



Wisconsin TAX BULLETIN

New Tax Laws Pending

The Governor's Budget Bill and other bills affecting Wisconsin taxes were still pending at the time this Bulletin went to press. If any of these bills become law, a special issue of the *Wisconsin Tax Bulletin* will be published later this summer, to provide information about the tax law changes. □



Do You Have Ideas or Suggestions for 1995 Tax Forms?

Do you have comments, ideas, or suggestions for improving Wisconsin's tax forms or instructions? Can you think of ways the forms or instructions could be made easier to understand? If so, the department would like to hear from you.

Please take a few moments to put your ideas in writing, and send them to Wisconsin Department of Revenue, Administration Technical Services, P.O. Box 8933, Madison, WI 53708-8933. Your suggestions could help make "tax time" easier for taxpayers and practitioners. □

Trempealeau County Adopts County Tax

Effective October 1, 1995, the county sales and use tax will be adopted by Trempealeau County. This brings to 48 the number of counties that have adopted the ½ % county tax.

The June 1995 *Sales and Use Tax Report*, a copy of which appears on pages 33 and 34 of this Bulletin, explains how the county tax applies to retailers and other persons. It includes a listing of the counties that have adopted the county tax. □

Wisconsin Tax Treatment of Foreign Sales Corporations

Under Wisconsin law, foreign sales corporations (FSCs), including small foreign sales corporations, are taxed like any other corporations. The net income of a FSC is subject to taxation as a separate corporation if it has nexus in Wisconsin and is a viable corporation with substance.

Section 71.26(3)(r), Wis. Stats. (1993-94), excludes the provisions of sections 921 to 927 of the Internal Revenue Code (IRC), relating to FSCs, in computing Wisconsin net income. Accordingly, Wisconsin law does not recognize the special pricing practices under the IRC, nor does it provide an exemption for foreign source income.

To qualify as a FSC, a corporation must meet the requirements of sec. 922(a)(1), IRC, and certain other conditions. A FSC subject to apportionment under sec. 71.25(6), Wis. Stats. (1993-94), will have a sales factor of zero if all of its sales have foreign countries as their destination. For such a FSC, the maximum FSC net income taxable by Wisconsin will be 50%. This percentage will be less

if the property and/or payroll factors are less than 100%.

See the tax release titled "Wisconsin Treatment of Foreign Sales Corporations" in *Wisconsin Tax Bulletin* 90 (January 1995), pages 26 and 27, for additional information. □

Wisconsin Tax Bulletin Annual Index Included

Once each year the *Wisconsin Tax Bulletin* includes an index of articles, tax releases, court cases, private letter rulings, and other materials that have appeared in past Bulletins. The index for issues 1 (October 1976) to 90 (January 1995) can be found on pages 35 to 61 of this Bulletin. □



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.

In This Issue

	Page		Page
Articles —		Question and Answer	4
New Tax Laws Pending	1	5 Charged With Failure to	
Do You Have Ideas or		File Tax Returns	5
Suggestions for 1995 Tax		Tax Crimes Result in Arrests,	
Forms?	1	Jail Time	5
Trempealeau County Adopts		Tax Publications Available	6
County Tax	1	IRS Visits Wisconsin	
Wisconsin Tax Treatment of		Businesses to Determine	
Foreign Sales Corporations	1	Compliance With Currency	
Wisconsin Tax Bulletin Annual		Reporting Laws	7
Index Included	1	Administrative Rules in	
Need a Speaker?	1	Process	8
Wanted: Your Comments		Recently Adopted Rules	
About the Wisconsin Tax		Summarized	8
Bulletin	2	Report on Litigation	11
Automatic 4-Month Extension		Tax Releases	20
Expires August 15	2	Private Letter Rulings	28
Information or Inquiries?	3	Attachments —	
Self-Employed Health		June Tax Report	33
Insurance Deduction	3	Index	35
Topical and Court Case Index		Order Blank	63
Available	3		
Meals, Food, and Beverages			
Given Away — Sales and			
Use Tax	4		

- What to expect in an audit.
- Common errors discovered in audits.
- Homestead credit.
- Farmland preservation credit.

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

Wanted: Your Comments About the Wisconsin Tax Bulletin

The *Wisconsin Tax Bulletin* (WTB) is published to provide tax information to YOU, the readers. To make the WTB more useful to you, the department is seeking suggestions for items that may be of interest to you, and ways to make the WTB more valuable to you.

