



Wisconsin TAX BULLETIN

New Tax Laws to Be Addressed in Special Issue

The Governor introduced his Budget Bill for the 1995-97 biennium on February 14, 1995. This bill includes several provisions affecting Wisconsin taxes. Additional bills which affect Wisconsin taxes have also been introduced.

The Wisconsin Legislature is scheduled to complete work on the 1995-97 Budget Bill by June 29, 1995. If any provisions of the Budget Bill (or other bills) affecting Wisconsin taxes become law, a special issue of the *Wisconsin Tax Bulletin* explaining the new laws will be published later this summer. □

Department to Host Tax Administrators Conference

The Department of Revenue will host the Midwestern States' Association of Tax Administrators (MSATA) Conference on August 20-22, 1995. The conference will be held at The Pfister Hotel in Milwaukee.

MSATA is an association of 13 midwestern states, affiliated with the Federation of Tax Administrators (FTA), organized to promote understanding and cooperation in the administration of revenue laws and to identify solutions to problems encountered in tax administration.

An annual conference is held to encourage training and sharing of information among the revenue employees in the participating states. Tax professionals from the private sector are also invited to participate.

If you're interested in receiving conference materials, please call the Department at (608) 266-1607 to be placed on the mailing list. Conference materials will be mailed in June. □

Focus on Publications: Wisconsin's LLC Act

Beginning January 1, 1994, Wisconsin law authorizes the organization and operation of limited liability companies (LLCs) in Wisconsin. The new Wisconsin Publication 119, *Limited Liability Companies (LLCs)*, provides information about the formation, operation, and Wisconsin tax treatment of LLCs. A copy of Publication 119 is reproduced on pages 49 to 60 of this Bulletin. □



Electronic Funds Transfers Available

The Department of Revenue now offers Electronic Funds Transfer (EFT) as a payment option for state withholding tax and estimated tax for corporations, individuals, estates, trusts, and temporary recycling surcharge for partnerships. In addition, the department **requires** EFTs for motor vehicle fuel tax. Later in 1995, the department plans to accept EFT

payments for other fuel taxes and excise taxes.

Electronic Funds Transfer is a safe and efficient automated payment method, eliminating the need for paper checks and payment vouchers. It can be as simple as making a toll free telephone call. The funds and tax payment information are transferred electronically through the Automated Clearing House (ACH) network, utilizing either the ACH Debit method or the ACH Credit method, with the funds getting deposited into the state treasury.

For more information, an "*Electronic Funds Transfer Guide*," Publication 118, is available by writing to:

Revenue Accounting — EFT Unit
Wisconsin Department of Revenue
P.O. Box 8912
Madison, WI 53708-8912

or by calling the Wisconsin Department of Revenue EFT Information Line at (608) 264-9918. □

Reminder: Local Exposition Taxes in Milwaukee County Effective 1/1/95

Effective January 1, 1995, three new taxes went into effect for persons making sales of lodging, food, and beverages and renting automobiles in cities and villages located wholly or partially in Milwaukee County.

In This Issue

	Page		Page
Articles —		Education Programs Target	
New Tax Laws to Be		Businesses, Students, Elderly	5
Addressed in Special Issue	1	Information or Inquiries?	5
Department to Host Tax Ad-		Question and Answer	6
ministrators Conference	1	Income, Sales Tax Evaders	
Focus on Publications:		Charged	6
Wisconsin's LLC Act	1	Felony Theft Conviction for	
Electronic Funds Transfers		Failure to Pay Sales Tax	7
Available	1	Farmers Receive Nearly \$46	
Reminder: Local Exposition		Million in Tax Credits	7
Taxes in Milwaukee County		Tax Publications Available	7
Effective 1/1/95	1	IRS Picks Up Speed on the	
Tax Auditors Discover Over		Information Superhighway	8
\$25 Million in Unpaid Use		Administrative Rules in Pro-	
Tax	2	cess	10
Need a Speaker?	2	Recently Adopted Rules Sum-	
Wisconsin Tax Bulletin Annual		marized	10
Index Available	3	Report on Litigation	12
Topical and Court Case Index		Tax Releases	15
Available	3	Private Letter Rulings	33
1995 Estimated Tax Require-		Attachments —	
ments for Individuals, Es-		Tax 11.51, Wis. Adm. Code	44
tates, and Trusts	3	Publication 119	49
Filing Wisconsin Fiduciary and		Order Blank	61
Estate Tax Returns	3		

Numerous questions have been raised regarding the 2% and 7% room taxes, the 0.25% food and beverage tax, and the 3% rental car tax. Many of these questions are answered in Wisconsin Publication 410, *Local Exposition District Taxes*, which is

available from Department of Revenue offices in Madison and the Milwaukee area. In addition, this Bulletin contains six tax releases on the local exposition taxes (see pages 28 to 32).

If you have questions regarding the local exposition taxes, you can obtain assistance by writing to Wisconsin Department of Revenue, P.O. Box 8902, Madison, WI 53708-8902. You may also call or visit the following Wisconsin Department of Revenue offices for assistance.

Milwaukee —
819 N. 6th St. (414) 227-4600
TDD (414) 227-4147

Madison —
4638 University Ave. (608) 266-2776
TDD (608) 266-1612

Tax Auditors Discover Over \$25 Million in Unpaid Use Tax

As part of its efforts to obtain compliance with Wisconsin use tax laws, Department of Revenue auditors assessed over \$25 million of use tax, penalties, and interest in the fiscal year ending June 30, 1994.

Auditors found that many businesses, while properly accounting for tax on sales, fail to have a system to keep track of purchases subject to use tax. Following are examples of purchases made without a sales or use tax being paid ... until the businesses were audited:

1. Purchases from unregistered, out-of-state sellers.
2. Purchases for which exemption certificates were issued to the seller but the item purchased was ultimately used in a taxable manner.

Purchasers should carefully review their accounting methods to ensure that use tax is properly reported. □



Need a Speaker?

Are you planning a 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 sales/use, 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.

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

Annual cost \$7.00

- 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. □

Wisconsin Tax Bulletin Annual 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* 88 (July 1994), pages 37 to 61, and includes information for issues 1 (October 1976) to 85 (January 1994). □

Topical and Court Case Index Available

Are you looking for an easy way to locate reference material to research a Wisconsin tax question? The *Wisconsin Topical and Court Case Index* will help you find reference material to research your Wisconsin tax questions. This index references Wisconsin statutes, administrative rules, *Wisconsin Tax Bulletin* articles, tax releases, publications, Attorney General opinions, and court decisions.

The first part of the index, the "Topical Index," gives references to alphabetized subjects for the various taxes, including individual income, corporation franchise and income, withholding, sales and use, gift, inheritance and estate, cigarette, tobacco products, beer, intoxicating liquor and wine, and motor 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, subscribe to the *Wisconsin Topical and Court Case Index*. The annual cost is \$18, plus sales tax. The \$18 fee includes a volume published in December, and an addendum published in May.

To order your copy, complete the order blank on page 61 of this Bulletin. The order blank may also be used for subscribing to the *Wisconsin Tax Bulletin* and for ordering the Wisconsin Administrative Code. □

1995 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. Taxpayers who expect to owe \$200 or more of tax on a 1995 Wisconsin income tax return are required to pay 1995 Wisconsin estimated tax. There are exceptions for certain estates and trusts, as explained below. A 1995 Form 1-ES, Wisconsin Estimated Tax Voucher, is filed with each estimated tax payment.

For calendar year taxpayers, the first estimated tax payment is due on April 17, 1995. Installment payments are also due on June 15, 1995, September 15, 1995, and January 16, 1996. 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, 1995. 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, 1997.

A trust which is subject to tax on unrelated business income is generally required to pay 1995 Wisconsin estimated tax if it expects to owe \$500 or more on a 1995 Wisconsin franchise or income tax return (Form 4T). A 1995 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.

Taxpayers may file their 1995 estimated tax by Electronic Funds Transfer (EFT). See the related article titled "Electronic Funds Transfers Available" on page 1 of this Bulletin.

If a taxpayer does not make the estimated tax payments when required or underpays any installment, interest may be assessed. □

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 must file a Wisconsin fiduciary income tax return (Form 2) if the gross income of the estate is \$600 or more. Nonresident estates must file Wisconsin fiduciary returns if they have gross income of

\$600 or more from Wisconsin sources.

Every trustee of a Wisconsin trust must file a Wisconsin fiduciary income tax return (Form 2) if the trust has:

1. any taxable income for the tax year, or
2. gross income of \$600 or more, regardless of the amount of taxable income.

A nonresident trust must file a Wisconsin fiduciary income tax return if the trust has:

1. any Wisconsin taxable income for the year, or
2. gross Wisconsin income of \$600 or more, regardless of the amount of taxable income.

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 file on a fiscal-year basis.) Estates may choose any fiscal year, but the first return may not cover more than a 12-month period, and the taxable year must end on 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 does not have enough income to require filing and needs a Closing Certificate for Fiduciaries, or if the estate will be filing only one fiduciary return when the estate is closed and needs the closing certificate before filing that return, use the following procedures:

1. Complete the top third of page 1 of Form 2.
2. Insert the appropriate statement at line 1:
 - a. "Gross income is less than \$600 and no 1041 is required." or
 - b. "A first and final return will be filed upon closing the estate."
3. Complete the "Information Required" section of page 2 of Form 2.
4. Sign and date the Form 2.
5. Attach copies of the inventory and will.

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, 1994, the department issued nearly 11,500 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. The decedent died February 15, 1994. 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, 1994, 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)	114
Total amount due	<u>\$1,314</u>

2. The decedent died February 15, 1994 and did not obtain an extension to file from the IRS. The Wisconsin estate tax return was filed November 30, 1994, 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. ☐

Education Programs Target Businesses, Students, Elderly

For the 1995 tax filing season (1994 tax returns), the Department of Revenue once again participated with the Internal Revenue Service (IRS) in several joint taxpayer education projects. The department provided materials and conducted workshops designed to help businesses, high school students, and elderly, disabled, or low-income taxpayers better understand Wisconsin taxes or credits.

Small Business Workshops

Department personnel developed the "Wisconsin Small Business Tax Workshop" workbook and conducted 20 workshops in the state. The workshops targeted persons just going into business in Wisconsin. The IRS works with the department to coordinate the workshops, and typically the Wisconsin workshop follows the federal presentation.

The IRS sponsored a statewide Small Business Workshop event, in which 5 or more workshops were held simultaneously around the state. More than 500 persons attended this event in 1994.

High School Project

An "Understanding Wisconsin Taxes" packet was mailed to high school teachers and school media centers in the state. Teachers use the Wisconsin packet as well as the federal "Understanding Taxes" packet to introduce students to Wisconsin and federal income tax return filing requirements, and to assist students in filing their own state and federal returns. For the 1995 tax season, over 1,700 Wisconsin packets were mailed.

VITA/TCE Program

The federal VITA (Volunteer Income Tax Assistance) and TCE (Tax Counseling for the Elderly) programs also include participation by department representatives. Through these programs, free help is available in preparing basic tax returns and homestead credit claims for elderly, disabled, and low-income persons.

The department developed a "1994 Wisconsin VITA/TCE Manual" and distributed over 2,000 copies of the manual and other training materials to VITA and TCE sites. In addition, department personnel trained VITA and TCE volunteers, conducting 50 training sessions.

The IRS works with the department to coordinate the training sessions, with most sessions being held between December 15 and March 15. It is estimated that over 30,000 state returns are prepared by VITA and TCE volunteers who are trained using the Wisconsin VITA/TCE manual. ☐

Information or Inquiries?

Listed below are telephone numbers to call if you wish to contact the Department of Revenue about any of the taxes administered by the Income, Sales, and Excise Tax Division.

Madison — Main Office

Area Code (608)

Appeals	266-0185
Audit of Returns: Corporation, Individual, Homestead	266-2772
Beverage	266-6701
Cigarette, Tobacco Products	266-8970
Copies of Returns:	
Homestead	266-2890
Individual	266-1266
All Others	266-0678
Corporation Franchise and Income	266-1143
Delinquent Taxes	266-7879
Estimated Taxes	266-9940
Fiduciary, Estate	266-2772
Forms Request:	
Taxpayers	266-1961
Practitioners	267-2025
Homestead Credit	266-8641
Individual Income	266-2486
Motor Vehicle Fuel	266-3223
Refunds	266-8100
Sales, Use, Withholding	266-2776
TDD	267-1049

District Offices

Appleton	(414) 832-2727
Eau Claire	(715) 836-2811
Milwaukee:	
General	(414) 227-4000
Refunds	(414) 227-4907
TDD	(414) 227-4147

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Question and Answer

Q I found that I owed additional tax when I completed my 1994 income tax return. What can I do to make sure my 1995 return will not show a balance due?

A You can either increase the amount of Wisconsin income tax withheld from your wages or make estimated tax payments for 1995. To increase the amount of income tax to be withheld from your wages, file a new Form WT-4, Employee's Wisconsin Withholding Exemption Certificate, with your employer. Estimated tax payments should be submitted with Form 1-ES. (Note: In general, if you do not have sufficient tax withheld from your wages, you are required to make estimated tax payments if you expect that you will owe \$200 or more with your Wisconsin tax return.)

Q I am getting a large refund of Wisconsin tax each year. What can I do so that my employer withholds less tax from my wages?

A You should first determine if your withholding can be reduced a sufficient amount by claiming additional withholding exemptions. If you are not claiming the maximum number of exemptions allowed, you may decrease your withholding by claiming an increased number of exemptions. (Note: Each additional withholding exemption claimed will reduce your withholding by \$20 on an annual basis.)

If you are claiming the maximum number of exemptions allowed and your withholding is still more than

your estimated tax liability, you may file Form WT-4A, Wisconsin Employee Withholding Agreement, to decrease the amount of tax to be withheld. A copy of Form 4T-4A is filed both with your employer and the Department of Revenue.

Q I file my federal return using a filing status of "qualifying widow(er) with dependent child." What is my filing status for Wisconsin?

A You should use the "head of household" filing status for Wisconsin. A person who qualifies to file his or her federal return as a "qualifying widow(er) with dependent child" may use either the "head of household" or the "single" filing status. Because a person filing as "head of household" is allowed a greater standard deduction, it will be advantageous to use the "head of household" filing status.

Q My wife and I keep a boat in a rented dock slip at a nearby lake during the summer. I understand that sales tax is due for the slip rental. My question concerns winter boat storage.

The owner of the marina where we keep our boat pulls our boat out of the water and onto his land in the autumn, and returns it to the water in the spring. Is Wisconsin sales tax due on this winter storage service?

A Yes. Charges for docking and storing boats are subject to Wisconsin sales tax. ☐

Income, Sales Tax Evaders Charged

In October 1994, criminal charges were filed in ten different counties against 26 persons, for evading state sales taxes. The 26, who all purchased used motor vehicles, were suspected of underreporting the purchase prices when registering the vehicles. Department of Revenue special agents have investigated over 75 similar cases, representing over \$38,000 in unreported sales taxes.

If convicted, the 26 persons charged each face up to 30 days in jail and fines up to \$500. In addition, most of the other persons have received assessments for additional taxes, interest, and penalties.

In February 1995, a self-employed Milwaukee area bookkeeper, Julie L. Zorn, 34, 7701 West Casper Street, pleaded guilty, in Milwaukee County Circuit Court, to charges of theft, forgery, and income tax evasion.

Between 1991 and 1993, Zorn operated a bookkeeping service, J&A Confidential Services, in which she did bookkeeping for the Rheumatic Disease Center. Prosecutors alleged that, during that time, Zorn inflated the hours she worked at the Rheumatic Disease Center and forged the signatures of doctors on checks, embezzling over \$157,000.

It was also alleged that Zorn altered her own payroll records at the Rheumatic Disease Center, and filed fraudulent state income tax returns for 1991, 1992, and 1993, evading \$10,985 in state income taxes during those years.

Zorn could be sentenced to up to twenty-five years in prison and fined up to \$30,000.

Also in February, Racine businessman Alan J. Sapko, 41, 333 Lake Avenue, entered a no contest plea in a scheme to evade state sales taxes related to the purchase of a boat.

According to the criminal complaint, Sapko purchased a 47 foot boat in March 1994 for \$275,000. Sapko altered the bill of sale to make it look like he paid only \$27,500 for the boat. He then registered the boat using the altered records and evaded \$12,375 in state sales taxes. At the time he registered it, he told a Department of Natural Resources agent that he got the boat for only \$27,500 because both the hull and the engines had been damaged.

In a plea negotiation, Sapko pleaded no contest to one misdemeanor count of obstructing an officer, for lying about the purchase price at the time he registered the boat. Racine County Circuit Judge Stephen Simanek found Sapko guilty, fined him \$2,000, and further ordered him to pay an additional \$7,004 to the Department of Revenue for interest and a civil fraud penalty, for understating the purchase price of the boat. Sapko previously paid the \$12,375 in additional taxes during the investigation. □

Felony Theft Conviction for Failure to Pay Sales Tax

In January 1995, Racine businessman John R. Balestrieri, 37, 2512 LaSalle Street, pleaded guilty to felony theft by a trustee, for failure to remit sales taxes that he collected. He was convicted in Racine County District Court by Judge Emmanuel J. Vuvunas.

Balestrieri, who operates The Flower Shop, 3900 Erie Street, had been charged with collecting but failing to remit to the state \$11,714.13, between January 1992 and March 1994. Department of Revenue investigators

had alleged that Balestrieri used the tax monies to pay his own salary, satisfy a debt on a corporate bank loan, and pay off other vendors.

