Tax 4.75 explains the payment of motor vehicle fuel taxes. The text of Tax 4.10, 4.11, 4.12, 4.50(1), 4.54(1), 4.65, and 4.75 is as follows:

Tax 4.10 Motor vehicle fuel tax liability. (s. 78.07, Stats.) (1) **PURPOSE.** This section clarifies the tax liability on all sales of motor vehicle fuel produced, refined, blended, manufactured or imported into Wisconsin.

(2) **IMPOSITION.** The tax on all motor vehicle fuel, either gasoline or clear diesel fuel, is payable to the department by suppliers required to be licensed with the department, as follows:

(a) *Fuel withdrawn from a Wisconsin marine terminal or pipeline terminal.* The motor vehicle fuel tax on gasoline and clear diesel fuel withdrawn from a Wisconsin marine terminal or pipeline terminal is payable by the position holder, which is the supplier who owns the product when the product is metered out at the terminal rack.

(b) *Imported fuel.* Gasoline and clear diesel fuel imported into Wisconsin is subject to the motor vehicle fuel tax and is payable by the out-of-state shipper/supplier when either of the following conditions applies:

1. The product is placed into a transport truck whose destination is a Wisconsin location other than a pipeline terminal or refinery. The bill of lading prepared by the out-of-state terminal operator shall clearly indicate Wisconsin as the destination state. The tax shall be paid by the position holder at the out-of-state terminal. The position holder is the supplier who owns the product when it is metered at the terminal rack.

2. The product is transported across the state line by a restricted supplier from an out-of-state bulk plant in a transporting vehicle not capable of carrying more than 4,200 gallons and the delivery location is no more than 25 miles inside the Wisconsin border. The sales invoice shall clearly indicate Wisconsin as the destination state and that the tax is to be paid by the restricted supplier.

(c) *Blending components.* Any product that is not a motor vehicle fuel and is blended as a component part of motor vehicle fuel other than at a refinery, marine terminal, pipeline terminal or place of manufacture is subject to tax at the time and place of blending. The tax on the component part is payable by the person who owns the motor vehicle fuel when blending is completed.

Tax 4.11 Tax exemption for dyed or marked diesel fuel. (s. 78.01(2p), Stats.) (1) **PURPOSE.** This section clarifies the tax exemption provided to suppliers when a dye or a marker has been added to diesel fuel.

(2) **STATUTES.** If indelible dye, a marker or both has been added to

diesel fuel before or upon withdrawal at a terminal or refinery rack, that fuel shall be used only for an exempt purpose.

(3) **GENERAL.** (a) All fuel dyed, marked or both, and labeled in accordance with the federal internal revenue service regulations is treated as destined for nontaxable use and is exempt from the motor vehicle fuel tax.

(b) Dyed diesel fuel shall only be used for nontaxable purposes.

Tax 4.12 Uncollected motor vehicle fuel taxes and repossessions. (s. 78.01(1) and (2s), Stats.)

(1) **PURPOSE.** This section clarifies when and how a licensed supplier is able to recover the motor vehicle fuel tax from the department when a purchaser is unable to pay the tax to the supplier.

(2) **STATUTES.** Under s. 78.01(2s), Stats., a licensed supplier is not liable for the tax on motor vehicle fuel when the licensed supplier is unable to recover the tax from a purchaser. With proper documentation, the supplier may claim a tax credit on a later remittance of taxes.

(3) **PROCEDURE.** (a) *Tax imposed.* A licensed supplier shall pay the motor vehicle fuel tax to the department within 15 days after the close of the month irrespective of whether the sale is for cash or credit.

(b) *Bad debts.* 1. 'Deduction from measure of tax.' A licensed supplier is relieved from the liability for motor vehicle fuel tax on accounts found worthless and charged off for income tax purposes or, if the licensed supplier is not required to file income tax returns, charged off in accordance with generally accepted accounting principles. The tax deduction shall be reported and claimed on the licensed supplier's monthly tax report. However, if a licensed supplier is out of business when the

account becomes worthless, a bad debt deduction may be claimed on the last return filed by that business or through a refund claim filed within the statutory time allowed.

2. 'Recovery of bad debts charged off.' If any accounts found worthless and charged off are thereafter in whole or in part collected by the supplier, the amount so collected shall be reported in the first tax report, form MF-002, filed after the collection, and the tax on the amount collected shall be paid with the report.

3. 'Amount deductible.' a. A deduction may only be claimed for the unpaid amount of tax on an account found worthless and charged off. The total amount charged off may include the cost of the fuel, interest, financing or insurance costs in addition to the tax amount. To determine the unpaid amount of tax to be deducted, all payments and credits to the account shall be prorated to the various components of the total amount that the purchaser contracted to pay.

b. No deduction is allowable for expenses incurred by a supplier in attempting to collect any account receivable, or for that portion of a debt recovered that is reclaimed by or paid to a third party as compensation for services rendered in collecting the account.

4. 'Special situations.' a. A purchaser of receivables is not entitled to a deduction of the motor vehicle fuel tax which subsequently becomes worthless.

b. A licensed supplier who sells its receivables and agrees to bear any bad debt loss on them is not entitled to a bad debt deduction for the amount of the tax paid.

5. 'Repossessions.' When motor vehicle fuel is repossessed a tax credit is allowable only to the extent that the supplier sustains a net loss upon which tax was paid.

(c) *Tax rate change.* If a deduction for uncollectible tax is being

claimed in a period when the tax rate is different from the tax rate in effect when the tax was reported on the tax report, an adjustment to the gallons claimed shall be made to compensate for the tax rate differential. The number of gallons to claim is computed by dividing the old tax rate by the new tax rate and multiplying that percentage by the gallons sold.

4.50(1) **ASSIGNMENT.** The assignment of a "Wisconsin" state tax document number" shall in each case originate with the shipper and be assigned by him or her the refiner, terminal operator or place of manufacture where the fuel is loaded. All subsequent transactions, invoices and reports regarding each respective shipment shall use and make reference to this number.

4.54(1) **GENERAL.** Under ss. 78.11, 78.48(9) and 78.57(9), Stats., the department may require motor vehicle fuel, special alternate fuel and general aviation fuel taxpayers to deposit security with the department. This security may be required before or after the fuel tax license is issued. The amount of security determination will shall be made by the department. ~~The amount of the security may not exceed \$100,000 for motor fuel and \$25,000 for special fuel and general aviation fuel.~~ If any person fails or refuses to place the security, the department may refuse to issue the license or may revoke the license.

Tax 4.65 Motor vehicle fuel tax refunds to vendors and tax credits to suppliers. (s. 78.01(2r), Stats.)

(1) **SCOPE.** This section applies to suppliers, wholesale distributors and retail dealers who sell motor vehicle fuel to customers for exempt purposes on which the tax was paid. Registered vendors may file refund claims with the department. Licensed suppliers may claim credits on their monthly reports. The claim for refund and the credit claimed

may be investigated by the department and adjusted within 4 years after the date of filing.

(2) **STATUTES.** Under s. 78.01(2r), Stats., the ultimate consumer who will not consume the fuel in a licensed motor vehicle, motor boat or snowmobile shall assign his or her claim for a refund or credit on the tax paid on clear diesel fuel and on all gasoline to the person from whom the ultimate consumer purchased the fuel.

(3) **PROCEDURES.** (a) Vendors, other than suppliers licensed with the department, shall register with the department, using form MF-112, to expedite the processing of a tax refund claim.

(b) Persons making exempt sales shall prepare and provide the customer with a sales invoice. A properly prepared legible invoice shall include the following information:

1. Name and address of seller.
2. Date of sale.
3. Name and address of purchaser.
4. Product sold.
5. Number of gallons.
6. Price per gallon.
7. A statement that no Wisconsin motor vehicle fuel tax is included in the price per gallon figure.

(c) The customer shall provide the vendor with an annual exemption certificate when purchasing clear diesel fuel and gasoline which will be consumed by that customer for an exempt purpose as defined in s. 78.01(2) and (2m), Stats. A purchaser of clear diesel fuel and gasoline for an exempt use shall provide the seller with a properly completed exemption certificate, form MF-209, prior to the tax-exempt purchase. The certificate may not cover a period of more than 12 months.

(d) Claims shall be made and filed upon forms prescribed and furnished by the department, form MF-012.

(e) Tax refunds are not available on fewer than 100 gallons and claims may not be filed more than once a month.

(f) The penalties provided in s. 78.73, Stats., for filing a false or fraudulent claim apply to all refund claimants.

(g) Refunds under s. 78.01(2r), Stats., shall be of tax only and may not include interest.

Tax 4.75 Payment of motor vehicle fuel tax. (s. 78.12(5), Stats.)

(1) **SCOPE.** This section applies to wholesaler distributors who have exercised their option to delay tax payment to suppliers licensed by the department.

(2) **STATUTES.** Under s. 78.12(5), Stats., the wholesaler distributor has the option to pay the motor vehicle fuel tax under normal credit arrangements or to delay paying the tax to the licensed supplier until the date that the tax is due to the department. A wholesaler distributor who makes delayed payments shall make the payment by electronic funds transfer to the supplier. If a wholesaler distributor fails to make timely payments, the licensed supplier may terminate the right of the wholesaler distributor to make delayed payments. Each licensed supplier shall notify the department of each wholesaler distributor who makes delayed payments of the tax.

(3) **PROCEDURES.** (a) Licensed suppliers are required to notify the department of the following:

1. Name, address, and federal employer identification number, or FEIN, of all wholesaler distributors who elect to delay tax payment.