How could the department improve on the information it publishes? What areas would you like to see covered or expanded? Do you have any par-

ticular likes or dislikes about the WTB? Do you have any other ideas, comments, or suggestions you'd like to share?

Please take a few moments to put your comments or ideas in writing, and be a part of improving *your* WTB. Send your comments or ideas to Wisconsin Department of Revenue, Administration Technical Services, P.O. Box 8933, Madison, WI 53708-8933. We'd like to hear from you! ☐



Automatic 4-Month Extension

Expires August 15

If your 1994 Wisconsin and federal individual income tax returns were due April 17, 1995, but you filed an application for an automatic 4-month extension for filing your federal return with the Internal Revenue Service (IRS), both your federal and Wisconsin returns are due August 15, 1995. When you file your Wisconsin return, be sure to attach to it a copy of the federal extension application, Form 4868.

Any filing extension available under federal law may be used for Wisconsin purposes, even if you are not using that extension of time to file your federal return. If you did not file a federal extension application but needed a 4-month extension for Wisconsin only, your 1994 Wisconsin return, ordinarily due April 17, 1995, must be filed by August 15, 1995. In this situation, you should attach a statement to the 1994 Wisconsin return you file, indicating that you are filing under the federal automatic 4-month extension provision, or attach a copy of federal Form 4868 with only the name, address, and signature areas completed.

(Note: You are not required to pay your 1994 taxes by April 17, 1995,

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as a condition for receiving an extension of time to file your Wisconsin tax return. However, even though you may have an extension of time to file your return, you will owe interest of 1% per month on any tax not paid by April 17, 1995.) ☐

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

☐

Self-Employed Health Insurance Deduction

On April 11, 1995 President Clinton signed into law a bill that reinstates the 25 percent deduction for health insurance premiums paid by self-employed individuals. This federal income tax deduction had expired on December 31, 1993. The reinstated deduction will be in effect for tax years beginning after December 31, 1993 (this includes 1994 returns).

The reinstated federal 25 percent deduction for health insurance premiums paid by self-employed individuals does not apply for Wisconsin. Instead, for 1994 Wisconsin allows a deduction for 50 percent of health insurance premiums paid by a self-employed individual or by an employee whose employer did not contribute toward the cost of the employee's health insurance.

In anticipation of this change in federal law, IRS provided a line on the 1994 federal Form 1040 (line 26) for claiming the self-employed health insurance deduction. Individuals who have not yet filed their federal return (e.g., have an extension of time to file) will simply claim the deduction when completing their federal return.

For Wisconsin, such individuals must complete Schedule I, Adjustments to Convert 1994 Federal Adjusted Gross Income and Itemized Deductions to the Amounts Allowable Under the December 31, 1993 Internal Revenue Code, before completing Form 1. By completing Schedule I, the individual will remove the self-employed health insurance deduction from federal adjusted gross income and adjust other items (e.g., certain itemized deductions) that are affected.

Individuals eligible for the federal deduction, but who filed their 1994 federal returns before the law change, may now file an amended federal

return (Form 1040X) to claim the self-employed health insurance deduction. Such individuals should not file an amended return for Wisconsin unless the individual was subject to the temporary recycling surcharge and the amount of the surcharge would be affected by the federal self-employed health insurance deduction. The federal self-employed health insurance deduction reduces net business income when computing the surcharge and net farm profit when determining whether a farmer is subject to the surcharge.

Example: An individual paid \$500 per month for health insurance in 1994. His federal self-employed health insurance deduction is \$1,500. The individual paid a temporary recycling surcharge of \$43.45 (\$10,000 net business income x .004345) with his original Wisconsin income tax return. The individual may file an amended return to reduce the temporary recycling surcharge to \$36.93 ((\$10,000 - \$1,500) x .004345), a difference of \$6.52.

For 1995 returns, the federal self-employed health insurance deduction will increase to 30% of health insurance premiums paid. If Wisconsin law does not change, Wisconsin will allow a deduction for 100% of health insurance premiums paid by a self-employed individual in 1995. ☐

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 63 of this Bulletin. The order blank may also be used for subscribing to the *Wisconsin Tax Bulletin* and for ordering the Wisconsin Administrative Code. □

Meals, Food, and Beverages Given Away — Sales and Use Tax

Questions have been received by the Department of Revenue as to how Wisconsin sales or use tax applies to meals, food, beverages, and other related items given to customers and employees by lodging providers, restaurants, taverns, and similar retailers.