Balestrieri could be sentenced to a maximum of up to two years in prison and \$10,000 in fines. □

Farmers Receive Nearly \$46 Million in Tax Credits

Nearly \$46 million in direct benefits were distributed to Wisconsin farmers in 1994 through two state programs, the farmland preservation credit program and the farmland tax relief credit program. About 23,500 Wisconsin farmers claimed farmland preservation credits amounting to \$29.9 million, and 61,000 farmers received farmland tax relief credits totalling \$15.9 million in 1994.

Farmland Preservation Credit

Benefits averaging \$1,274 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 83% of the claims were for land under zoning and 17% were for land covered by agreements.

Farmland Tax Relief Credit

Farmland tax relief credits averaging \$260 were paid to farmers statewide in 1994. 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. □

Tax Publications Available

The Department of Revenue publishes over 40 publications that are available, free of charge, to taxpayers or practitioners. To order any of the publications, write or call Wisconsin Department of Revenue, Shipping and Mailing Section, P.O. Box 8903, Madison, WI 53708-8903 (telephone (608) 266-1961).

Number	Title of Publication (and last revision date)
102	Wisconsin Tax Treatment of Tax-Option (S) Corporations and Their Shareholders (12/94)
103	Reporting Capital Gains and Losses for Wisconsin by Individuals, Estates, Trusts (10/94)
104	Wisconsin Taxation of Military Personnel (8/94)
109	Tax Information for Married Persons Filing Separate Returns and Persons Divorced in 1994 (10/94)
111	How to Get a Private Letter Ruling From the Wisconsin Department of Revenue (3/94)
112	Wisconsin Estimated Tax and Estimated Surcharge for Individual, Estates, Trusts, Corporations, Partnerships (8/94)
113	Federal and Wisconsin Income Tax Reporting Under the Marital Property Act (11/94)
114	Wisconsin Taxpayer Bill of Rights (11/94)
116	Income Tax Payments Are Due Throughout the Year (12/91)
117	Guide to Wisconsin Information Returns (9/94)

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| 118 | Electronic Funds Transfer Guide (12/94) | 500 | Tax Guide for Wisconsin Political Organizations and Candidates (12/94) |
| 119 | Limited Liability Companies (LLCs) (1/95) | 501 | Field Audit of Wisconsin Tax Returns (12/92) |
| 120 | Net Operating Losses for Individuals, Estates, and Trusts (11/94) | 502 | Directory of Free Publications (12/94) |
| 200 | Sales and Use Tax Information for Electrical Contractors (7/94) | 503 | Wisconsin Farmland Preservation Credit (12/94) |
| 201 | Wisconsin State and County Sales and Use Tax Information (9/94) | 504 | Directory for Wisconsin Department of Revenue (12/94) |
| 202 | Sales and Use Tax Information for Motor Vehicle Sales, Leases, and Repairs (7/94) | 505 | Taxpayers' Appeal Rights of Office Audit Adjustments (6/92) |
| 203 | Sales and Use Tax Information for Manufacturers (12/94) | 506 | Taxpayers' Appeal Rights of Field Audit Adjustments (11/91) |
| 205 | Do You Owe Wisconsin Use Tax? (Individuals) (5/94) | 507 | How to Appeal to the Tax Appeals Commission (8/92) |
| 206 | Sales Tax Exemption for Nonprofit Organizations (9/90) | 508 | Wisconsin Tax Requirements Relating to Nonresident Entertainers (8/94) |
| 207 | Sales and Use Tax Information for Contractors (7/94) | 509 | Filing Wage Statements and Information Returns on Magnetic Media (3/94) |
| 210 | Sales and Use Tax Treatment of Landscaping (5/94) | 600 | Wisconsin Taxation of Lottery Winnings (11/93) |
| 211 | Sales and Use Tax Information for Cemetery Monument Dealers (10/91) | 601 | Wisconsin Taxation of Pari-Mutuel Wager Winnings (3/94) |
| 212 | Businesses: Don't Forget About Use Tax (9/94) | 700 | Speakers Bureau presenting ... (2/93) |
| 213 | Travelers: Don't Forget About Use Tax (3/94) | W-166 | Wisconsin Employer's Withholding Tax Guide (9/90) <input type="checkbox"/> |
| 214 | Do You Owe Wisconsin Use Tax? (Businesses) (9/93) | | |
| 216 | Filing Claims for Refund of Sales or Use Tax (12/94) | | |
| 400 | Wisconsin's Temporary Recycling Surcharge (12/94) | | |
| 410 | Local Exposition Taxes (11/94) | | |

IRS Picks Up Speed on the Information Superhighway

Note: the following article was submitted by John T. Ader, Director, Milwaukee District, Internal Revenue Service

We live in an age of computers. Recognizing that, the Internal Revenue

Service and the Wisconsin Department of Revenue are both working to find new ways to use computers to help taxpayers and tax professionals meet their filing requirements.

The IRS now offers several filing methods for people looking for alternatives to the traditional paper forms. Two systems using computers — Electronic Filing and the 1040PC — are operating nationwide.

Electronic Filing

Electronic filing, in which accepted participants send tax filing data for their clients to the IRS from their computers, is available for balance due as well as refund returns. This means taxpayers can file returns earlier while still making tax payments by the April tax deadline. For taxpayers receiving refunds, electronic filing means a faster refund and the option of having the money deposited directly into their bank accounts.

Wisconsin was one of the first states in the nation to offer electronic filing, which was first tested in 1986. Nationwide, electronic filing of federal tax returns grew to about 13.5 million individual returns in 1994. We believe that 15.5 million returns will be filed electronically this year.

Wisconsin was also one of the first states in which taxpayers were able to file their state returns electronically as well as their federal.

1040PC Program

Home computer users can shorten their paperwork and choose direct deposit of their refunds with tax preparation software that uses the 1040PC format. Unlike traditional forms, which may have many blank lines, the 1040PC format only prints lines with entries. The result is a three-column list that can, for example, cut a regular 12-page return to two pages. Taxpayers sign the

1040PC printout and attach their W-2 forms and any other signature documents. These are mailed to the IRS. Standard computers and printers produce the 1040PC format on plain paper.

When a refund is due, the software may give the taxpayer the option of entering the information for a direct deposit to the taxpayers' bank account. When additional tax is due, the program prints out a voucher to accompany the payment. The taxpayer can send everything at once, or mail the 1040PC upon completion, and subsequently send the payment voucher and check to the IRS.

Benefits of Electronic Filing & 1040PC

These alternatives offer such benefits as:

- More accurate returns. Returns filed electronically or in the 1040PC format are more accurate because the software programs involved catch and correct mistakes while preparing the returns. If there are errors on electronically-filed returns, the system alerts the senders within a day or two so they can make corrections and retransmit the return. 1040PC format returns are easier for IRS data transcribers to process, reducing errors.
- Acknowledgments of receipt. Usually within 24 hours, the electronic filer receives a message that the IRS has accepted the return for processing.
- Earlier refunds. When the IRS receives complete, accurate computer-ready data, it can usually issue refunds within three weeks, compared to 40 days for paper returns. The refund arrives even sooner when a taxpayer elects to have the money deposited directly into a

savings or checking account. For alternatives which involve Direct Deposit, there's also greater security — no lost or stolen checks.

Tax Forms on CD-ROM

Tax professionals with PCs can get 1040s on CD from IRS. Or, in plain English, the Internal Revenue Service now provides federal income tax forms and publications on CD-ROM for people who have computers.

Using the CD-ROM, people can view 1994 tax forms and publications on their computer screens and print them. The CD-ROM is not a tax preparation software package.

The three-CD series can be ordered for \$69 through the Government Printing Office Superintendent of Documents. Call 202-512-1800 and ask for stock no. 648-094-00004-3. Or order through the GPO Federal Bulletin Board on 202-512-1387. Tax practitioners can fill out the order form in IRS Publication 1045, *Information for Tax Practitioners*.

IRS Goes On-Line with FedWorld

The Internal Revenue Service has gotten in line (or rather on-line) by offering federal income tax forms on FedWorld, a service that calls itself the electronic marketplace for government information. FedWorld was created in 1992 by the National Technical Information Service, within the Technology Administration of the U.S. Department of Commerce. It is an on-line network that provides the general public with government information from over 60 agencies. To date, FedWorld has been accessed over 1 million times.

If you have a computer and a modem, you will also have instant access to details about free IRS assistance programs, electronic tax filing, an-

swers to commonly asked questions, and publications.

For people in the United States and especially those living abroad, access to IRIS means instant access to forms and information that would have previously taken days or weeks to receive.

People can download and print forms, publications and monthly newsletters. Once printed, on-line tax forms can be filled in and mailed off just like standard forms.

FedWorld can be dialed-direct by setting modem parity to none, data bits to 8, stop bit to 1, terminal emulation to ANSI, duplex to full, and communication software to dial 703-321-8020.

FedWorld is available free over the Internet, which can be accessed by setting the telnet to fedworld.gov (192.239.93.3). For Internet File Transfer Protocol (FTP) services, connect to ftp.fedworld.gov (192.239.92.205).

Technical questions regarding FedWorld can be directed to the FedWorld help desk 24 hours a day at 703-487-4608.

Coming Soon for Wisconsin Taxpayers: TeleFile

The IRS will expand TeleFile, its telephone filing system, to more states next year. We hope that Wisconsin will be one of those states. TeleFile is offered to single taxpayers with income under \$50,000 who file Form 1040EZ. To use TeleFile, they must not have any name or address changes to their tax package label.

Last year, the IRS received 500,000 TeleFile returns. A typical TeleFiler was 25 years old and had income of \$10,000 with about \$25 of interest

income. Asked why they used TeleFile, taxpayers most often mentioned the faster refunds, ease of filing, and convenience. More than 700,000 TeleFile returns are expected this year.

TeleFilers prepare for their call by writing down their interest income, their total wages, and the amount of tax withheld. Then, using a Touch-Tone phone, they call a toll-free number and enter the requested information. The telephone call takes five to seven minutes. The IRS will figure the adjusted gross income, the tax, and any refund or tax due while the taxpayer is on the phone. Refunds will be sent about three weeks after the telephone filing. Any tax due can be paid by the April tax deadline.

IRS & WDOR: Moving into the Future Together

All of these systems enable IRS to process accurate information more quickly and effectively. Joint federal-state electronic filing is an excellent example of a system which enables us to take advantage of technology and reduce the cost of government. That saves tax dollars. And that's important to all of us. □

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, 1995, or at the stage in which action occurred during the period from January 2, 1995 to April 1, 1995.

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

- 2.89 Estimated tax requirements for short taxable years-NR
- 2.96 Extensions of time to file corporation franchise or income tax returns-R&R
- 3.03 Dividends received deduction — corporations-R&R

Rules Sent to Revisor for Publication of Notice

- 11.04 Constructing buildings for exempt entities-A

Rules Sent for Legislative Committee Review

- 11.13* Direct pay-NR
- 11.14* Exemption certificates, including resale certificates-A

* hearing held 2/13/95

Rules Adopted But Not Yet Effective

- 2.03 Corporation returns-R&R
- 2.04 Information returns and wage statements-R&R
- 2.08 Returns of persons other than corporations-R&R
- 2.10 Copies of federal returns, statements, schedules, documents, etc. to be filed with Wisconsin returns-R&R
- 2.39 Apportionment method-A

Rules Adopted and in Effect (adoption date February 1, 1995)

- 2.97 Earned income credit eligibility-NR

Emergency Rule in Effect

- 11.13* Direct pay-NR

* hearing held 2/13/95

Recently Adopted Rules Summarized

Reproduced below is the text of a new administrative rule, sec. Tax 2.97, "Earned Income Credit Eligibility," adopted effective February 1, 1995.

Section Tax 2.97 was created to describe a person's eligibility for the Wisconsin earned income credit, as a result of a law change creating a Wisconsin earned income credit computed separately from the federal credit. The text of sec. Tax 2.97 is as follows:

Tax 2.97 EARNED INCOME CREDIT ELIGIBILITY. (s. 71.07(9e)(ad), (ah), (ap) and (at), Stats.) (1) GENERAL. Under s. 71.07(9e)(ad), (ah), (ap) and (at), Stats., certain persons may claim an earned income credit based on the person's earned income or federal adjusted gross income.

(2) DEFINITIONS. In this section:

(a) "Earned income" means:

1. Wages, salaries, tips and other employee compensation.

2. The amount of the person's net earnings from self-employment for the taxable year within the meaning of s. 1402(a) of the internal revenue code, but net earnings shall be determined with regard to the deduction allowed to the person under s. 164(f) of the internal revenue code.

(b) "Qualifying child" means, with respect to any person for any taxable year, an individual:

1. Who meets the relationship test described in sub. (5)(a).

2. Who, except as provided in sub. (5)(a)3, has the same principal place of abode as the person for more than one-half of the taxable year.

3. Who meets the age requirements of sub. (5)(b).

4. Whom the person properly identifies under the requirements of sub. (5)(c).

(3) PERSONS ELIGIBLE FOR THE CREDIT. (a) Except as provided in pars. (b), (c) and (d), a person who has a qualifying child for the taxable year may claim the earned income credit.

(b) A person may not claim the earned income credit for the taxable year if the person is the qualifying child of another person for that taxable year.

Example: You and your daughter lived with your mother during the taxable year. Both you and your mother meet all the requirements for the earned income credit for the taxable year.

Your daughter is your qualifying child. Both you and your daughter are qualifying children of your mother.

You cannot take the earned income credit because you are your mother's qualifying child.

(c) If 2 or more persons would be treated as eligible for the credit with respect to the same qualifying child for taxable years beginning in the same calendar year, only the person with the highest federal adjusted gross income for the taxable year may claim the earned income credit with respect to the qualifying child.

Example: You and your 5-year-old son moved in with your mother in April. You are not a qualifying child of your mother. Your son meets the conditions to be a qualifying child for both you and your mother. Your federal adjusted gross income for the taxable year was \$7,000 and your mother's was \$14,000. Since your mother's federal adjusted gross income was higher, only your mother may claim the earned income credit with respect to your son.

(d) A person who claims the foreign earned income exclusion under s. 911 of the internal revenue code for the taxable year may not claim the earned income credit.

(4) **EARNED INCOME COMPUTATION.** (a) The earned income of a person shall be computed without regard to any marital property laws.

(b) No amount received as a pension or annuity may be taken into account in computing earned income.

(c) No amount to which s. 871(a) of the internal revenue code applies, relating to income of nonresident alien individuals not connected with United States business, may be taken into account in computing earned income.

(5) **"QUALIFYING CHILD" REQUIREMENTS.** (a) *Relationship test.* 1. An individual bears a relationship to the person if the individual is any of the following:

- a. A son or daughter of the person, or a descendant of either.
- b. A stepson or stepdaughter of the person.
- c. An eligible foster child of the person.

2. Subdivision 1 does not apply to any individual who is married as of the end of the person's taxable year unless the person is entitled to a deduction under s. 151 of the internal revenue code for that taxable year with respect to the individual or would be so entitled but for par. (2) or (4) of s. 152(e) of the internal revenue code.

3. For purposes of subd. 1.c, an eligible foster child is an individual not described in subd. 1.a or b who:

- a. The person cares for as the person's own child.
- b. Has the same principal place of abode as the person for the person's entire taxable year.

4. A child who is legally adopted or who is placed with a person by an authorized placement agency for adoption by

the person shall be treated as a child by blood.

(b) *Age requirements.* An individual meets the requirements of this paragraph if the individual meets any of the following conditions:

1. Has not attained the age of 19 as of the end of the calendar year in which the taxable year of the person begins.

2. Is a student as defined in s. 151(c)(4) of the internal revenue code who has not attained the age of 24 as of the end of the calendar year.

3. Is permanently and totally disabled as defined in s. 22(e)(3) of the internal revenue code at any time during the taxable year.

(c) *Identification requirements.* The requirements of this paragraph are met if, as part of the tax return on which the credit is claimed:

1. The person provides the name and age of each qualifying child.

2. In the case of a qualifying child who has attained the age of one year before the end of the person's taxable year, the person provides the taxpayer identification number of the qualifying child.

(d) *Abode must be in the United States.* The requirements of sub. (2)(b)2 and par. (a)3.b shall be met only if the principal place of abode is in the United States.

Note: The provisions of this section are effective for taxable years beginning on or after January 1, 1994, as a result of the enactment of 1993 Wis. Act 16, which created s. 71.07(9e)(ad), (ah), (ap) and (at), Stats. Prior to the enactment of 1993 Wis. Act 16, the Wisconsin earned income credit was based on a percentage of the federal basic earned income credit. □



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

Joint returns — joint and several liability

Tracy A. Smith (p. 12)

Nonresidents — S corporation liquidations

William W. and Cecelia G. Hansen, and Harry D. and Nancy W. Jacobs, Jr. (p. 12)

Retirement funds exempt — constitutionality

John D. and Jane A. Hennick (p. 13)

Corporation Franchise and Income Taxes

Apportionment — contractors
Losses — 1986 and prior — deductibility

Towne Realty, Inc. (p. 13)

Transitional rules — federalization

Lincoln Savings Bank, S.A. (p. 13)

Sales and Use Taxes

Admissions — boat operator's receipts

LaCrosse Queen, Inc. (p. 14)

Parking and storage — aircraft
Containers, packaging and shipping materials — plastic garment bags

Luetzow Industries (p. 15)

INDIVIDUAL INCOME TAXES

Joint returns — joint and several liability.

Tracy A. Smith vs. Wisconsin Department of Revenue (Circuit Court for Barron County, April 7, 1994). This is a petition for review of a Wisconsin Tax Appeals Commission ("Commission") decision, dated October 19, 1993. The issue is whether the taxpayer is jointly and severally liable for the income tax on a capital gain from the sale of a residence owned jointly with Kum C. Smith, his wife at the time of the sale.