2. Name of any wholesaler distributor who fails to make timely delayed tax payments. The supplier shall notify the department via facsimile, or FAX, transmittal within 5 days after the due date of the tax to the department.

(b) Wholesaler distributors are required to do the following:

1. Request approval from the supplier to delay the tax payment.
2. Submit the tax payment to the supplier via electronic funds transfer.
3. Submit security to the department if required.

(c) The department is required to do the following:

1. Maintain a listing of the name, address, and FEIN of all wholesaler distributors eligible to delay tax payment based on information received from licensed suppliers.
2. Require security from wholesaler distributors who have defaulted in making delayed tax payments and who wish to continue the delayed tax payment plan.

Tax 9.67 Cigarette tax credit.

Tax 9.67 is repealed and recreated, to: 1) reflect the change in the definition of "stamp"; 2) reflect the repeal of the requirement that the secretary prescribe rules describing security requirements; 3) reflect a change in the required payment date for credit extended by the department; and 4) update language and style. 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) **REVOCATION OF PRIVILEGE.** The privilege granted to any manufacturer or distributor of making cigarette tax stamp purchases on credit may be revoked at any time at the discretion of the department.

Tax 11.27 Insurance and warranties. Tax 11.27 is repealed and recreated, to define insurance and warranty, to address sales of insurance and repairs under insurance or warranty plans, to reflect that the sale of warranties is subject to tax if the related property sold is subject to tax, to reflect the department's position regarding "goodwill work," and to update language. The text of Tax 11.27 is as follows:

Tax 11.27 Insurance and warranties. (ss. 77.51(4)(a) and (14)(intro.), 77.52(2)(a)10 and 77.54(8), Stats.) (1) **DEFINITIONS.** In this section:

(a) "Insurance" means a contract or agreement which promises indemnity against loss or damage resulting from perils outside of and unrelated to defects in tangible personal property.

(b) "Warranty" means a contract or agreement which promises indemnity against defects in tangible personal property sold.

(2) **RECEIPTS FROM INSURANCE.** Gross receipts from the sale of insurance are not subject to Wisconsin sales or use tax when separately stated on the invoice.

(3) **RECEIPTS FROM WARRANTIES.** Gross receipts from the sale of warranties are subject to Wisconsin sales or use tax provided the tangible personal property to which the warranty relates is or was

subject to Wisconsin sales or use tax.

(4) **REPAIRS BY RETAILERS UNDER INSURANCE PLANS.** (a) Gross receipts from charges by a retailer to a customer or an insurer for taxable repair parts or taxable services performed under an insurance plan are subject to Wisconsin sales or use tax.

(b)1. A retailer who provides parts or performs taxable repair services to tangible personal property under an insurance plan may purchase the tangible personal property transferred to the customer as part of the repair without Wisconsin sales or use tax as property for resale.

2. A person who provides tangible personal property in repairing real property under an insurance plan is the consumer of tangible personal property transferred to a customer as part of the repair to real property and is subject to Wisconsin sales or use tax on the purchase of the tangible personal property transferred.

(5) **REPAIRS BY RETAILERS UNDER WARRANTIES.** (a) Gross receipts from charges by a retailer to a customer for taxable repair parts or taxable services performed under a warranty are subject to Wisconsin sales or use tax.

(b) Reimbursement to a retailer from a manufacturer or other person, whether in the form of money or replacement of parts used to perform repair services under a warranty is not subject to Wisconsin sales or use tax.

(c)1. A retailer who provides parts or performs taxable repair services to tangible personal property under a warranty may purchase the tangible personal property transferred to the customer as part of the repair without Wisconsin sales or use tax as property for resale.

2. A person who provides tangible personal property in repairing real property under a warranty is

the consumer of tangible personal property transferred to a customer as part of the repair to real property and is subject to Wisconsin sales or use tax on the purchase of the tangible personal property transferred.

(6) **REPAIRS NOT BY RETAILERS.** If a retailer does not repair tangible personal property under a warranty or insurance plan, but instead has another person perform the repairs covered under the warranty or insurance plan, the person's gross receipts from the sale of the repair to the retailer are not subject to Wisconsin sales or use tax provided the retailer gives the person a properly completed resale certificate. The charge for repairs by the other person is exempt as a sale for resale whether or not the original sale of the property to which the warranty or insurance plan relates occurred in Wisconsin.

The sales and use tax treatment of the charge by the retailer to the customer or plan provider is the same as provided in subs. (4) and (5).

(7) **GOODWILL WORK.** A retailer who provides free parts or services or both to a customer under an implied warranty in order to maintain good customer relations, although not required to do so under a sales agreement, maintenance agreement, express warranty, or insurance plan may purchase the parts without Wisconsin sales or use tax as property for resale.

Tax 11.82 Mailing lists and mailing services. Tax 11.82(1)(b) is amended, to reflect the Wisconsin Tax Appeals Commission decision in *A-K Corporation and Profile Publishing Co. dba Miles Kimball vs. Wisconsin Department of Revenue*, which held that mailing lists on magnetic tape are not tangible personal property;

and to update language and style. Tax 11.82(1)(c), (2)(a), (2)(b), and (2)(c) are amended, to update language. The text of Tax 11.82(1)(b) is as follows:

11.82(1)(b) A mailing list is tangible personal property, except for written ~~or~~, typed or printed lists of names and addresses and lists stored in machine-readable form, such as microfilm and computer tapes and disks, and the sales and use tax shall apply to the gross receipts from the sale of and the storage, use or other consumption of mailing lists in the form of tangible personal property, including the rental of or the granting of a license to use such those lists. ~~Examples of taxable~~ Taxable mailing lists include, but are not limited to ~~magnetic tapes and~~ mailing lists which are physically attached to the envelopes, such as Cheshire tapes, gummed labels and heat transfers.

□



Report on Litigation

Summarized below are recent significant Wisconsin Tax Appeals Commission (WTAC) and Wisconsin Court

decisions. The last paragraph of each decision indicates whether the case has been appealed to a higher Court.

The following decisions are included:

Individual Income Taxes

Domicile

Frank Gerlitz (p. 15)

Corporation Franchise and Income Taxes

Apportionment — contractors

Losses — 1986 and prior — deductibility

Towne Realty, Inc. (p. 15)

Sales and Use Taxes

Aircraft

Leeson Electric Corporation (p. 17)

Exemptions — commercial vessels and barges

Washington Island Ferry Line, Inc. (p. 18)

Occasional sales — business assets

Mail N'More, Inc. (p. 19)

Service enterprises — car washes

Dale W. Lamine and Knutson & Lamine Partnership (p. 19)

Service enterprises — horseshoeing/farrier

Mark Espersen (p. 20)

Temporary Recycling Surcharge

Temporary recycling surcharge — constitutionality

Love, Voss & Murray (p. 20)

Other

Appeals — appeal procedure

Laurence H. Grange (p. 21)

Appeals — tax appeals commission

Northern States Power Company (p. 21)

INDIVIDUAL INCOME TAXES

■ Domicile. *Frank Gerlitz vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, May 25, 1993). The issue in this case is whether the taxpayer abandoned his Wisconsin domicile and established an Illinois domicile for 1985.

The taxpayer moved to Wisconsin in 1971, purchasing a residence in the city of Madison in 1973, where he lived until late 1984. During that period he filed Wisconsin income tax returns as a resident, registered his automobile here, held a Wisconsin driver's license, attended the University of Wisconsin-Madison as a resident, was employed in Wisconsin, held a Wisconsin seller's permit, had a local checking account, and maintained a listing in the Madison telephone directory.

In late 1984, the taxpayer accepted employment in Illinois. He stayed at a hotel in Illinois until February 1985, when he began renting an apartment in Chicago and continued living there throughout 1985. He obtained a telephone at that address, established a bank account in Chicago, and filed an Illinois state income tax return for 1985.

However, while living and working in Illinois in 1985 and thereafter, the taxpayer continued to own the Madison, Wisconsin residence until 1989, continued to maintain his auto registration in Wisconsin at the Madison address at least until 1989, continued to receive mail at that address (it was sent to him in Illinois by tenants), continued to maintain a Madison telephone directory listing at that address at least until 1989, continued to register at the University of Wisconsin-Madison as a resident for tuition purposes until 1990, continued to maintain his checking account at his Madison bank and write checks

using the Madison address, and maintained his Wisconsin seller's permit using the Madison address at least until 1986.

In addition, although he apparently never returned to live in Madison, he renewed his Wisconsin driver's license in 1986, using the Madison residence address as his own. He finally sold the Madison residence in 1989, having completed his University of Wisconsin-Madison degree work, and moved to Michigan in 1989.

The Commission concluded that, although residing in Illinois during 1985, the taxpayer did not abandon his Wisconsin domicile and therefore was a Wisconsin domiciliary for purposes of imposition of the Wisconsin income tax. There is virtually no evidence in the record, other than the taxpayer's own testimony and that of his wife, that his Wisconsin domicile was abandoned or that he established a new domicile in Illinois.

The Commission retained jurisdiction of this appeal docket pending determination of the remaining rental loss and business expense issues, which will be scheduled for hearing.

The taxpayer has not appealed this decision. ☐

CORPORATION FRANCHISE AND INCOME TAXES

■ Apportionment — contractors; Losses — 1986 and prior — deductibility. *Towne Realty, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, December 14, 1993). The issues before the Commission are as follows:

A. Does the apportionment method used by the department in apportioning the income and loss real-

ized by the taxpayer in connection with its performance of long-term contracts for the construction of military housing outside of Wisconsin fail to clearly reflect and/or fairly apportion income and loss in violation of applicable Wisconsin Statutes and the Due Process and Commerce Clauses of the United States Constitution?