A tax release on this subject appears on pages 24 to 27 of this Bulletin. □

Question and Answer

Q I am a resident of Minnesota but I drive to my job in Wisconsin daily. Do I owe income tax to Wisconsin on the wages I earn in Wisconsin?

A No. Wisconsin has a reciprocal agreement with Minnesota whereby Wisconsin will not tax the wages of Minnesota residents working in Wisconsin and Minnesota will not tax the wages of Wisconsin residents working in Minnesota. To prevent Wisconsin income tax from being withheld from wages earned in Wisconsin, the Minnesota resident should file Wisconsin Form W-222, Statement of Minnesota Residency, with his or her employer.

Q I have always clipped coupons and used them to get lower prices on everything from groceries to automobile batteries. Recently, I used a coupon to get 50¢ off the \$2.00 retail price of a product. This coupon was issued by the manufacturer of the product, who reimburses the retailer for the 50¢ value of the coupon, plus a 2¢ handling fee for each coupon.

The retailer charged me sales tax on the \$2.00 retail price of the product, rather than on \$1.50 — the price I actually paid. Was the retailer correct in taxing the full retail price?

A Yes. Because you used a coupon for which the manufacturer reimburses the retailer for the value of the coupon, the retailer was correct in taxing the full retail price. The retailer's taxable gross

receipts include the \$1.50 you paid, plus the 50¢ coupon value for which the retailer is paid by the manufacturer.

The 2¢ handling fee paid by the manufacturer to the retailer is not subject to tax.

Note: When you use a coupon issued by the retailer, and not the manufacturer, the retailer should charge sales tax on the discounted price of the product (retail price minus retailer's coupon value).

For example, in the above situation, if the 50¢ coupon had been issued by the retailer, not the manufacturer, with no reimbursement from the manufacturer to the retailer, the retailer should charge sales tax on its discounted price of \$1.50 (\$2.00 retail price minus 50¢ retailer's coupon value).

Q I am a contractor doing remodeling for a motel. The terms of the contract include the installation of carpeting which the motel owner purchased from a store. If I hire and pay a subcontractor to lay the carpeting (which is owned by the motel owner), is the labor charge by the subcontractor subject to sales or use tax?

A No. The installation of carpeting in a building is a real property construction activity, and gross receipts from this activity are not subject to sales or use tax. (**Note:** The motel owner is responsible for paying sales or use tax on the purchase price of the carpeting.) □

5 Charged With Failure to File Tax Returns

Five Wisconsin men were charged in April 1995, with one or more counts each of failure to file Wisconsin income tax returns.

Daniel J. Welch, 40, Beloit, was charged with three counts of failing to file 1991, 1992, and 1993 returns, while allegedly his income for those years exceeded \$105,000 and his tax liability was \$6,976.

David L. Comey, 48, Elm Grove, was charged with eleven counts, including failure to file 1991 and 1992 personal income tax returns when he allegedly had over \$55,000 of interest and dividend income, and nine counts of failing to file corporate tax returns for five corporations he operated during 1992 and 1993. The complaint also accused Comey of habitual criminality, because he had been convicted in 1993 of failure to file 1989 and 1990 income tax returns and evading sales taxes on two automobile purchases.

Two Cedarburg men, Jay S. Helnore, 30, and Michael P. Strege, 33, were both charged with failure to file 1991 income tax returns. In 1991 they allegedly operated a business which grossed over \$400,000, from which Helnore made \$135,990 and Strege made \$98,475. The complaint also stated that both men failed to file 1992 and 1993 income tax returns.

Chiropractor Don C. Loeffler, 43, Onalaska, was charged with three counts of failure to file 1991, 1992, and 1993 income tax returns. The complaint alleges that in 1993 Loeffler began requesting that checks paid to him for chiropractic services be made payable to Circle of Light Trust, and that during 1991 to 1993 more than \$448,000 was deposited in bank accounts maintained by him and the trust.