The department assessed income tax for 1987 on the taxpayer and Kum C. Smith, for a capital gain on the sale of their jointly owned residence. The taxpayer filed a petition for redetermination with the department, protesting the amount of the assessment on the grounds that his "ex-wife Kum had been 'awarded 60% of this money on the judgment'." The department denied the petition and sent notices to both the taxpayer and Kum C. Smith, who were divorced. The taxpayer filed a petition with the Commission, alleging that the department was "billing the wrong person" and that "the money in question was granted to my ex-wife, Kum Cha Smith ... in our divorce ... in March 1990." The taxpayer did not contest the taxability of the capital gain nor the correctness of the amount of the assessment; rather, he contended that "the only money he had was being held by the bankruptcy trustee."

In its decision the Commission found that since the taxpayer and Kum C. Smith filed a joint Wisconsin income tax return for 1987 they were jointly and severally liable for the amounts due. The Commission further held that it was immaterial that the proceeds

from the sale of the residence went to Kum C. Smith or that the taxpayer's funds were tied up in bankruptcy.

The Circuit Court concluded that the Commission decision was proper, and that there is no legal basis for reversal. There is no basis in law for the taxpayer's argument that the spouse who received all the benefits should be taxed the entire tax penalty.

The taxpayer has not appealed this decision. □

Nonresidents — S corporation liquidations.

William W. and Cecelia G. Hansen, and Harry D. and Nancy W. Jacobs, Jr. vs. Wisconsin Department of Revenue (Circuit Court for Dane County, December 8, 1994).

The issue in this case is whether the disparity of income tax treatment between Wisconsin residents and nonresidents is unconstitutional. The Tax Appeals Commission held that the taxpayers did not meet their burden of proof regarding constitutionality. See *Wisconsin Tax Bulletin* 89 (October 1994), page 12, for a summary of the Commission decision.

The department and the taxpayers settled the issue under a Stipulation. They agreed that the tax due by the taxpayers was the amount that would be due if they were Wisconsin residents.

The Circuit Court issued an order modifying the Commission decision in accordance with the Stipulation. The Court then dismissed the petition of the taxpayers, without costs to either party. □

Retirement funds exempt — constitutionality. *John D. and Jane A. Hennick vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, December 5, 1994). The issues in this case are:

- A. Whether the taxpayers have established that sec. 71.05(1)(a), Wis. Stats., as applicable to members of exempt groups identified by that statute for 1989 through 1992, violates Art. VIII, Section 1 of the Wisconsin Constitution, by failing to qualify as a “reasonable exemption” provision from “taxes ... imposed on incomes, privileges and occupations.”
- B. Whether the taxpayers have established that sec. 71.05(1)(a), Wis. Stats., violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Taxpayer John D. Hennick was employed from 1956 through 1983 by a private employer. After retiring in 1983, he received annual pension payments from an insurance company, because of contributions made to a retirement fund pursuant to his service with his former employer.

The taxpayers filed amended Wisconsin income tax returns for 1989 through 1992, excluding the annual pension payments received by Mr. Hennick. The department denied the refund claims in full.

The Commission concluded as follows:

- A. The taxpayers have failed to establish that sec. 71.05(1)(a), Wis. Stats., as applicable to members of exempt groups identified by that statute for 1989 through 1992, violates Art. VIII, Section 1 of the Wisconsin Constitution, by failing to qualify as a “reasonable exemption” provision

from “taxes ... imposed on incomes, privileges and occupations.” The mere establishment of a difference in the taxation treatment accorded certain types of incomes does not *per se* indicate that those differences result from distinctions made through legislative enactments which are not reasonable.

- B. The taxpayers have failed to establish that sec. 71.05(1)(a), Wis. Stats., violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. They have failed to prove that the state’s income taxation of pensions, as reflected in the exemptions in sec. 71.05(1)(a), Wis. Stats., results in “palpably arbitrary” differences in the treatment of taxpayers, lacking in any reasonable consideration of difference or policy which may inform the enactment.

The taxpayers have appealed this decision to the Circuit Court.

CAUTION: This is a small claims decision of the Wisconsin Tax Appeals Commission and may not be used as a precedent. This decision is provided for informational purposes only. □

CORPORATION FRANCHISE AND INCOME TAXES

Apportionment — contractors; Losses — 1986 and prior — deductibility. *Wisconsin Department of Revenue vs. Towne Realty, Inc.* (Circuit Court for Milwaukee County, September 28, 1994). The department filed a petition for review of the December 14, 1993, decision by the Wisconsin Tax Appeals Commission. See *Wisconsin Tax Bulletin* 86 (April 1994), page 15, for a summary of that decision.

The department and the taxpayer reached a settlement of all claims relating to this case. They agreed to adjust Towne’s net business loss carryforward as recalculated. They also agreed that their settlement did not admit the correctness of either party’s position and did not establish a standard to apply to Towne’s returns outside the years under review.

Based on this information, the Circuit Court dismissed the case with prejudice on September 28, 1994. □

Transitional rules — federalization. *Lincoln Savings Bank, S.A., f/k/a Lincoln Savings and Loan Association, vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, January 12, 1995). The issue in this case is whether the taxpayer’s federal bad debt reserve balance as of December 31, 1961, constitutes an “amount that, because of [1987 Wisconsin Act 27], is required to be added to, or subtracted from, income in order to avoid the double inclusion, or omission, of any item of income, loss or deduction,” as a component of any transitional adjustment to be made under sec. 3047(1)(a) of 1987 Wisconsin Act 27.

Lincoln Savings Bank (Lincoln), formerly known as Lincoln Savings and Loan Association, is, and during the taxable periods in issue was, a state-chartered savings bank duly organized, existing, and authorized to do business under the laws of the State of Wisconsin, having its principal offices located in Milwaukee, Wisconsin.

Lincoln is, and during the taxable periods in issue was, a corporation within the meaning of sec. 3047(1)(a) of 1987 Wisconsin Act 27 (the Act).

Section 3047(1)(a) of the Act, effective for taxable year 1987 and at all

times material hereto, provided in relevant part:

Each corporation shall calculate, as of the close of its taxable year 1986, the amount that, because of this act, is required to be added to, or subtracted from, income in order to avoid the double inclusion, or omission, of any item of income, loss or deduction ... If the amount required to be added or subtracted is more than \$25,000, it shall be added or subtracted in amounts as nearly equal as possible over the 5 taxable years beginning with 1987 ...

For purposes of determining its yearly transitional adjustment allowable under sec. 3047(1)(a) of the Act, Lincoln calculated, as of the close of its taxable year 1986, the difference between its Wisconsin bad debt reserve and its federal bad debt reserve as \$1,016,144. Starting with its taxable year 1987, it subtracted one-fifth of that amount (\$203,229) from its Wisconsin taxable income as otherwise determined.

It is the department's position that Lincoln's federal bad debt reserve must be reduced by the amount in Lincoln's bad debt reserve as of December 31, 1961 (immediately prior to the period during which it first became subject to Wisconsin franchise taxes). That federal balance was \$309,743. Accordingly, the department's position is that Lincoln's annual transitional adjustment for this item under sec. 3047(1)(a) of the Act be computed as follows:

a. Federal bad debt reserve reserve balance as of 12/31/86	\$3,684,766
b. Minus federal bad debt debt reserve balances of 12/31/61	<u>(309,743)</u>

c. Applicable federal bad debt reserve balance as of 12/31/86	\$3,375,023
d. Wisconsin bad debt reserve balance as of 12/31/86	<u>2,668,622</u>
e. Aggregate transitional adjustment (c minus d)	\$ 706,401
f. Yearly transitional adjustment (e divided by 5)	\$ 141,280

The Commission concluded that the department correctly disallowed portions of transitional subtraction modifications taken by the taxpayer during the years under review to the extent that those adjustments contained increments of the taxpayer's federal bad debt reserve balance as of December 31, 1961.

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

SALES AND USE TAXES

— Admissions — boat operator's receipts. *La Crosse Queen, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, January 11, 1995). The issue in this case is whether the taxpayer's receipts from excursion trips on the Mississippi River are subject to Wisconsin sales tax.

The taxpayer operated a seasonal (May through October) excursion vessel on the Mississippi River under a water carrier permit issued by the Interstate Commerce Commission.

The taxpayer advertised its excursion trips as 1 1/2-hour sightseeing and dinner cruises. Its vessel carried only passengers, with no other merchan-

dise, on round trip sightseeing and dinner cruises originating and returning to its wharf in La Crosse, with no intermediate stops. Its passengers/customers came from Wisconsin, Minnesota, and other locations.

On its trip north, the vessel loaded at its wharf in La Crosse, traveled up river several miles, and then returned. On its trip south, the vessel traveled several miles, turned around, and returned.

The taxpayer has claimed exemption from sales tax under sec. 77.54(13), Wis. Stats., which exempts from sales tax:

"The gross receipts from the sales of and the storage, use or other consumption in this state of commercial vessels and barges of 50-ton burden or over primarily engaged in interstate or foreign commerce or commercial fishing, and the accessories, attachments, parts and fuel therefor."

The department concedes that the vessel at issue is a commercial vessel of 50-ton burden or over, but challenges that it is primarily engaged in interstate commerce.

The Commission concluded that the taxpayer is not primarily engaged in interstate commerce and is not entitled to the exemption from sales tax contained in sec. 77.54(13), Wis. Stats. There is no integral step in interstate movement or essential part of any interstate journey for the taxpayer's passengers, who embark and disembark at the same location in La Crosse. Their travel to and from interstate destinations is wholly independent of whether they ride the taxpayer's vessel.

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

✚ Parking and storage — aircraft; Containers, packaging and shipping materials — plastic garment bags. *Luetzow Industries vs. Wisconsin Department of Revenue* (Circuit Court for Milwaukee County, April 15, 1994). The issues in this case are:

- A. Whether gross receipts from airplane hangar leases are subject to or exempt from sales tax.
- B. Whether gross receipts from sales of garment bags to dry cleaning

establishments are subject to or exempt from sales tax.

The Circuit Court for Milwaukee County previously issued a decision in this case, on May 15, 1991. See *Wisconsin Tax Bulletin* 75 (January 1992), page 13, for a summary of that decision.

The Court of Appeals dismissed the department's October 23, 1991 petition for review of the Milwaukee County Circuit Court's May 15, 1991 decision, on the basis that the Circuit Court decision was not a final order.

The Circuit Court issued a final judgment on April 15, 1994. The Court concluded as follows:

- A. The airplane hangar lease receipts are subject to sales tax.
- B. The gross receipt from the sale of garment bags to dry cleaning establishments are exempt from sales tax.

The department appealed the April 15, 1994 decision to the Court of Appeals on July 12, 1994. □



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. Interest From Madison Community Development Authority Bonds (p. 16)
2. Medical Care Insurance Deduction — Nursing Home Insurance (p. 16)
3. Medical Care Insurance Deduction — Premiums Paid By a Statutory Employee and Former Employee (p. 16)
4. Separate Returns Filed After Joint Return (p. 17)
5. Treatment of Tax-Option (S) Corporation Items When Stock Is Held By a Grantor Trust (p. 18)

Corporation Franchise and Income Taxes

6. Making or Withholding an Election Not to Be a Tax-Option (S) Corporation for Wisconsin (p. 18)
7. Tax-Option (S) Corporation's Treatment of Certain Exempt Bond Interest (p. 20)

Sales and Use Taxes

8. Claims for Refund — Construction Activities (p. 21)
9. Claims for Refund — Seller With Tax Delinquency (p. 21)
10. Claims for Refund — Time Limitations (p. 22)
11. Use Tax On Building Materials Stored in Wisconsin (p. 27)

Local Exposition Taxes

12. Local Exposition Taxes — Brackets for Collecting Taxes From Customers (p. 28)
13. Local Exposition Taxes — Food and Beverage Tax — Sales of Beer and Liquor (p. 29)
14. Local Exposition Taxes — Food and Beverage Tax — Sales of Soda (p. 29)
15. Local Exposition Taxes — Food and Beverage Tax — Off-Premises Consumption (p. 30)
16. Local Exposition Taxes — Food and Beverage Tax — Gift Baskets (p. 31)
17. Local Exposition Taxes — Rental Car Tax — Rental of Service or Replacement Vehicles (p. 32)

INDIVIDUAL INCOME TAXES

1 Interest From Madison Community Development Authority Bonds

Statutes: Sections 66.4325(5m) and 71.05(6)(a)1, Wis. Stats. (1993-94)

Facts and Question: The Community Development Authority of the City of Madison, Wisconsin, has issued Lease Revenue Bonds, Series 1995, for the Monona Terrace Community and Convention Center Project.

Is the interest received from these bonds taxable for Wisconsin income tax purposes?

Answer: No. Interest received from community development authority bonds issued on or after January 28, 1987, is exempt from Wisconsin income tax under sec. 66.4325(5m), Wis. Stats. (1993-94). (Note: Community development authority bonds issued prior to January 28, 1987, are also tax-exempt. See the tax release titled "Interest Received From Community Development Authority Bonds" in *Wisconsin Tax Bulletin* 50 (April 1987), page 8.) □

2 Medical Care Insurance Deduction — Nursing Home Insurance

Statutes: Section 71.05(6)(b)17 through 20, Wis. Stats. (1993-94)

Note: This tax release applies only with respect to taxable years beginning on or after January 1, 1993.

Background: Section 71.05(6)(b)17 through 20, Wis. Stats. (1993-94), provides a deduction for a portion of the amount paid for medical care insurance by a self-employed person or by a person who is an employee if

the person's employer pays no amount of money toward the person's medical care insurance for the person, his or her spouse, and dependents. The deduction is claimed as a subtraction from federal adjusted gross income when computing Wisconsin taxable income.

"Medical care insurance" means a medical care insurance policy that covers the person, his or her spouse, and dependents and provides surgical, medical, hospital, major medical, or other health service coverage, and includes payments made for medical care benefits under a self-insured plan. "Medical care insurance" does not include hospital indemnity policies or policies with ancillary benefits such as accident benefits or benefits for loss of income resulting from a total or partial inability to work because of illness, sickness, or injury. [Sec. 71.05(6)(b)17.a, 18.a, 19.a and 20.a, Wis. Stats. (1993-94).]

Facts and Question: A self-employed person pays premiums for nursing home insurance. Benefits will be paid under the insurance plan when nursing home care is recommended by a physician due to inability to perform certain activities of daily living or cognitive impairment. There is no express requirement of the need for medical care as a precondition to admission to a nursing home. Surgical, medical, and hospital care are not the principal reasons for the plan's coverage of nursing home costs.

May the premiums paid for this nursing home insurance be used in the computation of the medical care insurance deduction?

Answer: No. The premiums paid for this nursing home insurance cannot be used for the medical care insurance deduction. Because this nursing home insurance plan does not fall clearly

within the terms "surgical, medical, hospital, major medical... coverage," as used by sec. 71.05(6)(b)17 through 20, Wis. Stats. (1993-94), premiums paid under this policy are not included as "medical care insurance." □

3 Medical Care Insurance Deduction — Premiums Paid By a Statutory Employee and Former Employee

Statutes: Section 71.05(6)(b)17 through 20, Wis. Stats. (1993-94)

Note: This tax release applies only with respect to taxable years beginning on or after January 1, 1993.

Background: For taxable years beginning in 1993, sec. 71.05(6)(b)17, Wis. Stats. (1993-94), provides a deduction for 25% of the amount paid for medical care insurance by a self-employed person or by a person who is an employee if the person's employer pays no amount of money toward the person's medical care insurance for the person, his or her spouse, and dependents. The deduction is claimed as a subtraction from federal adjusted gross income when computing Wisconsin taxable income.

For taxable years beginning in 1994, the deduction increases to 50% of the amount paid for medical care insurance for both a self-employed person and a person who is an employee whose employer pays no amount toward the person's medical care insurance.

For purposes of federal employment taxes (i.e., social security tax and unemployment tax), sec. 3121(d) of the Internal Revenue Code (IRC) includes as "employees" certain individuals who do not have an employer-employee relationship under the usual common law rules. These indi-

viduals are known as statutory employees. Statutory employees include the following:

- 1) An agent-driver or commission-driver who distributes meat, vegetable, fruit, or bakery products or beverages (other than milk), or delivers laundry or dry cleaning.
- 2) A full-time life insurance sales agent whose principal business activity is selling life insurance or annuity contracts, or both, primarily for one life insurance company.
- 3) An individual who works at home on materials or goods furnished by the employer. The employer must furnish specifications for the work to be done and the work must be returned to the employer or a person named by the employer.
- 4) A traveling or city salesperson (other than an agent-driver or commission-driver) who works full time (except for sideline sales activities) for one firm or person getting orders from customers. The orders must be for items for resale or use as supplies in the customer's business. The customers must be retailers, wholesalers, contractors, or operators of hotels, restaurants, or other businesses dealing with food or lodging.

A statutory employee is considered an employee for purposes of federal employment taxes, but is considered a self-employed independent contractor for reporting business income and expenses.

Facts and Question 1: Under federal law, Taxpayer A is considered a statutory employee. Taxpayer A's employer pays 80% of the premiums for medical care insurance for Tax-

payer A and his family. Taxpayer A pays 20% of the medical care insurance premiums. May Taxpayer A use the 20% he pays for medical care insurance in computing a deduction for medical care insurance paid by a self-employed person?

Answer 1: Yes. Taxpayer A may use the amount he pays for medical care insurance to compute a deduction for medical care insurance paid by a self-employed person. Although sec. 3121(d), IRC, classifies Taxpayer A as a statutory employee, that provision is only applicable for purposes of federal employment taxes. For purposes of the Wisconsin medical care insurance deduction, Taxpayer A is considered self-employed.