- B. Is the taxpayer appropriately entitled to a deduction under sec. 71.04(7), Wis. Stats. (1979-80), for advances it made to Woerful Corporation?
- C. Are amounts received by the taxpayer as repayment by Eastport, Inc., a wholly-owned subsidiary, for Eastport's share of the income tax liability of the consolidated group of corporations of which Eastport is a member, for which the taxpayer paid the entire tax liability, properly excludable from the taxpayer's Wisconsin apportionable income?
- D. Should dividends received by the taxpayer from corporations apportioning less than 50% of their income to Wisconsin be excluded from the taxpayer's Wisconsin apportionable income?
- E. Is the taxpayer entitled to a step-up in basis with respect to certain property purchased from Mr. Daniel Tishberg?
- F. Did the taxpayer properly utilize the completed contract method of accounting on computing its gain or loss from the Towne Realty of Hawaii Joint Venture?

Towne Realty, Inc., is a Wisconsin corporation, with its principal place of business located in Milwaukee, Wisconsin. The department issued to the taxpayer a notice of additional franchise tax assessment for fiscal years 1979 through 1983 inclusive.

Fiscal years 1975 through 1978 were adjusted to affect the net business loss carryforward which could be utilized by the taxpayer for years subsequent to fiscal year 1978.

The taxpayer has been in existence for nearly 50 years, and during the years 1975 through 1983 has been primarily involved in the business of real estate, real estate development, and contracting, both in Wisconsin and throughout the United States, including Alaska and Hawaii.

In the late 1960s, the taxpayer became involved in government contracting, primarily for the construction of military housing, through joint ventures. Initially, the other joint venturers in these projects were Woerful Corporation, an established construction company, and Miller, Waltz & Diedrich, an architectural firm. These parties joined together to submit bids for military housing construction projects. The joint venture was awarded construction contracts for 12 military facilities located outside Wisconsin.

The military housing projects were awarded in a set dollar amount, requiring the joint venture to deliver a specific "turnkey" product pursuant to plans and specifications. Once construction started, problems inevitably occurred on the projects. The government also requested changes in the type of work done and sometimes imposed standards beyond the scope of the contract. As a result of problems such as these, the joint ventures in which the taxpayer was involved incurred costs in excess of those anticipated when submitting the original bids and, by reason of these additional costs, ended up in disputes with the government on many of the projects. When disputes over additional costs arose, the government required that a formal claim be submitted requesting additional money. Typically the claims were heard by a

government panel, and ultimately negotiations would determine the amount, if any, which would be paid on the claim.

As of 1977, the joint venture had claims against the government totaling approximately \$17,000,000. The claims against the government were finally resolved, primarily in the fiscal year ending February 29, 1980. All but five of the claims were settled with the government, and the taxpayer sold its interest in the remaining five claims.

The military housing construction projects were not profitable for the joint venture and resulted in substantial losses which caused Miller, Waltz & Diedrich to withdraw early in the process of performing under the contracts, rendered Woerful Corporation insolvent, and nearly bankrupted the taxpayer.

During the late 1970s and early 1980s, the Internal Revenue Code basically permitted three different methods for recognizing income and expenses relating to long-term contracts: the completed contract method under which all revenues and expenses were recognized in the year in which the contract was deemed to be complete; the percentage of completion method under which revenues and expenses from the contract were recognized over the term of the contract to the extent the contract was complete; and any other method that clearly reflected income. The two principal methods used by the taxpayer were the completed contract method and the percentage of completion method.

In the taxpayer's fiscal year ending February 28, 1977, the year the majority of the joint venture military housing construction contracts were considered to be physically complete, the taxpayer had significant losses on the contracts. The Wisconsin appor-

tionment formula applied to the taxpayer's income in that year was very low, around 10-12%, because the denominators of the taxpayer's apportionment factors contained the aggregate of all of the out-of-state payroll, property, and revenue related to the out-of-state, long-term military housing construction contracts for all of the fiscal years ending February 28, 1974, through February 28, 1977. Accordingly, a very small percentage of these significant losses was apportioned to Wisconsin.

When the disputes under the contracts were finally settled in fiscal year 1980 and additional revenue was recognized by the taxpayer relating to the contracts, the taxpayer's Wisconsin apportionment formula was in the 80-85% range because the contracts had been completed years before and the apportionment factors in 1980 included none of the payroll, property, or revenue relating to the out-of-state, long-term military housing construction contracts.

The taxpayer paid the operating expenses of the 12 military housing construction joint ventures subsequent to 1977 and reflected Woerful Corporation's proportionate share of those expenses as loans and advances to Woerful. At the end of fiscal year 1980, Woerful owed the taxpayer \$2,786,175 for its proportionate share of the military joint venture expenses. The taxpayer expected to be reimbursed for its proportionate share of the expenses at the time the government claims were settled. However, after all the claims were collected, there were no additional funds that Woerful could utilize to repay the advances to the taxpayer. Woerful had no other source of income or financing as of February 29, 1980.

The Commission concluded:

A. The apportionment method employed by the department in

apportioning the income and loss realized by the taxpayer in connection with the joint venture long-term military housing construction contracts fails to fairly apportion such income and loss, fails to clearly reflect income, serves to tax income where none exists, attributes to Wisconsin an amount of income out of all appropriate proportion to the business transacted in the state, and leads to a grossly distorted amount.

B. The taxpayer is properly entitled to a deduction under sec. 71.04(7), Wis. Stats. (1979-80), for its fiscal year ending February 29, 1980, for funds advanced by it to Woerful Corporation.

C. Amounts distributed by Eastport, Inc., to the taxpayer constituted dividends and repayment of Eastport's share of federal consolidated tax liability, and no portion of such distributions constituted gain on the sale of Eastport stock.

D. Because the statutory scheme embodied in secs. 71.01(1m) and 71.04(4), Wis. Stats. (1975-77), serves to impose Wisconsin tax on such dividends while exempting from Wisconsin tax dividends paid by corporations who allocate 50% or more of their income to Wisconsin, the statutes unlawfully discriminate in favor of local business at the expense of business conducted in interstate commerce, in violation of the Interstate Commerce Clause and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. No portion of any dividends received by the taxpayer during the period 1982 through 1983 is includable in the taxpayer's Wisconsin apportionable income or the taxpayer's sales factor.

E. The taxpayer is entitled to a step-up in basis on the acquisition of Mr. Daniel Tishberg's joint venture interests.

F. The taxpayer properly treated the revenues and expenses from the Towne Realty of Hawaii Joint Venture under the completed contract method of accounting.

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

SALES AND USE TAXES

✦ Aircraft. *Leeson Electric Corporation vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, December 10, 1993). The substantive issues in this case are:

A. Whether valid, exclusive lease agreements applicable to aircraft existed between the taxpayer and Scott AirCharter ("Scott"), a licensed charter air carrier, at all times during the periods under review.

B. Whether the taxpayer's post-purchase utilization of the aircraft may comprise "storage, use or other consumption" sufficient to trigger use tax imposition under sec. 77.53(1), Wis. Stats.

The taxpayer is a Wisconsin corporation and has held a Wisconsin seller's permit at all times since April 3, 1980. In May 1988, the taxpayer purchased a jet airplane ("the first airplane"). The taxpayer timely reported and paid Wisconsin sales tax on that purchase.

In April 1989, the taxpayer traded in the first airplane and purchased another jet airplane ("the second airplane"). The taxpayer timely reported and paid Wisconsin sales tax on the base price of the second airplane, net of the trade-in allowance.

At all times during the periods at issue, Scott was a duly licensed carrier of persons in inter-state commerce under authority of the laws of the United States pursuant to a Federal Air Carrier Certificate obtained in 1983.

The taxpayer timely reported and paid Wisconsin use tax on repairs and capital improvements to the first airplane and second airplane for the periods November 1989, June 1990, and July 1990.

In December 1990, the taxpayer filed an amended sales and use tax return, claiming a refund of the sales and use tax it had paid on the first and second airplanes and on the repairs and capital improvements to the airplanes.

Additional facts are as follows:

The taxpayer flies in its aircraft to all forty-eight continental states of the U.S., as well as to Canada.

Sometime after the purchase of each of the two subject airplanes, the taxpayer claims to have made agreements with Scott, an air charter company, for Scott to manage and supervise the taxpayer's airplanes and charter them to third parties. The taxpayer's stated purpose in entering into the agreements was to offset the costs of owning aircraft with charter revenue; to make owning an airplane more affordable; and to have someone else handle the details of managing the aircraft.

The taxpayer was by far the most frequent user of the two airplanes, and in eight months during the taxing periods was the airplane's only user.

For the first airplane, the taxpayer produced an unsigned and undated copy of a purported lease agreement with Scott which had handwritten notes and changes thereon. It was never shown conclusively that any

lease agreement was ever finalized or signed by the taxpayer for that first airplane. Correspondence from Scott to the taxpayer demonstrates that key provisions of the written agreement alleged to have been observed by those parties concerning the first airplane were being negotiated or were yet to be finalized at the correspondence dates, months after the purchase of the first airplane.

For the second airplane, the taxpayer did not enter into a written lease agreement with Scott until almost two months after the purchase of the aircraft. The lease document was entitled "Aircraft operating and Lease Agreement." The agreement had a term of one year; there were no executed, written extensions of the agreement.

The taxpayer paid Scott an annual management/supervision fee in monthly payments to supervise and manage the two airplanes. The monthly payments were referred to at various times on the monthly Aircraft Financial Summaries prepared by Scott as "hangar fee," "management fee," and "supervision and management."