Each charge of failure to file a Wisconsin tax return can result in up to nine months imprisonment and up to \$10,000 in fines. Wisconsin law also provides for substantial civil penalties on the civil tax liability. Assessment and collection of the taxes, penalties, and interest due follows a conviction. □

Tax Crimes Result in Arrests, Jail Time

Julie L. Zorn, 34, a self-employed Milwaukee area bookkeeper, was sentenced in April 1995, to six years in prison for theft, forgery, and income tax evasion. She was also given ten years of probation and was ordered to make restitution of over \$27,000 in state taxes, interest, and penalties, pay more than \$150,000 in restitution to the Rheumatic Disease Center, and serve 200 hours of community service.

Between 1991 and 1993, Zorn allegedly operated a service through which she did bookkeeping for Rheumatic Disease Center. She inflated the hours she put in there and forged doctors' signatures on checks she wrote to herself, embezzling over \$157,000.

Zorn also allegedly altered her payroll records and falsified her 1991 to 1993 income tax returns. During those years she understated her income by over \$136,000 and evaded almost \$11,000 in state income taxes.

Also in April, police raids of eleven grocery stores in Milwaukee resulted in the arrests of 19 people suspected of accepting stolen property and reselling it. Confiscated items valued at an estimated \$75,000 included cigarettes, and some of those arrested were expected to be charged with cigarette tax related crimes. The Department of Revenue's Alcohol and Tobacco Enforcement Unit was in-

volved in the four-month investigation which culminated with the 19 arrests.

Former Appleton businessman Leo Wanta was found guilty in May 1995, of six counts of tax evasion for the years 1988 and 1989. A jury trial was held before Dane County Judge Michael Torphy, in Madison.

Wanta was accused of filing false income tax returns for 1988 and 1989 and in four instances hiding taxable income that he spent on purchases and loan repayments. He allegedly set up several dummy corporations to launder \$500,000 through banks in Switzerland, Beijing, and several U.S. cities.

Wanta was arrested in New York in November 1993 after being deported from Switzerland, and was extradited to Wisconsin to face the tax evasion charges. He was also previously arrested for fraud in Singapore and in Geneva, Switzerland. Among Wanta's many claims are that he has diplomatic immunity from tax charges because he is a CIA undercover agent, and that he was a U.S. Treasury agent and a Somalian ambassador.

Also in May, West Bend trucker Roger R. Dahm, 49, was sentenced to three months in jail and fined \$10,000, for filing fraudulent state income tax returns. He had been charged with four counts of understating his income for 1987 to 1990 by over \$100,000 and evading over \$40,000 in state and federal taxes. He pled guilty to the two charges for 1987 and 1988, in March 1995.

Dahm was also ordered to pay \$12,120 in prosecution and court costs and penalties, and to pay an additional \$21,098 to the Department of Revenue for restitution and back taxes, interest, and penalties. In addition, he was placed on four years of probation and ordered to perform 100 hours of community service.

During 1987 to 1990 Dahm allegedly operated a trucking business, hauling grain, as well as a second business that sold grain. He hid the sales income from his accountant and failed to report the sales income on his tax returns. He had operated the grain selling business since 1981.

After failing to appear in court in May 1995, arrest warrants were issued for a Trevor couple, Richard J. and Marie A. Kamin, ages 57 and 41. They had been charged in April 1995, with two counts each of failure to file 1991 and 1992 Wisconsin income tax returns.

The criminal complaint alleges that the Kamins had joint income of \$47,810 in 1991 and \$23,560 in 1992. Their total state income tax liability for the two years is \$3,354.

In June 1995, David L. Comey, 48, Elm Grove, was ordered by Dane County Circuit Judge Robert A. DeChambeau, to serve 15 months in jail and to pay a \$6,000 fine. He was convicted in May 1993 of failure to file 1989 and 1990 income tax returns when he had interest and dividend income of over \$50,000, and evading sales taxes due by falsifying title applications from the purchase of two Mercedes Benz automobiles.

Comey appealed the May 1993 conviction to the Court of Appeals, which ruled against him in January 1995. Upon further appeal, the Wisconsin Supreme Court refused to hear the case and in March 1995 sent it back to Circuit Court for further sentencing. □