Facts and Question 2: Taxpayer B worked for Company C for 30 years, after which he retired. As part of the retirement package, Taxpayer B continues to be covered under Company C's medical care insurance plan. Taxpayer B paid \$200 per month (\$2,400 for the year) for family coverage during 1994 and his former employer (Company C) paid the balance of the medical care insurance premiums.

Taxpayer B worked part-time for Company D for the entire year. He earned \$7,000 during 1994. As a part-time employee, Taxpayer B did not qualify to participate in Company D's medical care insurance plan.

May Taxpayer B use the \$2,400 he paid to compute a deduction for medical care insurance?

Answer 2: Yes. Taxpayer B may use the \$2,400 to compute a deduction for medical care insurance. Section 71.05(6)(b)17 through 20, Wis. Stats. (1993-94), provides that the medical care insurance deduction may be claimed by a person who is an employee if the person's employer pays no amount of money toward the

person's medical care insurance. In this case, the person's employer is Company D, and this employer is not paying any portion of the medical care insurance costs. The only payments are being made by a previous employer. "Employer," as used in the context of this statute, refers to a person's current employer; the statute does not refer to previous employers. □

4 Separate Returns Filed After Joint Return

Statutes: Section 71.03(2)(m)1 and 5, Wis. Stats. (1993-94)

Background: Section 71.03(2)(m)1, Wis. Stats. (1993-94), provides that for a taxable year for which a joint return has been filed, separate returns may be filed by the spouses on or before the last date prescribed by law for timely filing the return of either has elapsed.

Question: For purposes of changing from a joint return to separate returns, what is the "last date prescribed by law for timely filing the return"?

Answer: The "last date prescribed by law for timely filing the return" is the due date (e.g., April 15 for an individual who files on a calendar-year basis) or the extended due date for those individuals who have an extension of time to file their return. Therefore, separate returns may not be filed after a joint return if the due date or extended due date of either spouse's return has passed.

Example 1: A married couple files a joint 1994 income tax return on February 15, 1995. The due date of their return is April 15, 1995. If they change their minds and decide to file separate returns, they must file the separate returns (and pay any balance due) on or before April 15, 1995.

Example 2: A married couple files a joint 1994 income tax return on May 1, 1995. They have an extension of time to file their Wisconsin return until August 15, 1995. If they change their minds and decide to file separate returns, they must file the separate returns (and pay any balance due) on or before August 15, 1995.

Example 3: A married couple files a joint 1994 income tax return on May 1, 1995. The return was filed late because the due date was April 15, 1995. They did not have an extension of time to file their return. They may not file separate returns because such returns would have had to be filed on or before April 15, 1995. □

5 Treatment of Tax-Option (S) Corporation Items When Stock Is Held By a Grantor Trust

Statutes: Sections 71.05(10)(b) and 71.17(4), Wis. Stats. (1993-94)

Facts and Question: The sole shareholder of a tax-option (S) corporation transfers 80% of his shares of stock in the corporation to a grantor trust of which he is the trustee. The corporation earns \$50,000 of ordinary income and makes \$2,000 of charitable contributions. Internal Revenue Code section 1366 treats charitable contributions as a separately stated item that flows through to the shareholders and is claimed on their returns as if paid directly by the shareholders. For federal income tax purposes, the shareholder/grantor reports the entire \$50,000 of tax-option (S) corporation income and claims an itemized deduction for the entire \$2,000 of charitable contributions.

How does the shareholder/grantor treat the tax-option (S) corporation items for Wisconsin income tax purposes?

Answer: The shareholder/grantor treats the tax-option (S) corporation items in the same way as he would if he held all of the shares, the same as for federal purposes. The shareholder/grantor must report the entire \$50,000 of tax-option (S) corporation ordinary income on his Wisconsin individual income tax return. He may claim the entire \$2,000 of charitable contributions that is deductible federally, either as a subtraction from federal adjusted gross income under section 71.05(10)(b), Wis. Stats. (1993-94), or in his Wisconsin itemized deduction credit. □

CORPORATION FRANCHISE AND INCOME TAXES

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

Statutes: Section 71.365(4), Wis. Stats. (1993-94)

Note: This tax release supersedes the tax release with the same title, which was published in *Wisconsin Tax Bulletin* 84 (October 1993), page 20.

Background: Beginning with the 1987 taxable year, a corporation that is an S corporation for federal income tax purposes may elect not to be a tax-option (S) corporation for Wisconsin franchise or income tax purposes. This "opt-out" election requires the consent of persons who hold more than 50% of the shares of the tax-option (S) corporation on the day on which the "opt-out" election is made.

The corporation makes the election by filing Wisconsin Form 5E, "Election by an S Corporation Not to Be Treated as a Tax-Option (S) Corporation," on or before the due date or extended due date of its Wisconsin franchise or

income tax return for the first year affected by the election. Once the election is completed, the corporation or its successor may not claim Wisconsin tax-option status for the next 4 taxable years after the taxable year to which the "opt-out" election first applies. Corporations which make the "opt-out" election are treated as regular (C) corporations for Wisconsin and must file Wisconsin Form 4 or 5 rather than Form 5S.

Facts and Question 1: Corporation X, a calendar year S corporation, files a properly completed Form 5E with the department on February 1, 1995, for the 1994 taxable year. It has not yet filed its 1994 Wisconsin corporation franchise or income tax return, which is due March 15, 1995.

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

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

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

Facts and Question 2: The facts are the same as in Question 1 except that

Corporation X filed its 1994 Wisconsin corporation franchise or income tax return on February 1, 1995, as a regular (C) corporation.

May Corporation X withdraw the "opt-out" election prior to the March 15, 1995, due date of its Wisconsin corporation franchise or income tax return?

Answer 2: Yes. Although Corporation X filed a Wisconsin corporation franchise or income tax return in accordance with the "opt-out" election, the corporation may withdraw the "opt-out" election prior to the March 15, 1995, due date of its Wisconsin return.

To withdraw the election, Corporation X must take the following action on or before March 15, 1995:

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

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

Facts and Question 3: The facts are the same as in Question 1 except that Corporation X receives a federal extension until September 15, 1995, to file its 1994 federal income tax return. This extends the due date of its Wisconsin corporation franchise or income tax return to 30 days after the federal due date. On June 1, 1995, Corporation X files its Wisconsin

franchise or income tax return as a regular (C) corporation.

May Corporation X withdraw the "opt-out" election prior to the October 15, 1995, extended due date of its Wisconsin corporation franchise or income tax return?

Answer 3: Yes. Although Corporation X filed a Wisconsin corporation franchise or income tax return in accordance with the "opt-out" election, the corporation may withdraw the "opt-out" election prior to the October 15, 1995, extended due date of its Wisconsin return.

To withdraw the election, Corporation X must take the following action on or before October 15, 1995:

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

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

Facts and Question 4: Corporation Y, a calendar year S corporation, files its 1994 Wisconsin franchise or income tax return as a tax-option (S) corporation on February 1, 1995.

May Corporation Y elect to opt out of Wisconsin tax-option status for the 1994 taxable year prior to the March 15, 1995, due date of its Wisconsin corporation franchise or income tax return?

Answer 4: Yes. Corporation Y must make the "opt-out" election by the due date or extended due date of its Wisconsin corporation franchise or income tax return for the first year affected by the election.

To make the election, Corporation Y must take the following action on or before March 15, 1995:

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

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

Facts and Question 5: The facts are the same as in Question 4 except that Corporation Y receives a federal extension of time until September 15, 1995, to file its 1994 federal income tax return. This extends the due date of its Wisconsin corporation franchise or income tax return to 30 days after the federal due date. On May 15, 1995, Corporation Y files its Wisconsin franchise or income tax return as a tax-option (S) corporation.

May Corporation Y elect to opt out of Wisconsin tax-option status for the 1994 taxable year prior to the October 15, 1995, extended due date of its Wisconsin return?

Answer 5: Yes. Corporation Y must make the "opt-out" election by the extended due date of its Wisconsin franchise or income tax return for the first year affected by the election.

To make the election, Corporation Y must take the following action on or before October 15, 1995:

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

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

Facts and Question 6: Corporation Z, which was organized under Virginia law and is engaged in business solely in Virginia, elects to be treated as an S corporation for federal income tax purposes. Individual A, a full-year Wisconsin resident, owns 75% of the stock of Corporation Z. Corporation Z files its federal S corporation income tax returns on a calendar year basis. Corporation Z is not required to file Wisconsin franchise or income tax returns because it does not have nexus with Wisconsin.

May Corporation Z elect not to be a tax-option (S) corporation for Wisconsin franchise and income tax purposes?

Answer 6: Yes. Corporation Z may elect out of Wisconsin tax-option (S) corporation status with the consent of persons who hold more than 50% of the shares of the corporation on the day on which the election is made. To make the election, Corporation Z must file Form 5E, "Election by an S Corporation Not to Be Treated as a Tax-Option (S) Corporation," by the

due date, including extensions, for filing its federal income tax return. After the due date for filing the federal return has passed, the "opt-out" election cannot be withdrawn, and it remains effective for the corporation and its successors for at least the next 4 taxable years after the taxable year to which the election first applies.

Note: If Corporation Z opts out of Wisconsin tax-option (S) status, Individual A calculates his Wisconsin adjusted gross income and Wisconsin itemized deduction credit by excluding all items of S corporation income, loss, and deduction that were included in his federal taxable income and including in income taxable dividends received from the corporation. □

7 Tax-Option (S) Corporation's Treatment of Certain Exempt Bond Interest

Statutes: Sections 71.34(1) and 71.36(1m), Wis. Stats. (1993-94)

Wis. Adm. Code: Section Tax 3.095, January 1994 Register

Background: For the 1987 taxable year and thereafter, Wisconsin treats tax-option (S) corporations as pass-through entities, the same as for federal purposes. Items of income, loss, and deduction retain their character as business income or loss but pass through to the shareholders and are included in the shareholders' returns as if received or accrued, paid or incurred, directly by the shareholders.

A tax-option (S) corporation may deduct from its net income all amounts included in the Wisconsin adjusted gross income of its shareholders, the capital gain deduction under sec. 71.05(6)(b)9, Wis. Stats., and all amounts not taxable to nonres-

ident shareholders under secs. 71.04(1) and (4) to (9) and 71.362, Wis. Stats. For purposes of the tax-option corporation deduction, interest on federal obligations is not included in shareholders' income. Section 71.36(1m), Wis. Stats. (1993-94). As a result, tax-option (S) corporations are subject to Wisconsin franchise tax measured by the amount of interest and dividend income received from obligations of the United States government and its instrumentalities, which is allocable to Wisconsin.

Facts and Question: In addition to interest and dividends from U.S. government obligations, interest income on certain bonds issued by the government of Puerto Rico, other U.S. territories and possessions, and state and local governments is exempt from the Wisconsin individual income tax. See section Tax 3.095, Wis. Adm. Code for a list of exempt securities.

Is a tax-option (S) corporation subject to Wisconsin franchise tax measured by interest income on bonds issued by the government of Puerto Rico, other U.S. territories and possessions, and state and local governments when that interest is exempt from the Wisconsin individual income tax?

Answer: No. Although sec. 71.36(1m), Wis. Stats. (1993-94), requires a tax-option (S) corporation to include interest income on federal obligations in its taxable income for corporate franchise tax purposes, the Wisconsin Legislature has not specifically authorized the inclusion in the corporation's taxable income of interest income on bonds issued by the government of Puerto Rico, other U.S. territories and possessions, and state and local governments when that interest is exempt from the Wisconsin individual income tax. □

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 January 1995 issue of the Sales and Use Tax Report. A copy can be found in *Wisconsin Tax Bulletin* 90 (January 1995), pages 39 to 42.

8 Claims for Refund — Construction Activities

Note: This tax release applies to claims for refund of sales or use tax filed on or after September 1, 1994.

Statutes: Sections 77.51(2), 77.52(1) and (2)(a)10, and 77.59(4)(a) and (c), Wis. Stats. (1993-94)

Background: Section 77.59(4)(a), Wis. Stats. (1993-94), provides that a buyer or seller may file a claim for refund with the Department of Revenue for sales or use tax paid in error to a seller or the department if certain conditions are met.

Section 77.59(4)(c), Wis. Stats. (1993-94), provides that a seller who receives a refund of sales or use tax from the Department of Revenue that the seller has collected from buyers shall return the taxes and related interest to the buyers from whom the taxes were collected. The seller shall return to the Department of Revenue any part of a refund that the seller does not return to a buyer. Failure by the seller to return the refund to a buyer or the department may result in penalties.

Facts and Questions 1: Contractor A sells and installs a furnace in the home of Individual B. This transaction is a real property improvement.

However, Contractor A incorrectly assumes that the furnace is tangible personal property when installed and invoices Individual B as follows:

Materials	\$1,000
Labor	750
Subtotal	\$1,750
Sales Tax (\$1,750 x 5%)	88
Amount Due	<u>\$1,838</u>

Individual B pays the contractor \$1,838. Subsequently, Individual B files with the Department of Revenue a timely claim for refund for the \$88 of sales tax it paid to the contractor on the real property improvement. The claim is properly completed and filed on forms prescribed by the Department of Revenue.

Will the Department of Revenue refund the \$88 of tax plus applicable interest to Individual B under sec. 77.59(4)(a), Wis. Stats. (1993-94)?

Answer 1: Yes. Note, however, that Contractor A is liable for Wisconsin use tax on its purchase price of the materials (e.g., furnace) used in the real property improvement.

Facts and Question 2: Contractor A invoices Individual B for the sale and installation of cabinets in Individual B's home. This transaction is a real property improvement. Contractor A purchased the materials it used in installing the cabinets (e.g., cabinets, handles, hinges, etc.) without Wisconsin sales or use tax. Contractor A invoices Individual B for the sale and installation of the cabinets as follows:

Materials	
(\$1,200 cost + markup)	\$1,500
Labor	800
Subtotal	\$2,300
Sales Tax (\$2,300 x 5%)	115
Amount Due	<u>\$2,415</u>

Later, Contractor A determines it incorrectly charged Individual B Wisconsin sales tax on the sale and installation of the cabinets.

The sales tax paid in error on the sale of the cabinets by Contractor A to Individual B is \$115. Use tax of \$60 (\$1,200 X 5%) is due from Contractor A on the purchase price of the materials it used in installing the cabinets. The department issues a net refund of \$55 (\$115 - \$60), plus interest, to Contractor A.

What is the amount of refund and interest Contractor A must pass on to Individual B under sec. 77.59(4)(c), Wis. Stats. (1993-94)?

Answer 2: Contractor A is required to return to Individual B the \$115 of sales tax collected from Individual B in error, even though the net refund by the department to Contractor A was \$55. Contractor A must also remit to Individual B interest related to the \$115 of sales tax being refunded to Individual B. Interest is refunded at 9%, under sec. 77.60(1), Wis. Stats. (1993-94), from the due date of Contractor A's sales and use tax return for the period in which the sale and installation occurred to the date the refund was issued by the department to Contractor A. □

9 Claims for Refund — Seller With Tax Delinquency

Note: This tax release applies to claims for refund of sales or use tax filed on or after September 1, 1994.

Statutes: Section 77.59(4)(a) and (c) and (5), Wis. Stats. (1993-94)

Background: Section 77.59(5), Wis. Stats. (1993-94), provides in part that the department **may** offset the amount of any refund for a period, together with interest on the refund, against deficiencies for another period, and against penalties and interest on the deficiencies, or against any amount of whatever kind, due and owing on the books of the department from the person claiming the refund.

Facts and Question 1: Seller A requests a refund from the Department of Revenue for sales tax collected from buyers on sales that were not subject to tax. Seller A has provided with its claim for refund a list of the buyers who were incorrectly charged sales tax.

Seller A has a delinquency with the Department of Revenue for unpaid sales tax.

Will the department refund the tax and interest to Seller A under sec. 77.59(4)(a), Wis. Stats. (1993-94), or use the refund to offset Seller A's delinquency under sec. 77.59(5), Wis. Stats. (1993-94)?

Answer 1: Under sec. 77.59(5), Wis. Stats. (1993-94), the Department of Revenue has the option of issuing the refund to the seller or offsetting the seller's delinquency. In this situation, the Department of Revenue will refund the tax and related interest to the seller so that the seller can pass the refund on to the buyers.

Note: The Department of Revenue may not issue the refund directly to a buyer unless the buyer has filed a claim for refund with the Department of Revenue.

Caution: Under sec. 77.54(4)(c), Wis. Stats. (1993-94), if a seller is refunded tax and interest by the Department of Revenue for tax collected from a buyer, and the seller fails to return the tax and related interest to the buyer or the department due to negligence, the seller is subject to a penalty of 25% of the amount not returned. If a seller fails to return the tax and related interest to the buyer or the department due to fraud, the seller is subject to a penalty of 100% of the amount not returned.

Facts and Question 2: Seller A requests a refund from the Depart-

ment of Revenue for use tax it paid to the Department of Revenue on a purchase that was not subject to tax. Seller A has a delinquency with the Department of Revenue for unpaid sales tax.

Will the department refund the tax and interest to Seller A under sec. 77.59(4)(a), Wis. Stats. (1993-94), or use the refund to offset Seller A's delinquency under sec. 77.59(5), Wis. Stats. (1993-94)?

Answer 2: The Department of Revenue will use the refund to offset Seller A's delinquency. (**Note:** In this situation, the tax refunded to Seller A was not collected from a buyer.) □

10 Claims for Refund — Time Limitations

Note: This tax release replaces the tax releases on claims for refund of sales or use tax that appeared in *Wisconsin Tax Bulletins* 49 (January 1987), pages 13 to 15, and 69 (October 1990), pages 22 to 25, and *Tax Report* articles on claims for refund of sales or use tax appearing in issues dated June 1975, June 1980, and September 1984.