The taxpayer allowed Scott to charter the aircraft to others, for its standard charter rates, when the taxpayer did not plan to use the planes, with the taxpayer receiving 85% of the gross revenues generated by the charters or a minimum of \$1,500.00 per day and Scott receiving 15% of the charter revenues.

In the agreements with Scott, the taxpayer also agreed to pay for any taxes, fees, assessments, fines, and penalties on the aircraft, as well as the costs and expenses of the operation, maintenance, modification, repair, and inspection of the two aircraft, including parts, equipment, and flight manuals. The agreements called for the taxpayer to pay Scott an

annual fee for employment of a two-man crew to cover all of Scott's costs for the pilots, including salaries, benefits, and expenses. The pilots were technically Scott's employees.

There was a provision in the agreements which provided that selection of the taxpayer's designated crew members was subject to the "expressed approval" of the taxpayer. Scott did not hire any pilot without the taxpayer's "expressed approval." Chris Doerr, president of the taxpayer corporation, became involved in such activities as interviewing, reviewing resumes, taking test rides with pilot applicants, and discussing various applicants with Douglas Scott of Scott AirCharter.

Clauses in both written agreements offered by the taxpayer allowed the taxpayer a preemptive right over third party chartering engagements if the taxpayer chose to utilize the aircraft during that time slot. Testimony by Mr. Scott indicated that these clauses were frequently ignored in practice.

The Commission concluded that:

- A. The agreements offered by the taxpayer were not valid, exclusive leases of the aircraft for all periods under review. The taxpayer's purchases of the two airplanes were not solely for rental or lease under sec. Tax 11.29(2)(a), Wis. Adm. Code.
- B. The taxpayer "used" both of the aircraft on a repeated and continuing basis for its own business purposes during the period under review, rendering the full purchase price of the aircraft and repair or maintenance expenses subject to use tax under secs. 77.51(22)(a) and 77.53(1), Wis. Stats.

The taxpayer has not appealed this decision. □

Exemptions — commercial vessels and barges. *Wisconsin Department of Revenue vs. Washington Island Ferry Line, Inc.* (Circuit Court for Dane County, December 6, 1993). This is an appeal from a decision by the Wisconsin Tax Appeals Commission (Commission). For a summary of that decision, see *Wisconsin Tax Bulletin* 82 (July 1993), page 27. The issue is whether the taxpayer's purchases of a vessel and related accessories, attachments, parts, lubricants, and fuel during the years 1986-1990 qualify for sales and use tax exemption under sec. 77.54(12) or (13), Wis. Stats.

The taxpayer operates a ferry line consisting of 5 vessels. The boats move wholly within Wisconsin, traversing the five mile distance between mainland Door County and Washington Island. The island's winter population of 650 quadruples in the summer, primarily because of visitation by tourists. Its limited commercial industry includes gift shops, motels, hotels, and sightseeing railroads, all of which reflect its tourist base.

The taxpayer is the sole means of transportation to and from the island, carrying not only people and their vehicles, but any freight required by the island population, e.g. fuel, food, building materials. It holds state and federal licenses to operate as a common carrier.

The Circuit Court concluded that the Commission's decision that the taxpayer operates primarily in interstate commerce and qualifies for exemption on its purchases of a vessel, accessories, etc., was reasonable. Greater than 50% of all passengers and vehicles carried by the taxpayer originate outside Wisconsin. This group represents over 90% of the taxpayer's revenues. Because most of the freight also is characterized as interstate, the ferry takes in somewhat more than

50% of its revenues from interstate commerce.

The department appealed this decision to the Court of Appeals but subsequently withdrew its appeal. □

— Occasional sales — business assets. *Mail N' More, Inc. vs. Wisconsin Department of Revenue* (Circuit Court for Milwaukee County, August 11, 1993). This is a review of the December 4, 1992, decision of the Wisconsin Tax Appeals Commission. For a summary of this decision, see *Wisconsin Tax Bulletin* 81 (April 1993), page 12.

The issue in this case is whether the taxpayer is entitled to an occasional sales exemption on its sale of business fixtures and equipment when the taxpayer's seller's permit was not delivered to the department for cancellation within 10 days after the sale of the property.

On December 31, 1990, the taxpayer sold its business and ceased operations. The taxpayer reported the sale of its business on its sales and use tax returns for the months of November 1990, and December 1990, filed respectively on December 31, 1990, and January 31, 1991. In March of 1991, the department responded to the taxpayer's notification of sale by mailing a Notice of Sales and Use Tax Account Inactivation Form and a Disposition of Assets Report. The taxpayer returned these forms, along with the seller's permit, to the department with a letter dated March 26, 1991.

The taxpayer contends that he substantially complied with the statute with the timely notification of the business sale to the department on its sales and use tax returns, albeit not in the procedure mandated in sec. 77.51(9)(am), Wis. Stats. The taxpayer further contends that

sec. 77.51(9)(am), Wis. Stats., adding the 10 day grace period for surrender of the seller's permit, overrules the denial of the occasional sales exemption as found in the holdings of *Fiedler Foods v. Rev. Dept.*, 142 Wis. 2d 722 (Ct. App. 1987); *Midcontinent Broadcasting Co. v. Dept. of Rev.*, 98 Wis. 2d 379 (1980); and *Ramrod Inc. v. Dept. of Rev.*, 64 Wis. 2d 499, 505 (1974), all of which were decided under the old statute.

The Court concluded that the taxpayer's failure to deliver its seller's permit within 10 days of the sale of the property in question constituted noncompliance with the qualifications required to claim an occasional sales exemption.

The taxpayer has not appealed this decision. □

— Service enterprises — car washes. *Dale W. Lamine and Knutson & Lamine Partnership vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, October 27, 1993). The issues are as follows:

- A. Whether the taxpayers' operation of coin-operated self service and automatic vehicle wash facilities and provision of supplies to customers constituted the rental of tangible personal property or the providing of a taxable service.
- B. Whether the taxpayers' use of the equipment, parts, materials, and supplies, which were purchased without sales tax from a retailer located outside Wisconsin, were subject to Wisconsin use tax.
- C. Whether the taxpayers' sales of equipment, parts, materials, and supplies to others who operated similar vehicle wash facilities in Wisconsin, without collecting

sales and use tax exemption certificates, was subject to Wisconsin sales tax.

- D. Whether the department's assessments of additional sales and use tax violated the taxpayers' right of equal protection guaranteed by Article I, Section 1 of the Wisconsin Constitution.

During the period at issue, the taxpayers operated several car wash facilities. At a facility, a customer would drive his or her vehicle onto the premises and directly into one of the two types of vehicle cleaning bays.

Within one type of bay, the taxpayers had installed coin-operated vehicle washing equipment. The customer, by insertion of the proper amount of coins and turning a dial, was able to control the output of a gun or wand that was freely suspended in the bay. The gun or wand sprayed pressurized soap suds, rinse water, or wax as selected by the customer. After the customer completed cleaning the vehicle, the customer would reenter the vehicle and drive the vehicle out of the facility.

At each facility, the taxpayers also had installed automatic coin-operated vehicle washing equipment within the other type of cleaning bay. After the customer deposited the proper amount of coins, the equipment would systematically move over and around the vehicle, dispensing water, soap, and wax onto the vehicle and scrubbing the vehicle. After the equipment finished a cleaning cycle, it would retract and the customer would drive the vehicle out of the facility.

The customers provided all of the manual labor associated with cleaning their vehicles. The taxpayers neither offered nor were expected to provide any services in assisting a customer in actually cleaning the vehicle.

The taxpayers also provided soap, wax, and other supplies to customers through dispensing equipment.

The equipment and supplies described above are used by the customer on the taxpayer's premises. The customers cannot remove such equipment from the premises.

The coin-operated vehicle cleaning equipment, as well as all other equipment and supplies, were purchased by the taxpayers from a retailer located outside Wisconsin. No sales or use tax was paid when the taxpayers purchased the equipment and supplies. Some of the equipment and supplies were used by the taxpayers in Wisconsin and the rest were resold by the taxpayers to other owners and operators of vehicle wash facilities located in Wisconsin.

The taxpayers collected no sales tax from the owners and operators of those facilities on such sales, and the owners and operators of those facilities did not provide the taxpayers with sales and use tax exemption certificates.

The Commission concluded:

- A. The taxpayers' operation of the vehicle wash facilities and provision of incidental supplies constituted the providing of a taxable service under sec. 77.52(2)(a)10, Wis. Stats., and sec. Tax 11.67(3)(m), Wis. Adm. Code.
- B. Because the taxpayers were the ultimate consumers of the tangible personal property used in their business of providing a customer-operated vehicle wash service, the taxpayers were subject to the Wisconsin use tax imposed by sec. 77.53, Wis. Stats., to the extent of their purchases of such items from retailers outside Wisconsin without the payment of sales tax.

- C. Because the taxpayers sold tangible personal property for use in similar businesses without collecting a sales or use tax and without obtaining sales and use tax exemption certificates, the taxpayers were subject to the sales tax imposed by sec. 77.52, Wis. Stats., on such sales.

- D. The taxpayers have not shown that the assessments of sales and use tax under review have violated their right of equal protection guaranteed by Article I, section 1 of the Wisconsin Constitution.

The taxpayers have not appealed this decision. ☐

Service enterprises — horseshoeing/farrier. *Mark Espersen vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, January 24, 1994). The issue in this case is whether a farrier's services are subject to Wisconsin sales tax under sec. 77.52(2)(a)10, Wis. Stats.