This tax release applies to claims for refund filed with the Department of Revenue on or after September 1, 1994.

This tax release only addresses time limitations for filing claims for refund of sales or use tax by a seller or buyer. Other information on filing claims for refund, such as which form to use, offsets, etc., may be found in Wisconsin Publication 216, *Filing Claims for Refund of Sales or Use Tax*.

Statutes: Section 77.59(3m), (4), (6), and (8m), Wis. Stats. (1993-94)

Background: Section 77.59(3m), (4), and (8m) of the Wisconsin Statutes contain provisions regarding the time in which a claim for refund of sales or use tax may be filed by a seller or buyer.

The following information sets forth the time limitations for filing a claim for refund. The time limitations depend on whether the seller or buyer was audited by the department. The information is separated between claims for refund by a seller and claims for refund by a buyer.

Note: A claim for refund of a seller or buyer that is mailed is timely filed if (1) it is mailed in a properly addressed envelope with the postage duly prepaid, (2) the envelope is postmarked before midnight of the last day of the limitation period, and (3) the claim for refund is received by the Department of Revenue within 5 days after the last day of the limitation period.

Claims for Refund by Seller:

A. No Office Audit Determination Was Made for the Transaction and No Field Audit Determination Was Made for Period of Claim (sec. 77.59(4)(a), Wis. Stats. (1993-94))

If the transaction in the claim for refund (1) was not included in a prior office audit determination and (2) was not in the periods or years included in a prior field audit determination (neither (1) nor (2) occurred), claims for refund may be filed as follows:

- within 4 years after the unextended due date of the seller's Wisconsin income or franchise tax return, or
- if exempt from filing Wisconsin income or franchise tax returns, within 4 years of the 15th day of

the 4th month of the year following the close of the calendar or fiscal year.

Example: Seller J, an individual, overpaid sales tax to the Department of Revenue on her January 1994 sales and use tax return. The unextended due date of Seller J's 1994 income tax return is April 15, 1995.

Seller J has until April 15, 1999 to file a claim for refund for the overpaid sales tax reported on her January 1994 sales and use tax return.

B. Office Audit Determination Was Made for the Transaction (sec. 77.59(4)(b), Wis. Stats. (1993-94))

Claims for refund of the tax assessed by an office audit may be filed within two years of the issuance of the notice of determination of sales or use tax assessed by office audit, if the seller paid the tax and the tax was not protested by filing a petition for redetermination.

Example: In an office audit determination dated and issued July 15, 1994, the Department of Revenue assessed Seller K \$800 of sales tax on equipment Seller K sold to Buyer L in June 1992. Seller K paid the \$800 of sales tax on July 31, 1994, and did not file a petition for redetermination.

In January 1995, Buyer L provides Seller K with an exemption certificate, claiming the manufacturing exemption on the equipment.

Seller K has until July 15, 1996 (two years from the date the notice of office audit determination was issued) to file a claim for refund with the Department of Revenue for the \$800 of tax, since the overpaid tax was part of the July 15, 1994 office audit determination.

C. Field Audit Determination Was Made for Period of Claim

If the transaction occurred during the period or years included in a prior field audit determination, the time limitations for filing a claim for refund for such transaction are as follows:

1. **Transaction Not Assessed in Field Audit Determination** (sec. 77.59(4)(a), Wis. Stats. (1993-94))

a. *Field Audit Not Appealed to Department's Appellate Bureau*

Seller has until the earliest of the following to file a claim for refund:

- Four years from the unextended due date of the seller's income or franchise tax return or if exempt from filing Wisconsin income or franchise tax returns, within 4 years of the 15th day of the 4th month of the year following the close of the calendar or fiscal year (or date extended by waiver under sec. 77.59(3m), Wis. Stats. (1993-94)).

- Date the amount of the notice of determination is paid.

- 60 days after the date the seller received the notice of determination.

b. *Field Audit Determination Appealed to Department's Appellate Bureau, But Not to Wisconsin Tax Appeals Commission*

Seller has until the earliest of the following to file a claim for refund:

Four years from the unextended due date of the seller's income or franchise tax return or if exempt from filing Wisconsin income or franchise tax returns, within 4 years of the 15th day of the 4th month of the year following the close of the calendar or fiscal year (or date extended by waiver under sec. 77.59(3m), Wis. Stats. (1993-94)).

- Date the amount of the notice of determination is paid (this does not include deposits of tax under sec. 77.59(6)(c), Wis. Stats. (1993-94), while appeal is pending).

- 60 days after the date the seller received the Appellate Bureau's notice of redetermination.

c. *Seller Appeals Field Audit Determination to Wisconsin Tax Appeals Commission or Court*

Seller has until the earliest of the following to file a claim for refund:

- Four years from the unextended due date of the seller's income or franchise tax return or if exempt from filing Wisconsin income or franchise tax returns, within 4 years of the 15th day of the 4th month of the year following the close of the calendar or fiscal year (or date extended by waiver under sec. 77.59(3m), Wis. Stats. (1993-94)).

- Date the amount of the notice of determination is paid (this does not include deposits of tax under sec. 77.59(6)(c), Wis. Stats. (1993-94), while appeal is pending).

- 60 days after the date the seller received the Appellate Bureau's notice of redetermination, even though seller files the appeal with the Wisconsin Tax Appeals Commission before the 60 days have expired.
2. Transaction Assessed in Field Audit Determination (sec. 77.59(4)(b), Wis. Stats. (1993-94))

Claims for refund of the tax assessed by a field audit may be filed within two years of the issuance of the notice of determination of sales or use tax assessed by field audit, if the seller paid the tax and the tax was not protested by filing a petition for redetermination.

Example: Seller O is field audited by the Department of Revenue for the period January 1991 through December 1994, and is assessed \$5,000 of sales tax on sales made by Seller O. The notice of determination is dated and issued April 5, 1995.

Seller O pays the \$5,000 of sales tax on April 20, 1995, and does not file a petition for redetermination.

Seller O has until April 5, 1997, to file a claim for refund with the Department of Revenue for all or part of the \$5,000 of sales tax assessed.

D. Field Audit Determination Was Made and Customer Files Valid Claim With Seller (sec. 77.59(8m), Wis. Stats. (1993-94))

Even though a seller has been field audited, claims for refund may be filed within 4 years after the unextended due date of the seller's Wisconsin income or franchise tax return, or if exempt from filing Wisconsin

income or franchise tax returns, within 4 years of the 15th day of the 4th month of the year following the close of the calendar or fiscal year, if the seller's customers have filed valid claims for refund with the seller.

Example: Seller Q, a sole proprietor, is field audited by the Department of Revenue for the period January 1991 through December 1994. Seller Q is assessed \$2,000 of use tax on equipment purchased by Seller Q from vendors located outside Wisconsin. The notice of field audit determination is dated and issued June 10, 1995. Seller Q does not file a petition for redetermination.

Seller Q files its income tax return on a calendar year basis.

In November 1995, Seller Q receives a request from a church for a refund of \$500 of sales tax which it charged to the church on landscaping services provided by Seller Q in July 1993. The church has provided Seller Q with its certificate of exempt status number. Seller Q reported the \$500 of tax on its July 1993 sales and use tax return.

Since Seller Q reported the \$500 of tax on its July 1993 sales and use tax return, Seller Q has until April 15, 1998 (four years from the unextended due date of its 1993 income tax return), to file a refund claim with the Department of Revenue for the \$500 of sales tax.

Claims for Refund by Buyer — Tax Paid to Department of Revenue:

A. No Office Audit Determination Was Made for the Transaction and No Field Audit Determination Was Made for Period of the Claim (sec. 77.59(4)(a), Wis. Stats. (1993-94))

If the transaction in the claim for refund (1) was not included in a prior

office audit determination and (2) was not in the periods or years included in a prior field audit determination (neither (1) nor (2) occurred), claims for refund may be filed as follows:

- within 4 years after the unextended due date of the buyer's Wisconsin income or franchise tax return, or,
- if exempt from filing Wisconsin income or franchise tax returns, within 4 years of the 15th day of the 4th month of the year following the close of the calendar or fiscal year.

Example: Buyer J, an individual, overpaid use tax to the Department of Revenue on its January 1994 sales and use tax return. The unextended due date of Buyer J's 1994 income tax return is April 15, 1995.

Buyer J has until April 15, 1999 to file a claim for refund for the overpaid use tax reported on the January 1994 sales and use tax return.

B. Office Audit Determination Was Made for the Transaction (sec. 77.59(4)(b), Wis. Stats. (1993-94))

Claims for refund of the tax assessed by an office audit may be filed within two years of the issuance of the notice of determination of sales or use tax assessed by office audit, if the buyer paid the tax and the tax was not protested by filing a petition for redetermination.

Example: In an office audit determination dated and issued July 15, 1994, the Department of Revenue assessed Buyer K \$800 of use tax on equipment Buyer K purchased in June 1992. Buyer K paid the \$800 of use tax on July 31, 1994, and did not file a petition for redetermination.

Buyer K has until July 15, 1996 (two years from the date the notice of office audit determination was issued) to file a claim for refund with the Department of Revenue for the \$800 of tax, since the tax was part of the July 15, 1994 office audit determination.

C. Field Audit Determination Was Made for Period of Claim

If the transaction occurred during the period or years included in a prior field audit determination, the time limitations for filing a claim for refund for such transaction are as follows:

1. Transaction Not Assessed in Field Audit Determination (sec. 77.59(4)(a), Wis. Stats. (1993-94))

a. Field Audit Not Appealed to Department's Appellate Bureau

Buyer has until the earliest of the following to file a claim for refund:

- Four years from the unextended due date of the buyer's income or franchise tax return or if exempt from filing Wisconsin income or franchise tax returns, within 4 years of the 15th day of the 4th month of the year following the close of the calendar or fiscal year (or date extended by waiver under sec. 77.59(3m), Wis. Stats. (1993-94)).
- Date the amount of the notice of determination is paid.
- 60 days after the date the buyer received the notice of determination.

b. Field Audit Determination Appealed to Department's

Appellate Bureau, But Not to Wisconsin Tax Appeals Commission

Buyer has until the earliest of the following to file a claim for refund:

- Four years from the unextended due date of the buyer's income or franchise tax return or if exempt from filing Wisconsin income or franchise tax returns, within 4 years of the 15th day of the 4th month of the year following the close of the calendar or fiscal year (or date extended by waiver under sec. 77.59(3m), Wis. Stats. (1993-94)).
- Date the amount of the notice of determination is paid (this does not include deposits of tax under sec. 77.59(6)(c), Wis. Stats. (1993-94), while appeal is pending).
- 60 days after the date the buyer received the Appellate Bureau's notice of redetermination.

c. Buyer Appeals Field Audit Determination to Wisconsin Tax Appeals Commission or Court

Buyer has until the earliest of the following to file a claim for refund:

- Four years from the unextended due date of the buyer's income or franchise tax return or if exempt from filing Wisconsin income or franchise tax returns, within 4 years of the 15th day of the 4th month of the year

following the close of the calendar or fiscal year (or date extended by waiver under sec. 77.59(3m), Wis. Stats. (1993-94)).

- Date the amount of the notice of determination is paid (this does not include deposits of tax under sec. 77.59(6)(c), Wis. Stats. (1993-94), while appeal is pending).
- 60 days after the date the buyer received the Appellate Bureau's notice of redetermination, even though the buyer files the appeal with the Wisconsin Tax Appeals Commission before the 60 days have expired.

2. Transaction Assessed in Field Audit Determination (sec. 77.59(4)(b), Wis. Stats. (1993-94))

Claims for refund of the tax assessed by a field audit may be filed within two years of the issuance of the notice of determination of sales or use tax assessed by field audit, if the buyer paid the tax and the tax was not protested by filing a petition for redetermination.

Example: Buyer O is field audited by the Department of Revenue for the period January 1991 through December 1994, and is assessed \$5,000 of use tax on purchases made. The notice of determination is dated and issued April 5, 1995.

Buyer O pays the \$5,000 of use tax on April 20, 1995, and does not file a petition for redetermination.

Buyer O has until April 5, 1997, to file a claim for refund with the Department of Revenue for all or part of the \$5,000 of use tax assessed.

Claims for Refund by Buyer — Tax Paid to Seller:

A. *No Field Audit Determination Was Made for Period of the Claim* (sec. 77.59(4)(a), Wis. Stats. (1993-94))

If the transaction in the claim for refund was not in the periods or years included in a prior field audit determination, claims for refund may be filed as follows:

- within 4 years after the unextended due date of the buyer's Wisconsin income or franchise tax return, or,
- if exempt from filing Wisconsin income or franchise tax returns, within 4 years of the 15th day of the 4th month of the year following the close of the calendar or fiscal year.

Example: Buyer J, an individual, overpaid sales tax of \$100 to Seller K in January 1994. The unextended due date of Buyer J's 1994 income tax return is April 15, 1995.

Buyer J has until April 15, 1999 to file a claim for refund for the overpaid sales tax paid to Seller K in January 1994.

B. *Field Audit Determination Was Made for Period of Claim* (sec. 77.59(4)(a), Wis. Stats. (1993-94))

If the transaction occurred during the period or years included in a prior field audit determination, the time

limitations for filing a claim for refund for such transaction are as follows:

1. Field Audit Not Appealed to Department's Appellate Bureau

Buyer has until the earliest of the following to file a claim for refund:

- Four years from the unextended due date of the buyer's income or franchise tax return or if exempt from filing Wisconsin income or franchise tax returns, within 4 years of the 15th day of the 4th month of the year following the close of the calendar or fiscal year (or date extended by waiver under sec. 77.59(3m), Wis. Stats. (1993-94)).
- Date the amount of the notice of determination is paid.
- 60 days after the date the buyer received the notice of determination.

2. Field Audit Determination Appealed to Department's Appellate Bureau, But Not to Wisconsin Tax Appeals Commission

Buyer has until the earliest of the following to file a claim for refund:

- Four years from the unextended due date of the buyer's income or franchise tax return or if exempt from filing Wisconsin income or franchise tax returns, within 4 years of the 15th day of the 4th month of the year following the close of the calendar or fiscal year (or date extended by waiver under sec. 77.59(3m), Wis. Stats. (1993-94)).

- Date the amount of the notice of determination is paid (this does not include deposits of tax under sec. 77.59(6)(c), Wis. Stats. (1993-94), while appeal is pending).

- 60 days after the date the buyer received the Appellate Bureau's notice of redetermination.

3. Buyer Appeals Field Audit Determination to Wisconsin Tax Appeals Commission or Court

Buyer has until the earliest of the following to file a claim for refund:

- Four years from the unextended due date of the buyer's income or franchise tax return or if exempt from filing Wisconsin income or franchise tax returns, within 4 years of the 15th day of the 4th month of the year following the close of the calendar or fiscal year (or date extended by waiver under sec. 77.59(3m), Wis. Stats. (1993-94)).
- Date the amount of the notice of determination is paid (this does not include deposits of tax under sec. 77.59(6)(c), Wis. Stats. (1993-94), while appeal is pending).
- 60 days after the date the buyer received the Appellate Bureau's notice of redetermination, even though the buyer files the appeal with the Wisconsin Tax Appeals Commission before the 60 days have expired. □

11 Use Tax On Building Materials Stored in Wisconsin

Statutes: Sections 77.51(18), 77.53(1) and (2), and 77.54(2), Wis. Stats. (1993-94)

Background:

Law

Section 77.53(1), Wis. Stats. (1993-94), provides:

“An excise tax is levied and imposed on the use or consumption in this state of taxable services under s. 77.52 purchased from any retailer, at the rate of 5% of the sales price of those services; on the storage, use or other consumption in this state of tangible personal property purchased from any retailer, at the rate of 5% of the sales price of that property; and on the storage, use or other consumption of tangible personal property manufactured, processed or otherwise altered, in or outside this state, by the person who stores, uses or consumes it, from material purchased from any retailer, at the rate of 5% of the sales price of that material.”

Section 77.53(2), Wis. Stats. (1993-94), provides, in part, that a receipt with the tax separately stated from a retailer engaged in business in Wisconsin, or authorized by the Department of Revenue to collect the tax, relieves the purchaser from further liability for the tax to which the receipt refers.

Section 77.51(18), Wis. Stats. (1993-94), provides that “storage” includes any keeping or retention in Wisconsin for any purpose except sales in the regular course of business of tangible personal property purchased from a retailer.

Section 77.54(2), Wis. Stats. (1993-94), provides an exemption from sales and use tax for:

“The gross receipts from sales of and the storage, use or other consumption of tangible personal property becoming an ingredient or component part of an article of tangible personal property or which is consumed or destroyed or loses its identity in the manufacture of tangible personal property in any form destined for sale, but this exemption shall not include fuel or electricity.”

Application of Law

One of the effects of the above laws is that persons who store tangible personal property in Wisconsin, and later incorporate the tangible personal property into real property in or outside Wisconsin, are liable for Wisconsin use tax on their purchase price of the tangible personal property (assuming no Wisconsin sales or use tax was paid to a retailer on the purchase of the tangible personal property). The storage of tangible personal property (e.g., raw materials) prior to a manufacturing process and the storage of completed products both constitute “storage” for purposes of determining use tax liability.

The following examples illustrate this.

Example 1: (Storage of Building Materials-Incorporated into Real Property)

- Company A purchases lumber from Supplier B. Supplier B, located outside Wisconsin, does not have nexus in Wisconsin and therefore does not charge Wisconsin sales or use tax.
- Supplier B delivers the lumber via common carrier to Company A's Wisconsin location.