In 1977, the taxpayer attended a farrier school for three months, where he was taught the anatomy of the hooves and legs of horses, along with how to shoe and trim them. The taxpayer subsequently completed continuing education courses on the care of horses' legs and hooves.

In 1978, the taxpayer started a farrier/horseshoeing business in Wisconsin, which he continued during the years under review. His services as a farrier included the trimming and shoeing of horses' hooves.

The taxpayer did not obtain a seller's permit from the department or collect and remit sales taxes on the gross receipts he received from his farrier business, because he was unaware they were taxable.

The question for the Commission to decide is whether a farrier is a veterinarian within the intent and meaning of sec. 77.52(2)(a)10, Wis. Stats. The last sentence of sec. 77.52(2)(a)10, Wis. Stats., which states "'Service' does not include services performed by veterinarians.", is in effect an exemption from tax.

The Commission concluded that the taxpayer does not fit clearly within the exemption language of sec. 77.52(2)(a)10, Wis. Stats., and, thus, the services he performed as a farrier are subject to sales tax.

Before an individual can become a licensed veterinarian in Wisconsin, he or she must graduate from a college of veterinary medicine and also pass a national and state board examination.

A farrier/horseshoer is not a veterinarian, whether licensed or not. The educational requirements and the responsibilities of the two occupations are enormously dissimilar.

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

TEMPORARY RECYCLING SURCHARGE

Temporary recycling surcharge — constitutionality. *Love, Voss & Murray vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, February 8, 1994). This case was before the Commission on cross motions by the parties for summary judgment. The issue in this case is whether secs. 77.92, 77.93, 77.94, 77.95, and 77.96, Wis. Stats. (1991-92), are unconstitutional as violative of the Fourteenth Amendment to the United States Constitution and Article I, section 1, of the Wisconsin Constitution by denying the taxpayer the equal protection of the laws, and

further violative of the tax uniformity provisions of Article VIII, section 1, of the Wisconsin Constitution.

The taxpayer is a Wisconsin partnership engaged in the practice of law, with offices in Waukesha. As such, it filed a Form 3S Wisconsin Partnership Temporary Surcharge return for calendar year 1991 on which it reported Wisconsin net business income that resulted in the calculation of an amount owing of \$694.22. The taxpayer refused to pay this amount, declaring that the surcharge was unconstitutional, which resulted in the assessment at issue.

The taxpayer claims the law taxes various entities "in a substantially disparate fashion, solely on the basis of whether they are or are not a noncorporate entity engaged in farming . . ." and that no rational justification exists for excluding noncorporate farming entities from the recycling surcharge.

The statutory scheme attacked by the taxpayer imposes, "[f]or the privilege of doing business in this state," a "temporary recycling surcharge" which is differentially calculated for four categories of taxpayers: (1) "C" corporations; (2) "S" corporations; (3) sole proprietorships, partnerships, estates, and trusts *not engaged in farming*; and (4) sole proprietorships, partnerships, estates, and trusts *engaged in farming*.

In the first three categories, the surcharge is calculated as a percent either of the Wisconsin income tax or of net income, with a minimum surcharge of \$25 and a maximum surcharge of \$9,800.

But, the taxpayer complains, in category 4 the surcharge is a nominal \$25 regardless of income or tax and is imposed only if net income exceeds \$1,000, thus denying the taxpayer (who falls in category 3) the equal

protection of the laws merely because the taxpayer is not engaged in farming.

The Commission found several reasonable rationales to sustain the statutory classification scheme attacked by the taxpayer. Given the language of Article VIII, section 1, of the Wisconsin Constitution and the many United States and Wisconsin Supreme Court cases upholding legislative prerogative in making classifications when enacting tax laws and other public-purpose legislation, together with the many longstanding statutory tax preferences accorded farmers in Wisconsin, the Commission was compelled to rule against the taxpayer's challenge.

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

OTHER

— **Appeals — appeal procedure.** *Laurence H. Grange vs. Wisconsin Department of Revenue* (Circuit Court for Dane County, September 16, 1993).

The taxpayer seeks review of a decision by the Wisconsin Tax Appeals Commission denying his petition for redetermination. The issue is whether the taxpayer's petition for redetermination of a sales tax assessment issued by the department was timely filed with the Tax Appeals Commission.

The Commission received the taxpayer's petition for redetermination one day past the 60 day statutory filing period. The taxpayer claims his petition should be considered timely filed because it was postmarked one day prior to the expiration of the 60 days.

The Court concluded that, although the statute provides an exception if

the petition is sent via certified mail, the taxpayer's petition sent by regular mail is deemed filed when *received* by the Commission.

The taxpayer has not appealed this decision. □

— **Appeals — tax appeals commission.** *Northern States Power Company vs. Mark D. Bugher, Secretary of Revenue, et al.* (Court of Appeals, District IV, October 28, 1993). The taxpayer appeals from an order dismissing its petition for review of the Wisconsin Tax Appeals Commission's denial of its request for redetermination of its 1975 and 1976 franchise tax assessment. The issue is whether the taxpayer's failure to raise the constitutional issue before the Wisconsin Tax Appeals Commission prevented it from obtaining judicial review of the issue.

The taxpayer began this 42 U.S.C. sec. 1983 action against the present and former Secretaries of the Wisconsin Department of Revenue in their official and personal capacities. The taxpayer seeks injunctive and declaratory relief and monetary damages, claiming that the present Secretary seeks to collect an unconstitutional tax from it.

The taxpayer claimed as a charitable deduction under sec. 71.04(5)(a) and (d), Wis. Stats. (1975), the value of land donated to the federal government for the St. Croix National Scenic Riverway. The department disallowed the deduction and assessed an additional tax. The Commission denied the taxpayer's petition for redetermination.

The taxpayer argued that the tax imposed on it denied it equal protection because its donation was deductible for federal income tax purposes, but not deductible for Wisconsin state income tax purposes.

The Court of Appeals concluded that because the taxpayer did not raise the equal protection issue before the Wisconsin Tax Appeals Commission,

it failed to exhaust its administrative remedies and cannot attack the additional franchise tax on constitutional grounds in this action.

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



Tax Releases

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

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

The following tax releases are included:

Individual Income Taxes

1. Wisconsin Historic Rehabilitation Credits for Property Used for Both Business and Personal Purposes (p. 22)

4. Mobile Mixing Units (p. 26)

5. Motor Vehicle Warranty Transfer Fees (p. 26)

6. Sale and Lease of Modular Office Units (p. 26)

Sales and Use Taxes

2. Fireworks Displays (p. 23)
3. Lights Used at Outdoor Sporting Facilities (p. 25)

Corporation Franchise and Income Taxes

7. Wisconsin Treatment of Tax-Option (S) Corporations' Officer's Life Insurance (p. 28)

Under section 47(c)(2) of the Internal Revenue Code (IRC), "qualified rehabilitation expenditure" means any amount chargeable to capital account for property for which depreciation is allowable under IRC section 168 and which is nonresidential real property, residential rental property, real property with a class life of more than 12.5 years, or an addition or improvement to such property in connection with the rehabilitation of a qualified rehabilitated building.

A qualified rehabilitated building is one which has been "substantially rehabilitated." This means that the qualified rehabilitation expenditures within a 24-month (or, in certain cases, 60-month) period must be more than the greater of \$5,000 or the adjusted basis of the building and its structural components. IRC section 47(c)(1).

INDIVIDUAL INCOME TAXES

1 Wisconsin Historic Rehabilitation Credits for Property Used for Both Business and Personal Purposes

Statutes: Section 71.07(9m) and (9r), Wis. Stats. (1991-92)

Note: This tax release applies for taxable years beginning on or after January 1, 1991.

Background: Wisconsin law provides two historic rehabilitation credits for

preserving or rehabilitating historic property located in Wisconsin:

- (1) *Supplement to the federal historic rehabilitation tax credit.* This credit equals 5% of the "qualified rehabilitation expenditures" for certified historic structures used for business purposes. To qualify for the credit, the rehabilitation project must be begun after December 31, 1988, and the rehabilitated property must be placed in service after June 30, 1989.

- (2) *State historic rehabilitation credit.* For taxable years beginning on or after January 1, 1991, an individual may claim a credit equal to 25% of the costs of preservation or rehabilitation of an owner-occupied personal residence. The residence cannot actively be used in a trade or business, held for the production of income, or held for sale or other disposition in the ordinary course of the claimant's business.

To be eligible for the credit, qualified preservation or rehabilitation costs must be more than \$10,000.

Eligible costs are those relating to the exterior of the historic property, the interior of a window sash if work is done to the exterior of the window sash, structural elements of the property, the heating or ventilating systems, and electrical or plumbing systems, but not electrical or plumbing fixtures. Section 71.07(9r)(b), Wis. Stats. (1991-92).

Facts and Question 1: Taxpayer A acquires a 2-story historic structure for \$50,000 and spends \$15,000 rehabilitating it. He operates a business on the first floor of the structure and uses the second floor as his personal residence. He allocates one-half of the basis of the building to business use and the remainder to personal use. He rehabilitates the exterior and the heating system of the historic structure. The expenditures benefit the building as a whole; therefore, one-half of the amount is allocated to the business portion and the remainder to the personal portion.

Taxpayer A does not qualify for the federal historic rehabilitation tax credit because the \$15,000 of qualified rehabilitation expenditures do not exceed the \$50,000 adjusted basis of the entire building. In *Alexander v. Comr.*, 97 T.C. 244 (1991), the Tax Court held that an entire building must be "substantially rehabilitated," as defined in the Internal Revenue Code, for a taxpayer to be entitled to the federal rehabilitation tax credit.