- Company A stores the lumber in Wisconsin, and as the lumber is needed, removes it from storage.
- Company A then uses the lumber in real property construction activities both in Wisconsin and outside Wisconsin.

Company A owes Wisconsin use tax on the lumber it purchased from Supplier B and stored in Wisconsin. The lumber is considered stored in Wisconsin under sec. 77.51(18), Wis. Stats. (1993-94), and therefore is subject to use tax under sec. 77.53(1), Wis. Stats. (1993-94). All of the lumber stored in Wisconsin and incorporated by Company A into real property is subject to Wisconsin use tax, whether used by Company A in Wisconsin or in other states.

Example 2: (Storage of Building Materials-Incorporated into Real Property and Sold at Retail)

- Company E is an electrical contractor engaged in real property construction in and outside Wisconsin.
- Company E purchases 12-2 NM-B indoor copper building wire from Supplier F and stores the wire in Wisconsin.
- Supplier F is located outside Wisconsin, does not have nexus in Wisconsin and therefore does not charge Wisconsin sales or use tax to Company E.
- Company E removes wire purchased from Supplier F from storage as needed, and incorporates some of the wire into real property, both in and outside Wisconsin. Other wire purchased from Supplier F is removed from storage as needed and sold at retail in Wisconsin by Company E to the general public.

- Company E does not know at the time of purchase whether the wire will be sold at retail or incorporated into real property by Company E.

Company E owes Wisconsin use tax on the wire it purchased from Supplier F, stored in Wisconsin and incorporated into real property in or outside Wisconsin. The wire which is incorporated by Company E into real property in and outside Wisconsin is considered stored in Wisconsin under sec. 77.51(18), Wis. Stats. (1993-94), and therefore is subject to use tax under sec. 77.53(1), Wis. Stats. (1993-94). Company E is liable for Wisconsin sales tax on its retail sales of wire to the general public.

Example 3: (Storage of Both (1) Raw Materials Prior to Manufacturing, and (2) Manufactured Products)

- Company C manufactures windows at its Wisconsin plant.
- Company C purchases the raw materials (lumber, glass, etc.) for the windows without tax, using a manufacturer's exemption certificate, from suppliers in Wisconsin, Illinois, and Iowa.
- Company C stores the raw materials for the windows in Wisconsin, and as the raw materials are needed, removes them from storage.
- After manufacturing the windows, Company C stores them in Wisconsin. The windows remain in storage for one day to six months.
- From its inventory of windows in storage, some windows are sold as retail sales to the public. Other windows are incorporated by Company C into real property (i.e. Company C sells windows

and installation to customers) both in Wisconsin and in other states.

Company C owes Wisconsin use tax on its purchase price of the raw materials (lumber, glass, etc.) which it stored and used in manufacturing windows, and incorporated into real property. Materials used for all of the windows which are incorporated by Company C into real property in and outside Wisconsin are considered stored in Wisconsin under sec. 77.51(18), Wis. Stats. (1993-94), and therefore are subject to use tax under sec. 77.53(1), Wis. Stats. (1993-94).

The exemption in sec. 77.54(2), Wis. Stats. (1993-94), does not apply to Company C's purchases of raw materials for windows which Company C incorporates into real property, because such windows are not destined for sale as tangible personal property.

Company C does not owe Wisconsin use tax on materials used for the windows which are sold by Company C as retail sales to the public. Company C is liable for Wisconsin sales tax on its retail sales of windows.

Example 4: (Storage of Raw Materials Prior to Manufacturing)

- Same facts as in Example 3 above, except that immediately after the windows are manufactured, Company C loads some of the windows onto its trucks and delivers them to job sites in and outside Wisconsin. Company C then incorporates these windows into real property in and outside Wisconsin. The remaining windows are stored by Company C in Wisconsin and later sold as retail sales to the public.

Company C owes Wisconsin use tax on its purchase price of raw materials it uses in manufacturing the windows which it incorporated into real prop-

erty in and outside Wisconsin. Materials used for all of the windows which are incorporated by Company C into real property in and outside Wisconsin are considered stored in Wisconsin under sec. 77.51(18), Wis. Stats. (1993-94), and therefore are subject to use tax under sec. 77.53(1), Wis. Stats. (1993-94). (Note: The materials were stored in Wisconsin prior to the manufacturing process.)

The exemption in sec. 77.54(2), Wis. Stats. (1993-94), does not apply to Company C's purchases of raw materials for windows which Company C incorporated into real property, because such windows are not destined for sale as tangible personal property.

Company C does not owe Wisconsin use tax on materials used for the windows which are sold by Company C as retail sales to the public. Company C is liable for Wisconsin sales tax on its retail sales of windows. □

LOCAL EXPOSITION TAXES

Note: The local exposition taxes apply only to sales of certain lodging, food, and beverages, and to certain rentals of automobiles, in cities and villages located wholly or partially in Milwaukee County.

12 Local Exposition Taxes — Brackets for Collecting Taxes From Customers

Statutes: Sections 66.75(1m)(c), 77.61(3), 77.982, and 77.991, Wis. Stats. (1993-94)

Question: Are there brackets, similar to those provided for Wisconsin state and county sales and use tax purposes, that are used to compute the amount of local exposition taxes from the sale of lodging, food, and beverages and the rental of automobiles?

Answer: No. The law does not authorize the department to set brackets for collecting the local exposition taxes. A mathematical computation rounded to the nearest cent should be used to compute the tax. You can drop amounts under .5¢ and increase amounts from .5¢ to .99¢ to the next cent. For example, 1.4¢ becomes 1¢ and 1.5¢ becomes 2¢.

Example: A grocery store in Milwaukee sells a candy bar for 50¢. The food and beverage tax charged to the customer is zero ($50¢ \times 0.25\% = .125¢$ rounded to the nearest cent, which is zero).

Example: A restaurant in Milwaukee county sells a meal for \$10. The food and beverage tax charged to the customer is 3¢ ($\$10 \times 0.25\% = 2.5¢$ rounded to the nearest cent, which is 3¢). □

13 Local Exposition Taxes — Food and Beverage Tax — Sales of Beer and Liquor

Statutes: Sections 77.54(20)(c)1 to 3 and 77.98, Wis. Stats. (1993-94)

Background: Section 77.98, Wis. Stats. (1993-94), imposes a 0.25% food and beverage tax on the retail sale of the following items subject to Wisconsin sales or use tax under secs. 77.54(20)(c)1 to 3, unless an exemption applies:

1. Meals, food, food products, and beverages sold by any person, organization, or establishment for direct consumption on the premises.

“Premises,” by way of illustration but not limitation, includes the building and parking area of a grocery store, convenience store, restaurant, etc. Sales from vending

machines are presumed to be for on-premises consumption unless records show which sales were for off-premises consumption.

2. Heated food or heated beverages.
3. Soda fountain items such as sundaes, milkshakes, malts, ice cream cones, and sodas.
4. Candy, chewing gum, lozenges, popcorn, and confections.

Question: Is the sale of fermented malt beverages (e.g., beer) and intoxicating liquor subject to the 0.25% food and beverage tax?

Answer: The following lists taxable and nontaxable sales of fermented malt beverages and intoxicating liquor:

Taxable Sales

- Sales of fermented malt beverages and intoxicating liquor for consumption **on** the seller's premises.

Example: A restaurant in Milwaukee County serves beer and liquor with the meals served at the restaurant. The sale of the beer and liquor is subject to the 0.25% food and beverage tax.

Nontaxable Sales

- Sales of fermented malt beverages and intoxicating liquor for consumption **off** the seller's premises.

Example: A liquor store in Milwaukee County sells individual cans and bottles of beer, as well as six-packs, 12-packs, and cases for off-premises consumption. The sale of the beer is not subject to the 0.25% food and beverage tax. □

14 Local Exposition Taxes — Food and Beverage Tax — Sales of Soda

Statutes: Sections 77.54(20)(c)1 to 3 and 77.98, Wis. Stats. (1993-94)

Background: Section 77.98, Wis. Stats. (1993-94), imposes a 0.25% food and beverage tax on the retail sale of the following items subject to Wisconsin sales or use tax under secs. 77.54(20)(c)1 to 3, unless an exemption applies:

1. Meals, food, food products, and beverages sold by any person, organization, or establishment for direct consumption on the premises.

“Premises,” by way of illustration but not limitation, includes the building and parking area of a grocery store, convenience store, restaurant, etc. Sales from vending machines are presumed to be for on-premises consumption unless records show which sales were for off-premises consumption.

2. Heated food or heated beverages.
3. Soda fountain items such as sundaes, milkshakes, malts, ice cream cones, and sodas.
4. Candy, chewing gum, lozenges, popcorn, and confections.

Question: Is the sale of soda subject to the 0.25% food and beverage tax.

Answer: The following lists taxable and nontaxable sales of soda:

Taxable Sales

- Sales of soda for consumption **on** the seller's premises.

Example: A restaurant in Milwaukee County serves soda with the meals served at the restaurant. The sale of the soda is subject to the 0.25% food and beverage tax.

Example: A manufacturer in Milwaukee County has soda vending machines in its employee breakroom. The employee inserts the necessary coins and receives a can of soda from the machine. The sale of the soda is subject to the 0.25% food and beverage tax.

Note: Sales from vending machines are assumed to be for on-premises consumption regardless of where the vending machines are located.

- Sales of soda from a dispenser or soda fountain for consumption **on** or **off** the seller's premises.

Example: A convenience store in Milwaukee County has a self-serve soda dispenser. A customer selects a cup and fills it with soda from the dispenser. The sale of the soda is subject to the 0.25% food and beverage tax.

Nontaxable Sales

- Sales of soda in bottles and cans for consumption **off** the seller's premises, other than sales from vending machines.

Example: A grocery store in Milwaukee County sells individual cans and bottles of soda, as well as six-packs, 12-packs, and cases, for off-premises consumption. Customers select the soda they wish to purchase from shelves or refrigerated display cases. The sale of the soda is not subject to the 0.25% food and beverage tax. □

15 Local Exposition Taxes — Food and Beverage Tax — Off-Premises Consumption

Statutes: Section 77.98, Wis. Stats. (1993-94)

Background: Section 77.98, Wis. Stats. (1993-94), imposes a 0.25% food and beverage tax on the retail sale of products subject to Wisconsin sales tax under sec. 77.54(20)(c)1 to 3, Wis. Stats, unless an exemption applies.

The following information describes items that are subject to the 0.25% local exposition food and beverage tax when sold by grocers, convenience stores, restaurants, etc., for **off-premises** consumption.

"Premises," by way of illustration but not limitation, includes the building and parking area of a grocery store, convenience store, restaurant, etc. Sales from vending machines are presumed to be for on-premises consumption unless records show which sales were for off-premises consumption.

What's Taxable — Sales for Off-Premises Consumption: A 0.25% local exposition food and beverage tax is imposed on sales of the following items for **off-premises** consumption (assuming the sales take place in cities and villages located wholly or partially in Milwaukee County):

1. Meals and sandwiches, whether heated or not.

A "meal" usually consists of a diversified selection of foods which are not capable of being eaten in the absence of at least some articles of tableware and which are not conveniently eaten while one is standing or walking.

A "sandwich" is a slice of bread or roll covered with a filling such as meat, cheese, fish, or various mixtures which is usually covered with another slice of bread or roll.

2. Heated food and heated beverages.

"Heated food and heated beverages" means those products, items, or components which have been prepared for sale in a heated condition and which are sold at any temperature higher than the air temperature of the room or place where they are sold.

3. Soda fountain items such as sundaes, milk shakes, malts, ice cream cones, and sodas.
4. Candy, chewing gum, lozenges, popcorn, and confections.

Examples of Taxable Sales for Off-Premises Consumption: Administrative Rule Tax 11.51 lists various items sold by grocers, convenience stores, restaurants, etc., that are taxable or exempt for Wisconsin sales tax purposes. A copy of this rule appears on pages 44 to 48 of this Bulletin (*Wisconsin Tax Bulletin* 91, April 1995).

Of all the items listed in Rule Tax 11.51(2)(a) and (b), **only** the following items are subject to the 0.25% local exposition food and beverage tax when sold for **off-premises** consumption (assuming the sale takes place in a city or village located wholly or partially in Milwaukee County):

- Breath mints
- Candied fruit
- Candy
- Candy apples

- Carbonated beverages, only when sold from a dispenser

(Note: Sales of carbonated beverage in cans or bottles, other than from vending machines or dispensers, are **not** subject to the 0.25% food and beverage tax.)

- Chewing gum
- Cold remedies in lozenge form
- Confections
- Cough drops
- Deli items

(Note: Deli sales for off-premises consumption sold by a weight or measure, such as by the pound or the dozen, and not at a stated price for any particular combination of the separate ingredients which can be designated as either a meal or sandwich, are exempt. Deli sales for off-premises consumption sold in a heated state or sold at a stated price for a combination of the separate ingredients designated as either a meal or sandwich are taxable. Sales of sandwiches are taxable.)

Examples: 1) A grocer's deli sells potato salad, fruit salad, cheese, ham, coleslaw, corned beef, and fresh rolls at room temperature. These items are sold by the pound or dozen. The sale of these items is not subject to the 0.25% food and beverage tax.

2) A grocer's deli sells a serving of each of the following for \$3.59: potato salad, fruit salad, cheese, ham, coleslaw, corned beef, and fresh roll. Because the sale is at a stated price for a particular combination of ingredients which can be considered a meal, the sale is subject to the 0.25% food and beverage tax.

3) A grocer's deli sells party trays in an unheated condition. The price varies based on the size of the tray. The types of party trays include shrimp and sauce, meats, fresh vegetables, fresh fruits, cheeses, or cookies. The trays do not include combinations of items which could be considered a meal or sandwich. The sale of these party trays is not subject to the 0.25% food and beverage tax.

- Drug sundries in lozenge form
- Fruit drinks that are carbonated and sold from a dispenser
- Granola bars that are candy or yogurt coated
- Gum
- Heated foods and beverages
- Ice cream bars and similar products
- Ice cream in cones
- Internal remedies in lozenge form (e.g., throat lozenges)
- Lozenges
- Medicinal preparations in lozenge form
- Mineral tablets in lozenge form
- Nuts that are candy or yogurt coated
- Peanuts that are candy or yogurt coated
- Popcorn, raw or popped
- Raisins that are candy or yogurt coated
- Root beer that is carbonated and sold from a dispenser

(Note: Sales of carbonated root beer in cans or bottles, other than from vending machines or dispensers, are **not** subject to the 0.25% food and beverage tax.)

- Sandwiches, hot or cold
- Soda water beverages that are sold from a dispenser

(Note: Sales of soda water beverages in cans or bottles, other than from vending machines or dispensers, are **not** subject to the 0.25% food and beverage tax.)

- Soft drinks that are carbonated and sold from a dispenser

(Note: Sales of carbonated soft drinks in cans or bottles, other than from vending machines or dispensers, are **not** subject to the 0.25% food and beverage tax.)

- Taffy apples
- Water that is carbonated and sold from a dispenser

(Note: Sales of carbonated water in cans or bottles, other than from vending machines or dispensers, are **not** subject to the 0.25% food and beverage tax.)

- Yogurt bars, cones, and sundaes

Caution: The list of items in Rule Tax 11.51(2)(a) is not all-inclusive. Therefore, there may be items which are not included in Rule Tax 11.51(2)(a) which are subject to Wisconsin sales tax and the 0.25% food and beverage tax. □

16 Local Exposition Taxes — Food and Beverage Tax — Gift Baskets

Statutes: Sections 77.54(20)(c)2.d., and 77.98, Wis. Stats. (1993-94)

Background: Section 77.98, Wis. Stats. (1993-94), imposes a 0.25% food and beverage tax on the retail sale of items subject to Wisconsin sales or use tax under sec. 77.54(20)(c)1 to 3, Wis. Stats., unless an

exemption applies. Items subject to tax include candy, chewing gum, lozenges, popcorn, and confections.

Question: Is the sale of candy, that is included in a gift basket containing nontaxable food, subject to the 0.25% food and beverage tax?

Answer: Yes. The sale of candy is subject to the 0.25% food and beverage tax, even though sold with nontaxable food items. The seller should allocate the selling price between taxable and nontaxable items and impose the 0.25% tax on the taxable items.

Example: A grocery store located in Milwaukee County sells gift baskets which contain the following: Fruit, cheese, sausage, and candy. The baskets sell for \$20. The store's cost of the nontaxable items (fruit, cheese, and sausage) is \$10 and the cost of the candy is \$6.

The 0.25% food and beverage tax may be computed as follows:

Cost of candy	\$	6
Divide by cost of all items in the basket	÷	16
		.375
Multiply by selling price	×	20
Amount subject to tax	\$	7.50
Multiply by 0.25% tax	×	0.0025
Food and beverage tax due	\$.02*

* 1.88¢ rounded to the nearest cent, which is 2¢



17 Local Exposition Taxes — Rental Car Tax — Rental of Service or Replacement Vehicles

Statutes: Sections 77.52(13) and (14), 77.99 and 77.991(2), Wis. Stats. (1993-94)

Background: Section 77.99, Wis. Stats. (1993-94), provides, in part, that a 3% rental car tax is imposed on the rental, but not for rental as a service or repair replacement vehicle, of Type 1 automobiles, as defined in sec. 340.01(4)(a), Wis. Stats. (1993-94), by establishments primarily engaged in short-term rental of passenger cars without drivers, for a period of 30 days or less.

Section 77.991(2), Wis. Stats. (1993-94), provides, in part, that the provision of sec. 77.52(13) and (14), Wis. Stats., as it applies to sales and use taxes, also applies for purposes of administering the local exposition rental car tax.

Section 77.52(13) and (14), Wis. Stats. (1993-94), provides in part that a seller must take from the purchaser an exemption certificate to prove that a sale is exempt from tax. If a certificate is not taken by the seller, the burden of proving that the sale is exempt from tax is on the seller.

Question 1: Is a lessor's rental of a car to a customer subject to the 3%

rental car tax if the customer's car is being serviced or repaired when 1) the lessor does the service or repair, or 2) someone other than the lessor does the service or repair?

Answer 1: The lessor's rental of a car to a customer is not subject to the 3% rental car tax if the customer's car is being serviced or repaired, regardless of who does the service or repair.

Question 2: If the rental of a car is not subject to the 3% rental car tax because the customer's car is being serviced or repaired, must any records be kept by the lessor to show that the rental was exempt from the 3% tax?

Answer 2: Yes. The lessor must obtain an exemption certificate (Form EX-207) or similar document from the customer. If a document other than Form EX-207 is used, the document must contain all of the following:

- Signature of the customer.
- Name and address of the customer.
- Basis for the claimed exemption (e.g., customer is renting this car while his or her car is being repaired or serviced by [fill in company's name]).





Private Letter Rulings

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

The ruling number is interpreted as follows: The "W" is for "Wisconsin"; the first four digits are the year and week the ruling becomes available for publication (80 days after the ruling is issued to the taxpayer); and the last three digits are the number in the series of rulings issued that year. The date is the date the ruling was issued.

Certain information that could identify the taxpayer has been deleted. Additional information is available in Wisconsin Publication 111, "How to Get a Private Letter Ruling From the Wisconsin Department of Revenue."

The following private letter rulings are included:

Sales and Use Taxes

Computer software — tangible vs. intangible

Computer software — maintenance

W9452010 (p. 33)

Exemptions — advertising materials for out-of-state use

W9438008 (p. 37)

Exemptions — prosthetic devices

Exemptions — medicines

W9434007 (p. 38)

Purchases for resale — promotional campaigns

W9505001 (p. 39)

Use tax — subsequent shipment out-of-state

W9451009 (p. 41)



W9452010, September 29, 1994

Type Tax: Sales and Use

Issue: Computer software — tangible vs. intangible; Computer software — maintenance

Statutes: Sections 77.51(20) and 77.52(1) and (2)(a)10, Wis. Stats. (1991-92)

Wis. Adm. Code: Section Tax 11.71, April 1993 Register

This letter responds to your request for a private letter ruling regarding the Wisconsin sales and use tax treatment of computer software licensing fees and support charges.

Facts

General

Company C sells computer systems, including computer hardware, and licenses various industry-specific computer software applications to automobile, truck, motorcycle, industrial, vehicle, and agricultural equipment dealers. The separate software applications range from back-office accounting and inventory control to front-office showroom traffic tracking and vehicle financing. The size of the dealer clients ranges from single brand dealers to "mega-dealers" who carry multiple brands.

Company C offers approximately 30 software applications. On average, large multi-franchise dealers ("mega-dealers") license 20 applica-

tions while single-franchise dealers license 9 applications.

Each of the 30 software applications represents standard software offered universally to all clients. Each standard application has several alternative "set-up" modification options, most of which are installed or "set up" by the client. In a few circumstances, the taxpayer will reprogram or "customize" a standard application to a limited extent for a client. Accordingly, the software licensed by each client is different only to the extent that "set-up" modifications may vary or, in limited situations, to the extent that the standard applications are customized.

Set-ups

Each of the 30 standard applications is tailored to meet the individual needs of each client through use of "set-ups." The client's requirements are generally defined by a series of "set-up" decisions that will control how the particular application (e.g., inventory, accounting) will function on a daily basis for that client.

A "set-up" is a feature within the software that tailors the standard application to the client's needs. It allows the dealer to choose options which alter the functionality of the software application without actually modifying the program.

Virtually all "set-ups" are installed by the client. Generally, client-installed "set-ups" are those that pertain to client preference options. Examples include defining how many days' supply for stock orders, the number of invoices to

print, the number of days to store information, what accounts are to be scheduled, or the different types of MIS information the user may want from the system.

A few "set-ups" are installed by Company C. Typically, Company C will install "set-ups" either because they are standard across the industry or because of their complexity. Examples include setting up the software application printers on specifically defined ports or helping the user to set up a daily operating chart.

User Programming Application

The User Programming Application is a separate application available to clients who wish to present or calculate their data in a manner different than what could be obtained from a standard application. This application allows clients the ability to retrieve data from standard application data files in order for the client to recalculate or present data in a different format or to store its data.

It is the client, not Company C, that reformats or recalculates the information by means of the standard User Programming Application. However, Company C conducts the requisite training to educate clients in the use of this application.

Custom Modifications of Standard Programs

In some instances, there is a need for Company C to modify the standard applications in order to meet the specific needs of a client. This is required when neither the standard "set-ups" nor the standard User Programming Application can meet the client's needs. When modifications are made by Company C, they range from small changes to an extensive change, usually ranging from 1% to 10% of the original program.

Customization usually involves reformatting or calculation of data in a non-standard format. Examples of such custom modifications include invoice print formats, finance and insurance application calculations, and third party interface to Company C applications.

The number of clients to whom this type of customization has been provided ranges from less than 1% for some applications to 4% for others.

Generally, customization can be performed without changing the standard software code. In less than 1% of the modifications, the program code needs to be rewritten to some extent.

Customization is performed by the Company C Special Programming Group. Client requests are analyzed before a decision is made by Company C to accept the request. If accepted, a specification is created and an estimate of time and cost is provided to the client for approval. The client is billed by the hour for custom programming. This is a separate one-time charge and is in addition to the standard contractual licensing fee paid on the standard software.

Once the custom programming is completed, the custom software is installed on the client's computer by Company C. The client is either instructed via telephone, documentation, or both in the operation of the new software program.

Software License and Fees

The average term of a software licensing agreement is five to seven years. For each application, there is a one-time prepaid license fee and also a monthly license and support fee. The prepaid license fees vary, depending on the software application. For any single software application, the list price fee is the same

from client to client. Any difference in such fees is attributable to prices negotiated by the client and is not due to the number of "set-ups."

Presale Consultation and Analysis of User's Requirements

Each Company C sales representative spends a significant amount of time in solicitation, consultation, and configuration of the hardware (e.g., PCs, printers, modems) and software to be used at each prospective dealership client. Most of the presale consultation is devoted to software.

Each dealership has its own unique needs.

After consulting with each of the dealership's five major managers, the Company C sales representative first identifies the individual needs of that dealership and determines the configuration of hardware and software required to meet these needs. In presale consultation, the sales representative and the dealership personnel work together to determine whether the Company C standard software applications (with appropriate "set-up" options) can meet the user's specifications. In cases where they do not, Company C's Special Programming Group may supply more customized features or programs.

The average time spent dedicated to presale consultation and analysis of the user's needs is detailed as follows:

1. Detailed manager review

This represents a 2 to 3 hour meeting with each of the dealer's five main managers in order to determine the way the dealer's current system works and propose changes (Company C software applications) that would make the dealership more efficient. (15 estimated man hours)

2. Product demonstration

This involves a comprehensive hardware and software presentation with each of the dealer's department managers emphasizing those features of each software application, together with the appropriate "set-up" options, relevant to each manager. A demonstration can take from a minimum of 8 man hours to a maximum of 48 man hours. (Average 16 estimated man hours)

3. Custom report analysis

Where the standard software applications and available "set-ups" do not entirely meet the needs of an individual prospective client, the sales representative identifies the specific concern or request and confers with Company C's programmers and support people to determine whether Company C can program the desired change. If so, and if a contract is executed, the standard application would then be customized for the client. (Average 16 estimated man hours, when applicable)

Immediately after the client has agreed to license the software, account executives, conversion specialists, install coordinators, programmers, and trainers invest approximately 100 additional hours with each new client.

Post-Sale Activities

1. Installation and testing of program

When the computer system is shipped to the client, it has been pre-loaded with the Company C software applications requested by the client. The system at this

point does not have the specific tables and "set-ups" necessary to allow the software applications to execute in accordance with the client's business needs and requirements.

The computer hardware is installed by Company C at the client site after which the client is responsible for testing the application software and the custom "set-ups," whether those "set-ups" were installed by Company C or the client.

2. Training and documentation

Training is always provided to the client's management and staff. Much of the training is held at a Company C office location. In some instances, the training is done at the client's place of business. It would be difficult for a client to effectively operate the Company C software applications without preliminary training from Company C.

The number of days required for training varies depending on the application. For core applications, such as Accounting, Inventory, or Finance and Insurance, training classes average 5 days for each application and are provided to the client's managers. Other applications require 3 to 5 days training for each application.

Company C also supplies documentation and user guides to its clients. The documentation varies by the software application. In general, each application might have a User Guide (defining daily functions), a Maintenance Guide (defining "set-ups"), and a Manager's Guide. However, due to the number of software applications offered and the various

"set-ups" for each client, the documentation and user guides alone would not provide a complete understanding of the system without personal training.

3. Enhancements and maintenance support

a. Software maintenance and updates

Company C systems require that clients be able to interact with Company C via modem. This is referred to as "on-line access." This access provides for both electronic and manual updates of the system software. "Updates" refer to database changes, such as changes in auto parts prices by manufacturers. These updates can be delivered electronically or by magnetic tape. The software is not useful without current data.

Corrections to software can also be made by Company C on-line. Corrections involve solving problems that clients encounter when using the software.

The on-line access also provides for a quick and easy method for Company C to respond to specific regulation changes imposed by local, state, and federal agencies. Also, auto manufacturers make changes that require Company C to modify standard software. Such changes occur on a frequent basis.

Company C releases an average of 20 to 30 upgrades per client per year or 2 to 4 upgrades per application. All clients of a particular application receive the same updates.

b. Telephone support

Company C also provides telephone support to its clients. The average client calls approximately 12 to 14 times per month. Approximately 40% to 50% of these calls raise questions on how to use the applications. The remaining calls are either technical in nature or request assistance implementing a "set-up."

The software telephone consultation support is not optional to the client.

Request

You ask the following:

1. Is the prepaid license fee for Company C's software applications subject to Wisconsin sales or use tax?
2. Is the monthly charge for "software license and support" subject to Wisconsin sales or use tax?

Ruling

1. The prepaid license fee for Company C's standard software applications, including User Programming Applications, is subject to Wisconsin sales or use tax, except those standard applications where Company C customizes the software by rewriting program codes.
2. The monthly charge for "software license and support" relating to the standard applications subject to tax in #1 above is subject to Wisconsin sales or use tax. The monthly charge for "software license and support" relating to standard applications where Company C customizes the software by rewriting program codes is not subject to Wisconsin sales or use tax.

Analysis*Prepaid License Fee*

Section 77.52(1), Wis. Stats. (1991-92), imposes a Wisconsin sales tax on sales of tangible personal property and taxable services at retail in Wisconsin.

"Tangible personal property" for purposes of imposing Wisconsin sales tax is defined in sec. 77.51(20), Wis. Stats. (1991-92), to include computer programs, except custom computer programs.

Section Tax 11.71(1)(e), Wis. Adm. Code (April 1993 Register), defines "custom programs" to mean utility and application software which accommodate the special processing needs of the customer. The determination of whether a program is a custom program shall be based upon the facts and circumstances, including the following:

1. The extent to which the vendor or independent consultant engages in significant presale consultation and analysis of the user's requirements and system.
2. Whether the program is loaded into the customer's computer by the vendor and the extent to which the installed program must be tested against the program's specifications.
3. The extent to which the use of the software requires substantial training of the customer's personnel and substantial written documentation.
4. The extent to which the enhancement and maintenance support by the vendor is needed for continued usefulness.
5. There is a rebuttable presumption that any program with a cost of

\$10,000 or less is not a custom program.

6. Custom programs do not include basic operational programs or prewritten programs.
7. If an existing program is selected for modification, there must be a significant modification to the program by the vendor so that it may be used in the customer's specific hardware and software environment.

The standard software applications and user programming applications sold by Company C which do not require customization by Company C are tangible personal property as defined in sec. 77.51(20), Wis. Stats. (1991-92).

Such applications do include significant presale consultation, enhancement and maintenance support by the vendor, preloading of software by Company C prior to obtaining the hardware purchased from Company C, and some training and documentation by Company C. However, the standard software applications exist at the time ordered by the client. In addition, the standard applications are not tested by Company C against program specifications nor are they modified in any way by Company C so that they may be used by the client. The standard applications sold by Company C are usually under \$10,000 per year per application.

In addition, standard applications which are customized for purposes of reformatting or calculation of data, but which do not involve rewriting program codes, are tangible personal property. Such applications are not custom programs because the modifications are not considered significant.

Customization of standard applications by Company C which involves rewriting program codes is consid-

ered to be a significant modification. Therefore, the resulting application after the customization is a custom program, and the charge for the standard application and customization is not subject to Wisconsin sales or use tax.

Software License and Support Fees

Section 77.52(2)(a)10, Wis. Stats. (1991-92), provides that the service or maintenance to tangible personal property is subject to Wisconsin sales or use tax. Company C, in providing telephone support, is providing a service to software. If the software is tangible personal property, the service is subject to Wisconsin sales or use tax.

Section Tax 11.71(3)(c), Wis. Adm. Code (April 1993 Register), provides that gross receipts from providing program technical support, error correction services, and maintenance and enhancement to **custom programs** are not subject to Wisconsin sales or use tax. Therefore, services performed by Company C to the nontaxable customized software are not subject to tax. □

✻ **W9438008**, June 24, 1994

Type Tax: Sales and Use

Issue: Exemptions — advertising materials for out-of-state use

Statutes: Section 77.54(25), Wis. Stats. (1991-92)

Wis. Adm. Code: Section Tax 11.19, March 1991 Register

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

Facts

XYZ Funds ("The Funds") are organized as a Massachusetts Business

Trust registered for sale in all 50 states and the District of Columbia. Its shares are sold only to members of a certain religion or to parties affiliated with that religion. Federal law and regulations, as well as state laws and regulations, require that it provide prospectuses and periodic financial statements to its shareholders.

Company A, a subsidiary of Company B, is the distributor for shares of The Funds. It uses the Company B national sales force of licensed Registered Representatives to sell The Funds and it splits the sales charge or "load" with the Registered Representatives.

Securities laws require that most sales and promotional material be preceded or accompanied by a current prospectus. In order to encourage sales of The Funds, Company A pays for the printing of additional prospectuses. It provides these prospectuses, free of any charge, to its Registered Representatives who use them both alone and in conjunction with Company A's sales literature.

Company A is a member of the National Association of Securities Dealers ("NASD"). As a member, it files the sales and promotional materials that are given to the public with the NASD for review. Because Company A is legally obligated to supervise its Registered Representatives' activities, it only permits its Registered Representatives to use these pre-approved sales and promotional materials. Because of the promotional nature of its use of the periodic financial reports, Company A files text and graphics it proposes to use in the financial reports with the NASD and pays for the printing of additional financial reports. Company A provides these periodic financial reports free of charge to its Registered Representatives to use for sales and promotional activities.

The Funds mailed about 123,000 prospectuses and annual reports dated June 30, 1993, to shareholders (no claim for sales tax exemption is made for these pieces). Company A anticipates using 450,000 prospectuses and 160,000 annual reports for sales and promotional purposes. The estimated cost per prospectus and annual report ranges from about \$0.12 to \$0.15 per prospectus or report.

Because of state securities registration requirements or "Blue Sky" laws, Company A must maintain detailed records concerning the nature and number of shares and accounts sold in each state. State laws also require that Registered Representatives be licensed and supervised. Company A maintains detailed records concerning the number and location of a Registered Representative's sales.

The prospectuses and financial reports used to satisfy legal requirements regarding existing shareholders, are sent from the printer to a mail house for transmittal. The prospectuses and financial reports used by Company A for sales and promotional purposes are shipped to a central warehouse from which their distribution is monitored. Neither The Funds nor Company A has previously made any claim for exemption from sales tax.

Request

You have requested a ruling that the prospectuses and financial reports that are actually used to fulfill legal requirements or are used in Wisconsin for any reason would be subject to Wisconsin sales or use tax. You propose that sec. 77.54(25), Wis. Stats. (1991-92) and sec. Tax 11.19(4) Wis. Adm. Code, March 1991 Register, be interpreted to require sales tax on those prospectuses and financial reports sent to existing shareholders.

You then propose that when prospectuses and financial reports are used by Registered Representatives with prospective customers to induce new sales, these prospectuses and financial reports should be treated as sales and promotional material and not be subject to Wisconsin sales or use tax.

Ruling

Prospectuses of The Funds when transported outside Wisconsin for use solely outside Wisconsin, qualify for exemption from Wisconsin sales and use tax under sec. 77.54(25), Wis. Stats.

Prospectuses used in Wisconsin for any reason are subject to Wisconsin sales or use tax.

Annual reports are subject to Wisconsin sales or use tax because they do not qualify for exemption under sec. 77.54(25), Wis. Stats.

Analysis

Section 77.54(25), Wis. Stats., provides an exemption from Wisconsin sales and use tax for "The gross receipts from the sale of and the storage of printed material which is designed to advertise and promote the sale of merchandise, or to advertise the services of individual business firms, which printed material is purchased and stored for the purpose of subsequently transporting it outside the state by the purchaser for use thereafter solely outside the state."

Webster's Ninth New Collegiate Dictionary (1991), defines "advertise" as follows: "to call public attention to especially by emphasizing desirable qualities so as to arouse a desire to buy or patronize."