Does Taxpayer A qualify for either of the Wisconsin historic rehabilitation credits and, if so, how are the credits computed?

Answer 1: No, Taxpayer A does not qualify for either of the Wisconsin

historic rehabilitation credits. Taxpayer A may not claim the supplement to the federal historic rehabilitation tax credit since he does not qualify for the federal credit. The qualified rehabilitation expenditures for the entire property are taken into account when determining whether the threshold for the state supplement to the federal historic rehabilitation tax credit is exceeded.

Taxpayer A does not qualify for the state historic rehabilitation credit because the \$7,500 of rehabilitation expenditures for the personal residence do not exceed \$10,000. Only the qualified rehabilitation expenditures attributable to the personal residence portion of the structure are taken into account when determining whether the threshold for the state historic rehabilitation credit is exceeded.

Facts and Question 2: Taxpayer B acquires an historic structure for \$40,000 and spends \$45,000 rehabilitating it. She uses one-half of the building for business purposes and the other half as her personal residence; therefore, she allocates one-half of the basis of the structure to each use. Of the expenditures for rehabilitating the property, \$30,000 are attributable to the personal residence and \$15,000 are attributable to the business portion.

Does Taxpayer B qualify for either of the Wisconsin historic rehabilitation credits and, if so, how are the credits computed?

Answer 2: Yes, Taxpayer B qualifies for both of the Wisconsin historic rehabilitation credits. Taxpayer B qualifies for the supplement to the federal historic rehabilitation tax credit because the total qualified rehabilitation expenditures of \$45,000 exceed the \$40,000 adjusted basis of the entire property. She may claim a supplement to the federal historic

rehabilitation tax credit of \$750, which is 5% of the \$15,000 of qualified rehabilitation expenditures attributable to the business portion of the building.

Taxpayer B qualifies for the state historic rehabilitation credit because she spent more than \$10,000 rehabilitating the personal residence. She may claim a state historic rehabilitation credit of \$7,500 (\$30,000 x 25%). □

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 1993 issue of the *Sales and Use Tax Report*. A copy can be found in *Wisconsin Tax Bulletin* 85 (January 1994), pages 37 to 40.

2 Fireworks Displays

Statutes: Section 77.51(19), Wis. Stats. (1989-90), and secs. 77.51(18), 77.52(1) and (2m)(a) and (b), and 77.53(1), (2), and (12), Wis. Stats. (1991-92)

Wis. Adm. Code: Section Tax 11.67(1), (2), and (3)(j), November 1993 Register

Background: Section Tax 11.67(3)(j), Wis. Adm. Code, provides that detonating explosives is a nontaxable service. A person who performs such service and furnishes the explosives used in conjunction with the service is the consumer of the explosives.

Facts and Question 1: Company A is in the business of providing fire-

works display programs. Municipality B advertises for bids for the furnishing and firing of its Fourth of July fireworks display program. Specifications for bidding include:

- Bidder shall submit a proposal for furnishing and firing the fireworks display, including aerial shells, ground pieces, mortars, and any other materials needed to set up and successfully fire the display.
- Bidder shall submit proof of insurance to cover all workers, spectators, and vehicles.
- Bidder shall be responsible for the inspection of the display area and removal and disposal of any unfired fireworks devices immediately after the show.

Upon completion of the bidding process, Company A enters into a contract with Municipality B for the furnishing and firing of the municipality's Fourth of July fireworks display program. Terms of the contract include:

- The contractor (Company A) shall perform everything required to be performed and shall provide and furnish all labor and materials and all utility and transportation services required to be performed to complete the Fourth of July fireworks display program.

Is the charge by Company A to Municipality B for the Fourth of July fireworks display program subject to Wisconsin sales tax?

Answer 1: No. Company A is considered to be providing a nontaxable service (i.e., a fireworks display program). Municipality B is not purchasing tangible personal property (i.e., aerial shells, ground pieces, mortars, etc.).

Facts and Question 2: Assume the same facts as in Facts and Question 1. Are Company A's purchases of aerial shells, ground pieces, mortars, and miscellaneous supplies, which are used or consumed by Company A in providing the Fourth of July fireworks display program, subject to Wisconsin sales or use tax?

Answer 2: Yes. Company A contracted with Municipality B to provide a nontaxable service. Therefore, Company A is the consumer, not the retailer, of the aerial shells, ground pieces, mortars, and other tangible personal property which Company A used or consumed in providing the service. Tax applies to the purchase of such property by Company A.

Facts and Question 3: Company C entered into a contract with XYZ Yacht Club to furnish the yacht club with a predetermined assortment of aerial shells, ground pieces, mortars, and other miscellaneous supplies for the club's 25th anniversary party. The contract does not provide for Company C to furnish any services to XYZ Yacht Club.

Is the charge by Company C to XYZ Yacht Club subject to Wisconsin sales or use tax?

Answer 3: Yes. Company C is selling tangible personal property to XYZ Yacht Club, which is subject to Wisconsin sales tax pursuant to sec. 77.52(1), Wis. Stats. (1991-92). Company C may purchase without tax from its suppliers the aerial shells, etc., that it resells to XYZ Yacht Club, provided it gives a properly completed resale certificate to its supplier.

Facts and Question 4: Company D, a Wisconsin corporation, is in the business of providing services relating to fireworks display programs. Company D purchases aerial shells, ground pieces, mortars, and miscella-

neous supplies from a supplier located outside Wisconsin. The supplier does not have nexus in Wisconsin and is not registered to collect Wisconsin use tax.

The supplier has the aerial shells, ground pieces, mortars, and miscellaneous supplies shipped to Wisconsin by common carrier. The fireworks are stored in Wisconsin by Company D and subsequently shipped to Michigan for use in a fireworks display program. Company D has contracted to provide for City E in Michigan. Terms of the advertisement to bid and contract are the same as in Facts and Question 1.

Are Company D's purchases of aerial shells, ground pieces, mortars, and miscellaneous supplies from the out-of-state supplier, which are used or consumed in providing the fireworks display program for City E in Michigan, subject to Wisconsin use tax?

Answer 4: Effective October 1, 1991, tangible personal property (e.g. aerial shells, ground pieces, mortars, and miscellaneous supplies) which are stored in Wisconsin and subsequently used or consumed outside Wisconsin are subject to Wisconsin use tax.

Prior to October 1, 1991, the tangible personal property (e.g., aerial shells, ground pieces, mortars, and miscellaneous supplies) stored in Wisconsin and subsequently transported outside Wisconsin for use outside Wisconsin was not subject to Wisconsin use tax. Section 77.51(19), Wis. Stats. (1989-90), which was repealed by 1991 Wisconsin Act 39, provided that storage and use, for purposes of imposing Wisconsin use tax, did not include keeping, retaining, or exercising any right or power over tangible personal property for purposes of subsequently transporting it outside Wisconsin for use solely outside Wisconsin.

Note: See the tax release titled "Effective Date of Imposition of Use Tax on Items Stored in Wisconsin and Subsequently Shipped Outside Wisconsin" in *Wisconsin Tax Bulletin* 76 (April 1992), page 12, for more information about the application of the revisions to sec. 77.51(18) and (19), Wis. Stats. (1989-90), by 1991 Wisconsin Act 39. □

3 Lights Used At Outdoor Sporting Facilities

Statutes: Sections 77.51(2), 77.52(2)(a)10 and 77.54(41), Wis. Stats. (1991-92)

Wis. Adm. Code: Section Tax 11.68(3)(f) and (4)(b), December 1992 Register

Background: Section 11.68(4)(b), Wis. Adm. Code, provides that certain types of property have a variety of functions, and may be personal property in some instances and additions to real property in others. When the property is installed primarily to provide service to a building or structure and is essential to the use of the building or structure, it is a real property improvement. However, when similar property is installed to perform a processing function, it may retain its status as personal property.

Effective October 1, 1991, sec. 77.54(41), Wis. Stats. (1991-92), allows builders, contractors, or subcontractors to purchase without sales or use tax, building materials, supplies, and equipment acquired solely for or used solely in the construction, renovation, or development of property that would be exempt under sec. 70.11(36), Wis. Stats. (1991-92). Section 70.11(36), exempts property consisting of or contained in a sports and entertainment home stadium, including but not limited to parking lots, garages, restaurants, parks,

concession facilities, transportation facilities, and facilities and structures while they are being built, constructed by, leased to, or primarily used by a professional athletic team that is a member of a league that includes teams that have home stadiums in other states, and the land on which that stadium and those structures and facilities are located.

Facts and Question 1: To accommodate night sporting events, multiple sets of high intensity lights are constructed around the outside of an outdoor amateur sporting facility. Some of these lights are located on top of high poles, which are anchored in concrete. Other lights are attached to the top of buildings (e.g., a grandstand roof). The lights serve two purposes. First, they illuminate the area where the sporting event is played. Second, they provide lighting for customer safety as spectators and others move around the facility.

Is the installation of the high intensity lights an improvement to real property or are the lights installed as tangible personal property?

Answer 1: The installation of the lights, whether on poles or on the top of buildings, is an improvement to real property. The lights are primarily used to service the real estate and are essential for the use of the real estate.

The contractor is subject to Wisconsin sales or use tax on its purchase of the materials used in installing the poles and lights (sec. 77.51(2), Wis. Stats. (1991-92)).

Facts and Question 2: Assume the same facts as in Facts and Question 1.

Is the charge for the repair of the lights subject to Wisconsin sales or use tax?

Answer 2: No. The repair of the lights is not subject to Wisconsin sales or use tax.