Black's Law Dictionary, Sixth Edition (1990), defines "prospectus" as

"A document published by a corporation ... setting forth the nature and objects of an issue of shares, debentures, or other securities created by the company or corporation, the investment or risk characteristics of the security and inviting the public to subscribe to the issue. ... It is the document which is to contain all material facts concerning a company and its operations so that a prospective investor may make an informed decision as to the merit of an investment."

When prospectuses are transported outside Wisconsin, they qualify for exemption since they are being used to "advertise," as defined above.

The exemption provided by sec. 77.54(25), Wis. Stats. (1991-92), applies to prospectuses, whether the prospectuses are transported outside Wisconsin for use by Registered Representatives with prospective customers to induce new sales or whether they are mailed to existing shareholders outside Wisconsin to induce additional sales. In both situations, prospectuses are used for advertising purposes.

Annual reports, whether sent to existing shareholders or to Registered Representatives, do not qualify for exemption under sec. 77.54(25), Wis. Stats. Section Tax 11.19(4), Wis. Adm. Code, March 1991 Register, provides that the exemption does not apply to stockholders' annual reports or proxy statements. □

✱ **W9434007**, May 27, 1994

Type Tax: Sales and Use

Issue: Exemptions — prosthetic devices; Exemptions — medicines

Statutes: Section 77.54(14), (14g)(a) and (b), and (22)(b), Wis. Stats. (1991-92)

This letter responds to your request for a private letter ruling regarding the sales and use tax status of various air support therapy beds and products sold, rented, and leased by Companies D, E, F, and G.

Facts

The ABC and DEF products at issue are eight different products. The tradename "GHI" is used for a variation of the above products with alternating pressure/pulsations as an added air support therapy modality and the "JKL" frame is the frame to which all of the ABC and DEF air support therapy units may be attached.

The products are used by and in hospitals, and under the care of registered nurses for home patients, exclusively on a prescription by a physician basis. These air support therapy units are primarily available on a rental basis rather than sale, although occasional sales are made of the units. With the exception of sales directly to hospitals, all transactions are under doctor's prescription. Company F manufactures and sells parts to owners of the units described for repair and upkeep of these units.

The products in this ruling request are all designed in connection with the alleviation and treatment of skin ulceration caused by long-term bed care. Skin ulceration proceeds, in the long-term care patient, to involve muscle and bone damage, necrosis of bone, and damage to muscle, bone, and supporting structures. The ulceration described is caused by a malfunction of the capillaries in and adjacent to the skin and in the supporting structures, caused by the long-term confinement to bed care in the long-term patient.

The air support therapy beds and products alleviate the malfunction of the capillaries. Release air allows the

body to support the capillaries and allows the body to heal itself.

Ruling Request

A ruling is requested that each and every one of the products and models of hospital beds and mattresses, mattresses, and mattress overlays described above, as well as future products and modifications with the same or similar function (and parts for repair and upkeep of these products) be exempt from sales and use tax on the basis that they are prosthetic devices, appliances, or aids. Alternatively, a ruling is requested that the described devices are exempt from sales and use tax as medicines for use by external application to the body and the cure, mitigation, treatment, or prevention of disease.

Ruling

The air support therapy beds and products described above do not qualify for exemption from Wisconsin sales and use tax under either sec. 77.54(22)(b), Wis. Stats. (1991-92), as equipment worn as a correction or substitute for any functioning portion of the body, or under sec. 77.54(14), Wis. Stats. (1991-92), as medicines.

Analysis

Section 77.54(22)(b), Wis. Stats. (1991-92), provides an exemption from Wisconsin sales and use tax for the gross receipts from the sales of or the storage, use or other consumption of artificial limbs, artificial eyes, hearing aids and other equipment worn as a correction or substitute for any functioning portion of the body.

The air support therapy beds and products do not qualify for exemption under sec. 77.54(22)(b), Wis. Stats., because they are not "worn" by the patient.

"Worn" is defined in Webster's Third New International Dictionary as the past part of "wear." "Wear" is defined as follows:

"1: to bear or have upon the person ... to have attached to the body or part of it or to the clothing ..."

Although the long-term care patient is not capable of operating independently of the bed, the air support therapy beds are not worn by the patient.

Section 77.54(14), Wis. Stats. (1991-92), provides an exemption for the gross receipts from the sales of and the storage, use or other consumption of medicines under certain circumstances.

"Medicines" are defined in sec. 77.51(14g), Wis. Stats. (1991-92), to mean any substance or preparation intended for use by external or internal application to the human body in the diagnosis, cure, mitigation, treatment or prevention of disease and which is commonly recognized as a substance or preparation intended for such use.

Section 77.54(14g)(a), Wis. Stats. (1991-92), provides that "medicines" do not include any prosthetic device or appliance. Section 77.54(14g)(b), Wis. Stats. (1991-92), provides that "medicines" do not include articles which are in the nature of splints, bandages, pads, compresses, supports, dressings, instruments, apparatus, contrivances, appliances, devices or other mechanical, electronic, optical or physical equipment or article or the component parts or accessories thereof.

The air support therapy beds and products do not qualify for exemption under sec. 77.54(14), Wis. Stats., because they are not "medi-

cines," as defined above. The air support therapy beds and products are physical equipment, which is specifically excluded from the definition of medicines. □

✱ **W9505001**, November 14, 1994

Type Tax: Sales and Use

Issue: Purchases for resale — promotional campaigns

Statutes: Section 77.51(14)(intro.) and (14)(k), Wis. Stats. (1991-92)

This letter responds to your request for a private letter ruling regarding the Wisconsin sales and use tax implications relating to Company H's purchase of promotional items under several fact patterns.

Facts

Company H is a manufacturer of dry-cell batteries and flashlights (products). In an effort to market its products, Company H offers numerous promotional campaigns including (but not limited to):

- Mountain bike giveaways (drawings). A mountain bike is shipped to the customer with every order of twelve cases of multi-pack alkaline batteries. For this promotion, all batteries (except for batteries sold to general retailers) are priced at "full distributor" price, which is substantially higher than the permanent pricing plan.

This promotion is primarily geared toward general and special industrial customers, although there was one mountain bike promotion involving general retailers.

- Fishing lure packaged with Company H lantern batteries.
- Company H baseball caps distributed to customers who give them away. Company H recommends customers give out a cap with the sale of three multi-packs, however, customers are free to set up their own promotional programs as they feel appropriate. The customer is required to make a minimum purchase from Company H to receive baseball caps. The required minimum purchase for the customer depends on the Company H pricing plan category of the customer.

This promotion is geared toward industrial customers, but on occasion is used for general retailers.

The promotional items are distributed to three different types of customers:

Type I — General Retailer

The general retailer does not pay a special price for the product during promotional campaigns. The promotional items are simply a means for increasing sales. The profits from the batteries and flashlights sales are more than enough to pay for the promotional items.

General retailers do not have the option of buying outside the program (i.e., buying product at a lower price without the promotional items).

Type II — General Industrial

General industrial customers have two pricing plans. The permanent pricing plan is used to sell batteries for non-promotional purchases, while a special pricing plan is used during promotional campaigns. The special pricing plan gives Company H additional margins which are meant to

pay for the promotional items. The essence of the special pricing plan is that the industrial customer pays the same price for the batteries with a premium to pay for the promotion.

General industrial customers have an option to buy outside the program.

Type III — Special Industrial

Company H has a special industrial customer that receives a promotional allowance of X% of purchases from Company H. The customer uses this allowance to purchase various promotional programs. If the customer does not use all of the allowance by the end of the year, a cash credit is applied to the customer's account.

The special industrial customer does not have the option of buying outside the program.

Ruling Request

Are Company H's purchases of promotional items which are distributed to the three different types of customers subject to Wisconsin sales or use tax?

Ruling

Type I — General Retailer

Company H may purchase fishing lures which it packages with its products and then distributes to general retailers without sales or use tax as purchases for resale. Company H is subject to sales or use tax on its purchases of mountain bikes and baseball caps which it distributes to general retailers.

Type II — General Industrial

Company H may purchase the promotional items to be resold to its general industrial customers without

Wisconsin sales or use tax as purchases for resale.

Type III — Special Industrial

Company H may purchase the promotional items to be resold to its special industrial customer without Wisconsin sales or use tax as purchases for resale.

Analysis

Type I — General Retailer

Company H may purchase fishing lures without tax, for resale, because the fishing lures are packaged with Company H batteries. The fishing lures become a part of the product sold by Company H to general retailers. Section 77.51(14)(intro), Wis. Stats. (1991-92), provides that "sale", "sale, lease or rental", "retail sale", "sale at retail", or equivalent terms do not include sales of tangible personal property for resale. Therefore, the sale of the fishing lures to Company H is not a retail sale.

Company H's purchases of mountain bikes and baseball caps which are distributed to general retailers are subject to Wisconsin sales or use tax because they are not for resale. The promotional items are given to the general retailers without charge.

Section 77.51(14)(k), Wis. Stats. (1991-92), provides that "sale", "sale, lease or rental", "retail sale", "sale at retail", or equivalent terms includes: "Any sale of tangible personal property to a purchaser even though such property may be used or consumed by some other person to whom such purchaser transfers the tangible personal property without valuable consideration, such as gifts, and advertising specialties distributed gratis apart from the sale of other tangible personal property or service."

Type II — General Industrial

Because an additional charge is made by Company H to general industrial customers for promotional items, Company H is not giving away the promotional items, rather, it is selling them. As provided in sec. 77.51(14)(intro), Wis. Stats., "retail sale" does not include Company H's purchases of promotional items to be resold to general industrial customers. Company H should provide its suppliers with resale certificates for the promotional items which it will resell to general industrial customers.

Type III — Special Industrial

Because the special industrial customer can take its promotional allowance as a cash credit or apply it to promotional purchases, Company H is not giving away the promotional items, rather, it is selling them. Under sec. 77.51(14)(intro), Wis. Stats., "retail sale" does not include Company H's purchases of promotional items to be resold to its special industrial customer. Company H should provide its suppliers with resale certificates for the promotional items which it will resell to its special industrial customer. □

✱ **W9451009**, September 28, 1994

Type Tax: Sales and Use

Issue: Use tax — subsequent shipment out-of-state

Statutes: Sections 77.51(14)(intro.), (14)(i) and (14r), 77.52(1), 77.53(1), and 77.54(2), Wis. Stats. (1991-92)

Wis. Adm. Code: Section Tax 11.68, April 1994 Register

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

Facts

Company I is a Wisconsin corporation with manufacturing facilities in Wisconsin and another state and administrative, sales, and management offices in Wisconsin. Company I, directly or indirectly, manufactures and sells equipment. Additionally, Company I sometimes purchases for resale products manufactured by a related corporation located outside Wisconsin and by unrelated companies in Wisconsin and another state.

Company I products are sold nationally and internationally both through independent representatives and through a direct sales and service division of Company I (that is not a separate legal entity). Company I's equipment products are sold to end users and contractors, most frequently without installation. Installation of the equipment is a simple process and most frequently is performed by the customer, a contractor retained by the customer, or an independent representative or its subcontractor. Company I (through its sales and service division) and independent representatives do receive orders which include installation of the product.

For its internal sales locations, as an accommodation to its independent representatives, and for the convenience of its customers, Company I sometimes contracts with the customer and bills them directly for the sale and installation of the product.

In the case of installation contracts, Company I has paid Wisconsin sales or use tax, as applicable, on products manufactured and installed in Wisconsin.

Company I proposes to do the following:

1. Form a corporation (Company J) that will purchase the manufac-

turing assets and inventory of Company I at their fair market value.

2. Transfer 66 Company I employees, who perform manufacturing functions, to Company J.
3. Have Company I perform certain administrative functions for Company J. These services will be provided and purchased on an arms-length basis pursuant to an administrative services agreement.

Company J will purchase materials to manufacture or assemble products. The resulting products, in addition to other products purchased from suppliers, will be sold to Company I. Company I will resell some of the products purchased from Company J and will sell and install the remaining products in real property construction.

Company J will have no involvement in sales to the ultimate consumer or in any installation or construction activities. Rather, Company J will sell its products to Company I and deliver the products using common or contract carriers retained and paid for by Company J.

Except in the case of Wisconsin destination deliveries, possession of the products will not pass to Company I or its customer until delivered to the state of ultimate destination or installation. Company J will charge Company I for products sold on the basis of the cost of manufacturing and shipping plus an appropriate profit.

Request

You ask the following:

1. Is the sale of materials to Company J that it uses in manufacturing the equipment subject to Wisconsin sales or use tax?

2. Is the sale of equipment by Company J to Company I subject to Wisconsin sales or use tax when possession of the equipment is transferred from Company J to Company I outside Wisconsin?
3. Is the sale of equipment by Company J to Company I subject to Wisconsin sales tax when possession of the equipment is transferred from Company J to Company I in Wisconsin?

Ruling

1. The sale of materials to Company J that become ingredients or component parts of the equipment it manufactures, or that are consumed or destroyed or lose their identity in the manufacture of the equipment, is exempt from Wisconsin sales or use tax under sec. 77.54(2), Wis. Stats. (1991-92).
2. The sale of equipment by Company J to Company I is not subject to Wisconsin sales or use tax when possession of the equipment is transferred from Company J to Company I outside Wisconsin.
3. The sale of equipment by Company J to Company I where possession transfers in Wisconsin is not subject to Wisconsin sales or use tax if Company I resells the equipment as tangible personal property. Sales of equipment by Company J to Company I in Wisconsin which Company I will use in real property construction either within or outside Wisconsin are subject to Wisconsin sales tax.

Analysis

Sales to Company J of Materials Used to Manufacture Product

Section 77.54(2), Wis. Stats. (1991-92), provides an exemption from Wisconsin sales or use tax for

gross receipts from the sales of and the storage, use, or other consumption of tangible personal property becoming an ingredient or component part of an article of tangible personal property or which is consumed or destroyed or loses its identity in the manufacture of tangible personal property in any form destined for sale, not including fuel and electricity.

The materials that become an ingredient or component part of the equipment, or that are consumed, destroyed, or lose their identity in manufacturing the equipment, are not subject to tax because the equipment, which is tangible personal property when manufactured, is sold to Company I. Company J must provide its suppliers with properly completed exemption certificates for the materials it purchases and uses as described above.

Sales by Company J to Company I — Possession Transfers Outside Wisconsin

Section 77.52(1), Wis. Stats. (1991-92), provides that the sale of tangible personal property at retail in Wisconsin is subject to Wisconsin sales or use tax. Section 77.51(14r), Wis. Stats. (1991-92), provides that a sale takes place when and where possession of tangible personal property transfers from the seller or the seller's agent to the buyer or the buyer's agent. Common carriers and the U.S. Postal Service are agents of the seller, regardless of any f.o.b. point and regardless of the method by which freight or postage is paid.

Since possession of the equipment transfers from Company J or its agent (i.e., a common carrier or a contract carrier hired by Company J) to Company I outside Wisconsin, the sale of the equipment takes place outside Wisconsin. Since the sale is

not at retail in Wisconsin, it is not subject to Wisconsin sales tax under sec. 77.52(1), Wis. Stats. (1991-92).

Section 77.53(1), Wis. Stats. (1991-92), as amended by 1993 Wisconsin Act 16, imposes a Wisconsin use tax on the storage, use, or consumption of tangible personal property in Wisconsin. Storage is defined in sec. 77.51(18), Wis. Stats. (1991-92), to include the keeping or retention in this state for any purpose except sales in the regular course of business of tangible personal property purchased from a retailer. Use is defined in sec. 77.51(22), Wis. Stats. (1991-92), to include the exercise of any right or power over tangible personal property incident to the ownership, possession or enjoyment of the property or services, or the results produced by the services, including installation or affixation to real property and including the possession of, or the exercise of any right or power over tangible personal property by a lessee under a lease, except that it does not include the sale or rental of the property in the regular course of business.

Because the products sold by Company J are not stored, used, or consumed by Company I in Wisconsin, use tax is not imposed on Company I's purchase of the equipment.

Sales by Company J to Company I — Possession Transfers In Wisconsin

1. Sales for Resale by Company I

Section 77.52(1), Wis. Stats. (1991-92), imposes a Wisconsin sales tax on the sale of tangible personal property at retail in Wisconsin. Section 77.51(14)(intro.), Wis. Stats. (1991-92), provides that retail sale includes the transfer of the ownership of, title to, possession of, or

enjoyment of tangible personal property or services for use or consumption but not for resale as tangible personal property.

If Company I resells to its customers the equipment sold to it by Company J (i.e., does not install the equipment), the sales to Company I are not retail sales because they are for resale. Sales tax is not imposed under sec. 77.52(1), Wis. Stats. (1991-92), on sales that are not retail sales. Company I should provide Company J with a properly completed resale certificate.

2. Sales and Installations by Company I

Section 77.52(1), Wis. Stats. (1991-92), imposes a Wisconsin sales tax on the sale of tangible personal property at retail in Wisconsin. Section 77.51(14)(i), Wis. Stats. (1991-92), defines retail sale to include sales of building materials, supplies and equipment to owners, contractors, subcontractors, or builders for the erection of buildings or structures or the alteration, repair, or improvement of real property. Section 77.51(2), Wis. Stats. (1991-92), further provides that contractors are the consumers of tangible personal property used by them in

real property construction activities and the sales and use tax applies to the sale of tangible personal property to them.

Section Tax 11.68(5)(d), Wis. Adm. Code (April 1994 Register), provides that buildings, and structural and other improvements to buildings are real property when installed.

The equipment is real property when installed by Company I. Therefore, the sale of the equipment by Company J to Company I in Wisconsin which Company I will use in real property construction is a retail sale which is subject to Wisconsin sales tax under sec. 77.52(1), Wis. Stats. (1991-92). □