Section 77.52(2)(a)10, Wis. Stats. (1991-92), provides that only the repair of tangible personal property is subject to tax. The lights are real property for purposes of repair.

The contractor is subject to Wisconsin sales or use tax on its purchase of the materials used in the repair (sec. 77.51(2), Wis. Stats. (1991-92)).

Facts and Question 3: Assume the same facts as in Facts and Question 1, except the lights were installed on or after October 1, 1991, in a sporting facility that would be exempt under sec. 70.11(36), Wis. Stats. (1991-92).

Does the contractor owe Wisconsin sales or use tax on the materials used in 1) installing the lights and 2) repairing the lights?

Answer 3: 1) The contractor is not subject to Wisconsin sales or use tax on the purchase of the materials used in the installation of the lights, providing it gives its supplier a properly completed exemption certificate.

2) The contractor is subject to Wisconsin sales or use tax on the purchase of the materials used in repairing the lights. The exemption in sec. 77.54(41), Wis. Stats. (1991-92), only applies to construction, renovation, and development of the sporting facility.

If the installation occurred before October 1, 1991, the contractor is subject to Wisconsin sales or use tax on the purchase of the materials used in the installation or repair of the lights. □

4 Mobile Mixing Units

Statutes: Section 77.54(5)(d), Wis. Stats. (1991-92)

Background: Section 77.54(5)(d), 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 mobile units used for mixing and processing. The exemption includes the motor vehicle or trailer on which the unit is mounted, including accessories, attachments, parts, supplies, and materials for those vehicles, trailers, and units.

Facts and Question 1: Company A sells Company B a cement mixer mounted on a truck chassis. Water is mixed with stone, sand, or gravel in the cement mixer, and then poured into foundations or ditches under construction.

Is the cement mixer used for this purpose subject to Wisconsin sales or use tax?

Answer 1: No. The cement mixer is used for mixing and processing and is exempt from Wisconsin sales or use tax under sec. 77.54(5)(d), Wis. Stats. (1991-92).

Facts and Question 2: Company A sells a cement mixer mounted on a truck chassis to Company B. Company B will use it to mix soil with surfactants in order to remove contaminants from the soil. No tangible personal property is manufactured.

Is this mobile mixing unit subject to Wisconsin sales or use tax?

Answer 2: No. The sale of this mobile unit is exempt from Wisconsin sales or use tax under sec. 77.54(5)(d). The contaminated soil is being mixed and processed. There is no requirement that the mixer be

manufacturing tangible personal property for the exemption to apply. □

5 Motor Vehicle Warranty Transfer Fees

Statutes: Section 77.52(1) and (2)(a), Wis. Stats. (1991-92)

Background: Section 77.52(2)(a), Wis. Stats. (1991-92), imposes Wisconsin sales or use tax on certain selected services. Specifically, sec. 77.52(2)(a)10, Wis. Stats. (1991-92) imposes Wisconsin sales or use tax on the repair, service, alteration, fitting, cleaning, painting, coating, towing, inspection, and maintenance of tangible personal property.

Facts and Question 1: A customer purchases a motor vehicle and an extended warranty from a motor vehicle dealership. One of the provisions of the extended warranty contract allows the original purchaser of the motor vehicle to transfer the rights and duties under the warranty to a subsequent purchaser of the motor vehicle for \$25. The provision states that the transfer fee covers the administrative cost to the warranty company in recording the transfer.

The original owner sells the motor vehicle to another person for \$5,000. The original owner then tells the buyer of the extended warranty. The buyer agrees to pay the warranty provider \$25 to have the extended warranty transferred to the buyer's name.

Is the \$25 warranty transfer fee subject to Wisconsin sales or use tax?

Answer 1: No. The transfer fee is a charge for the record keeping required to record the transfer of the rights and duties under the warranty. The fee is a charge for a service not

subject to Wisconsin sales or use tax under sec. 77.52(2)(a), Wis. Stats. (1991-92).

Facts and Question 2: Assume the same facts as above except the warranty transfer fee applies to the warranty the motor vehicle manufacturer provides with the sale of a new motor vehicle.

Is the \$25 warranty transfer fee subject to Wisconsin sales or use tax?

Answer 2: No. The transfer fee is a charge for the record keeping required to record the transfer of the rights and duties under the warranty. The fee is a charge for a service not subject to Wisconsin sales or use tax under sec. 77.52(2)(a), Wis. Stats. (1991-92). □

6 Sale and Lease of Modular Office Units

Statutes: Sections 77.51(2) and (20), 77.52(1), 77.53(2), and 77.57, Wis. Stats. (1991-92)

Wis. Adm. Code: Section Tax 11.68(4), December 1992 Register

Background: Section 77.51(2), Wis. Stats. (1991-92), provides that contractors and subcontractors are the consumers of tangible personal property used by them in real property construction activities, and sales and use tax applies to the sale of tangible personal property to them.

Section 77.51(20), Wis. Stats. (1991-92), defines tangible personal property to include leased property affixed to realty if the lessor of the realty has the right to remove the property upon breach or termination of the lease, unless the lessor of the property is also the lessor of the realty to which the property is affixed.

Section Tax 11.68(4)(a), Wis. Adm. Code, provides that in determining whether tangible personal property becomes a part of real property, the following criteria shall be considered:

1. Actual physical annexation to the real property,
2. Application or adaption to the use or purpose to which the real property is devoted, and
3. An intention on the part of the person making the annexation to make a permanent accession to the real property.

Facts: Company A sells a modular office unit to Company B. The unit is on wheels and is delivered by semi-trailer to Company B. Once delivered, Company A places the unit on cinder blocks, in a gravel area prepared by Company B. The unit is on land owned by Company B. The wheels may be removed; however, the axles remain on the unit. In certain areas, three to four foot anchors are augered into the ground to keep the unit from moving. Strips of vinyl skirting are attached to the base of the unit. Wood decks and stairs are also attached. Installation takes about two weeks. It is Company B's responsibility to physically hook up the utilities; however, the unit's utility hookups are easily accessible. Company B intends the unit to be permanent.

The units can be removed easily by removing the seams, cinder blocks, skirting, and decking with no damage to the unit. This process takes about two days. Company A will remove the unit if a customer defaults on the lease.

Question 1: Is Company A subject to Wisconsin sales or use tax on the installation and sale of the modular office unit?

Answer 1: No. Company A is installing real property when it sells and installs the modular unit.

The modular unit is physically annexed to real property because it sits on a foundation and is hooked up to utilities. "On the foundation" means the unit is off the wheels and sitting on some other support. The modular unit in question is off its wheels and sits on a support of cinder blocks, sometimes anchored to the ground. "On a foundation" does not require being bolted to a concrete slab. The modular unit is also adapted to the purpose to which the real property is devoted. Company B also intends it to be permanent. The fact that the unit is movable does not mean it is not intended to remain at the location permanently.

Question 2: Is Company A subject to Wisconsin sales or use tax on its purchase of a modular office unit that is sold and installed for Company B?

Answer 2: Yes. Company A is subject to Wisconsin sales or use tax on its purchase of the modular unit sold and installed, because contractors are the consumers of tangible personal property used by them in real property construction (sec. 77.51(2), Wis. Stats. (1991-92)).

Question 3: Assume the same facts as above, except that Company A leases the modular office unit to Company B.

Is Company A subject to Wisconsin sales or use tax on the installation and lease of the modular office unit?

Answer 3: Yes. The charge for the installation and lease is subject to Wisconsin sales or use tax. Although the unit leased is installed in the same manner as a unit that is sold by Company A, Company A is leasing tangible personal property. Company A has the right to remove the unit upon breach or termination of the lease, and because the unit is not affixed to land owned by Company A, the unit is deemed to be tangible personal

property under sec. 77.51(20), Wis. Stats. (1991-92).

Question 4: Assume that after leasing the modular unit to Company B, Company A removes the unit from Company B's property and sells the unit to Customer C, installing it on Company C's property.

Is Company A subject to Wisconsin sales or use tax on its purchase of that modular office unit that was originally purchased for lease to Company B and later sold to Company C and installed on Company C's property?

Answer 4: Yes. Company A is the consumer of the modular unit when it performs the real property construction activity of installing the unit for Company C. Section 77.57, Wis. Stats. (1991-92), provides that if a purchaser certifies in writing to a seller that property purchased will be used in a manner or for a purpose entitling the seller to regard the gross receipts from the sale as exempt from sales or use tax and uses the property in some other manner or for some other purpose, the purchaser is liable for the sales tax. The tax is measured by the sales price of the property to the purchaser (Company A), but if the taxable use first occurs more than six months after the sale, Company A may use as the measure of the tax either that sales price or the fair market value of the property at the time the taxable use first occurs.

Note: If the unit was purchased from an out-of-state vendor, where a certificate was not issued, use tax would be due at the time the unit was installed as a real property improvement. Every person storing, using, or otherwise consuming in this state tangible personal property or taxable services purchased from a retailer is liable for use tax (sec. 77.53(1) and (2), Wis. Stats. (1991-92)). The tax is measured by the sales price of the

property to the purchaser (Company A), but if the taxable use first occurs more than six months after the sale, Company A may use as the measure of the tax either that sales price or the fair market value of the property at the time the taxable use first occurs. □

CORPORATION FRANCHISE AND INCOME TAXES

7 Wisconsin Treatment of Tax-Option (S) Corporations' Officer's Life Insurance

Statutes: Section 71.34(1) and (1g), Wis. Stats. (1991-92)

Background: Tax-option (S) corporation shareholders are taxed on distributions received from the corporation, except distributions of net income on which they were previously taxed. To compute the Wisconsin tax effect of distributions made to their shareholders, tax-option (S) corporations use the Wisconsin Accumulated Adjustments Account (AAA) in taxable years beginning after December 31, 1982. The Wisconsin AAA will have a zero balance on the first day of the tax-option (S) corporation's first taxable year beginning after December 31, 1982.

In addition, tax-option (S) corporations with accumulated earnings and profits may have a previously taxed income (PTI) account and, for taxable year 1987 and thereafter, a Wisconsin Other Adjustments Account (OAA). Generally, accumulated earnings and profits are those derived in taxable years in which the corporation was a regular (C) corporation and in the tax-option (S) corporation's taxable years that began before 1983. Since 1987 is the first year for which the Wisconsin OAA may be used, the Wisconsin OAA will have a zero balance at the beginning of the tax-

option (S) corporation's 1987 taxable year.

If the corporation does not have accumulated earnings and profits for Wisconsin purposes at the end of the current taxable year, the Wisconsin AAA is adjusted as follows:

The Wisconsin AAA is increased by:

- Taxable income and gains, as determined under Wisconsin law.
- Nontaxable income earned in taxable year 1987 and after. (Nontaxable income earned prior to 1987 does *not* increase the Wisconsin AAA.)

The Wisconsin AAA is decreased by:

- Deductible losses and expenses, as determined under Wisconsin law.
- Nondeductible expenses (expenses that are never deductible for Wisconsin purposes).
- Distributions applicable to the Wisconsin AAA.
- The amount of the supplement to the federal historic rehabilitation tax credit computed.

If the corporation has accumulated earnings and profits for Wisconsin purposes at the end of the current taxable year, the Wisconsin AAA is not increased by nontaxable income nor decreased by nondeductible expenses related to nontaxable income. Instead, adjustments for these items are made to the Wisconsin OAA.

Facts and Question 1: A tax-option (S) corporation is the beneficiary of a life insurance contract payable by reason of the death of an officer of the corporation. Internal Revenue Code (IRC) section 101 excludes from gross income proceeds of life insurance policies paid to the benefi-

ciary upon the death of the insured. What is the Wisconsin tax treatment of the life insurance proceeds?

Answer 1: The proceeds of the officer's life insurance policy are nontaxable income of the tax-option (S) corporation. Since the Wisconsin tax-option (S) corporation law is based on the Internal Revenue Code, the federal treatment of the life insurance proceeds applies for Wisconsin purposes.

For the 1987 taxable year and thereafter, the officer's life insurance proceeds are reported as follows:

- If the corporation does not have accumulated earnings and profits, the corporation must add the officer's life insurance proceeds to its Wisconsin AAA.
- If the corporation has accumulated earnings and profits, the corporation must add the officer's life insurance proceeds to its Wisconsin OAA, not the AAA.

For 1986 and prior taxable years, Wisconsin law did not permit an adjustment to the Wisconsin AAA for the officer's life insurance proceeds, nor did it allow the use of a Wisconsin OAA.

Facts and Question 2: If a tax-option (S) corporation is the beneficiary of a life insurance policy payable by reason of the death of a corporate officer, must the corporation report the increase in cash surrender value of the policy in its Wisconsin AAA or OAA, as appropriate, each year?

Answer 2: No, a tax-option (S) corporation may not add the increase in the cash surrender value of the officer's life insurance policy to its Wisconsin AAA or OAA, as appropriate, each year.

Facts and Question 3: A tax-option (S) corporation which is directly or indirectly a beneficiary under its officer's life insurance policy pays the premiums on that policy. For federal income tax purposes, the corporation's premium payments are not deductible pursuant to IRC section 264 and Treasury Regulation §1.264-1(b). What is the Wisconsin treatment of the premium payments?

Answer 3: The officer's life insurance premiums are treated as a non-deductible expense, the same as for

federal purposes. Since this expense is related to nontaxable income, it must be reported in the same account where the nontaxable income would be reported.

For the 1987 taxable year and thereafter, the officer's life insurance premiums are reported as follows:

- If the corporation does not have accumulated earnings and profits, the corporation must subtract the premium payments from its Wisconsin AAA.

- If the corporation has accumulated earnings and profits, the corporation must subtract the premium payments from its Wisconsin OAA.

For 1986 and prior taxable years, the corporation, whether or not it had accumulated earnings and profits, was required to subtract the officer's life insurance premiums from its Wisconsin AAA. □



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 ruling is included:

Sales and Use Taxes

Advertising, video production,
and script writing
W9353006, October 8,
1993 (p. 29)

✻ W9353006, October 8, 1993

Type Tax: Sales and Use Taxes

Issue: Advertising, video production, and script writing

Statutes: Sections 77.51(14)(intro.) and 77.52(1) and (2)(a), Wis. Stats. (1991-92)

This letter responds to your request for a private letter ruling.

Facts

You have an understanding with a local cable television system to sell advertising that will be placed on the cable television system during certain times (local access time).

You contract with various companies (clients) for the production and airing of advertisements on the cable television system for a fee. This fee may or may not separately state the advertisement production and air time.

Your client provides you with an advertising concept and any script. You contract with a video company to have the advertisement produced. The video company does all filming and editing. Once production is completed, the advertisement is transferred to you and you provide it to the cable television system for airing. The video company bills you for the production of the advertisement.

Occasionally, your client will request that the script for the advertisement

be provided by you. You have the video company develop the script. The video company, in addition to the advertisement production, bills you for the "script writing," which you bill to your client.

You state that many television stations and newspapers produce advertisements in-house with the sale of air time. These television stations may bill clients for the production and air time together or separately.

Request

You ask the following:

1. Is your charge to a client for production of an advertisement, script writing, and air time subject to Wisconsin sales or use tax?
2. Does the answer to Question 1 differ if the charge for production of the advertisement and script writing is not separately stated from the air time?
3. Is the charge to you by the video company for script writing and advertisement production subject to Wisconsin sales or use tax?
4. Is the charge by a television station or newspaper for production of an advertisement and air time or advertising space subject to Wisconsin sales or use tax?

Ruling

1. The charge to your client for producing an advertisement is subject to Wisconsin sales or use tax. A charge for script writing which results in the production of an advertisement is also subject to Wisconsin sales or use tax.

The charge for air time is not subject to Wisconsin sales or use tax.

2. How you bill for production of an advertisement, script writing, and air time does not affect the taxability of the sale of these items. If the items are not separately stated, an allocation of the total charge between taxable and nontaxable items is required.

3. The charge by the video company for production of an advertisement and script writing may be purchased without Wisconsin sales or use tax as tangible personal property and services for resale.

4. The charge by a television station for producing an advertisement is subject to Wisconsin sales or use tax whether included with the charge for air time or stated separately. The television station must allocate the total charge and impose Wisconsin sales or use tax on that portion of the charge which is for production of the advertisement.

The charge by a newspaper for producing an advertisement which will be used in producing the newspaper is exempt from Wisconsin sales or use tax.

Analysis

Production of advertisement, script writing, and air time

Section 77.52(1), Wis. Stats. (1991-92), provides for the imposition of Wisconsin sales tax on gross receipts from the retail sale of tangible personal property.

Section Tax 11.70(2)(a), Wis. Adm. Code, provides that finished art is tangible personal property. Finished art is defined in sec. Tax 11.70(1)(a), Wis. Adm. Code, as final art used for actual reproduction by photomechanical or other processes, or for display purposes. Finished

art includes a taped commercial or advertisement.

Since the produced advertisement is finished art which is tangible personal property, gross receipts from the sale of the produced advertisement are subject to tax.

Section Tax 11.70(4), Wis. Adm. Code, provides that Wisconsin sales or use tax applies to the total gross receipts from the sale of tangible personal property (i.e., finished art) without any deduction for any cost element which becomes a part of the sales price. These elements include copy or any other labor or service cost incurred in the production of that property. Therefore, the total gross receipts from the sale of the produced advertisement are not reduced by the charge for script writing becoming a part of the produced advertisement.

Section Tax 11.70(3)(f), Wis. Adm. Code, provides that charges for obtaining media space and time are not subject to Wisconsin sales or use tax.

Method of invoicing

Section Tax 11.70(6), Wis. Adm. Code, provides that a fee representing both taxable and nontaxable sales shall be reasonably allocated between taxable and nontaxable sales.

If you charge a client a lump sum for production of an advertisement and air time, the charge must be allocated between the production of the advertisement and the charge for the air time and sales tax imposed on the charge for production of the advertisement.

Sales for resale

Section 77.51(14)(intro.), Wis. Stats. (1991-92), defines a sale at retail, which is subject to Wisconsin sales

or use tax, as the transfer of ownership of, title to, possession of, or enjoyment of tangible personal property or taxable services for use or consumption but not for resale as tangible personal property or services.

Since the production of the advertisement and script writing will be resold by you to your client, the sale by the video company of these items to you is not a sale at retail subject to Wisconsin sales or use tax. You should provide the video company

with a properly completed resale certificate when purchasing the advertisement and script writing without Wisconsin sales or use tax.

Sales by television stations and newspapers

The analyses as described under "Production of advertisement, script writing, and air time" and "Method of invoicing" apply for sales of air time, production of advertisements, and script writing by television stations.

With respect to newspapers, sec. 77.54(2m), Wis. Stats. (1991-92), provides an exemption from Wisconsin sales or use tax for gross receipts from the sale of tangible personal property that is consumed or loses its identity in the manufacture of newspapers. Since an advertisement, including any script writing, is economically consumed in the manufacture of the newspaper, the charge for production of the advertisement and script writing is exempt from Wisconsin sales or use tax. □