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)	201	Wisconsin State and County Sales and Use Tax Information (9/94)
103	Reporting Capital Gains and Losses for Wisconsin by Individuals, Estates, Trusts (10/94)	202	Sales and Use Tax Information for Motor Vehicle Sales, Leases, and Repairs (7/94)
104	Wisconsin Taxation of Military Personnel (8/94)	203	Sales and Use Tax Information for Manufacturers (12/94)
109	Tax Information for Married Persons Filing Separate Returns and Persons Divorced in 1994 (10/94)	205	Do You Owe Wisconsin Use Tax? (Individuals) (5/94)
111	How to Get a Private Letter Ruling From the Wisconsin Department of Revenue (3/94)	206	Sales Tax Exemption for Nonprofit Organizations (9/90)
112	Wisconsin Estimated Tax and Estimated Surcharge for Individual, Estates, Trusts, Corporations, Partnerships (8/94)	207	Sales and Use Tax Information for Contractors (7/94)
113	Federal and Wisconsin Income Tax Reporting Under the Marital Property Act (11/94)	210	Sales and Use Tax Treatment of Landscaping (5/94)
114	Wisconsin Taxpayer Bill of Rights (11/94)	211	Sales and Use Tax Information for Cemetery Monument Dealers (10/91)
116	Income Tax Payments Are Due Throughout the Year (12/91)	212	Businesses: Don't Forget About Use Tax (9/94)
117	Guide to Wisconsin Information Returns (9/94)	213	Travelers: Don't Forget About Use Tax (3/94)
118	Electronic Funds Transfer Guide (12/94)	214	Do You Owe Wisconsin Use Tax? (Businesses) (9/93)
119	Limited Liability Companies (LLCs) (1/95)	216	Filing Claims for Refund of Sales or Use Tax (12/94)
120	Net Operating Losses for Individuals, Estates, and Trusts (11/94)	400	Wisconsin's Temporary Recycling Surcharge (12/94)
200	Sales and Use Tax Information for Electrical Contractors (7/94)	410	Local Exposition Taxes (11/94)
		500	Tax Guide for Wisconsin Political Organizations and Candidates (12/94)
		501	Field Audit of Wisconsin Tax Returns (12/92)
		502	Directory of Free Publications (12/94)
		503	Wisconsin Farmland Preservation Credit (12/94)
		504	Directory for Wisconsin Department of Revenue (12/94)
		505	Taxpayers' Appeal Rights of Office Audit Adjustments (6/92)

- 506 Taxpayers' Appeal Rights of Field Audit Adjustments (11/91)
- 507 How to Appeal to the Tax Appeals Commission (8/92)
- 508 Wisconsin Tax Requirements Relating to Nonresident Entertainers (8/94)
- 509 Filing Wage Statements and Information Returns on Magnetic Media (3/94)
- 600 Wisconsin Taxation of Lottery Winnings (11/93)
- 601 Wisconsin Taxation of Pari-Mutuel Wager Winnings (3/94)
- 700 Speakers Bureau presenting ... (2/93)
- W-166 Wisconsin Employer's Withholding Tax Guide (9/90) ☐

IRS Visits Wisconsin Businesses to Determine Compliance With Currency Reporting Laws

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

In June, the Internal Revenue Service visited a total of about 400 Wisconsin insurance agents, check cashing centers, and credit unions. The purpose of the visits? To determine if these businesses were complying with the tax laws for reporting large cash transactions to the IRS.

During these visits, we learned that many businesses weren't aware that cash transaction reporting laws existed. They also weren't aware that they could owe as much as \$500,000 in fines for not knowing — and not complying — with these laws.

As a business owner or operator or a practitioner who has business clients, you may already be familiar with the requirement for reporting large cur-

rency transactions. You may also know that these reports help track money laundering. If you aren't aware of this requirement, or if you're unsure what these laws involve, you'll want to read on. Why? Because legitimate businesses are often used by people who want to hide illegally-obtained income. Before you or one of your clients becomes the victim of a money laundering scam — or faces scrutiny from the IRS — you should know the laws for reporting currency transactions.

What is money laundering? Money laundering involves concealing funds — or their illegal source — so that they appear legitimate. Most often, people think of drug "lords" laundering money so it can't be traced to their crimes. They do this by purchasing large-ticket items with money gained through some illegal activity. However, even money earned in otherwise legitimate activities can be laundered to hide its existence. Legitimate businessmen also purchase large-ticket items in cash to hide income. Either way, the outcome is the same. The cash goes unreported and untaxed.

Since 1970, laws have existed to curtail money laundering activity. One of the more recent laws requires that large cash transactions be reported to the IRS. The law says that anyone engaged in a trade or business that receives more than \$10,000 in cash from one customer must report this information to the Internal Revenue Service. They do this by filing Form 8300, *Report of Cash Payments Over \$10,000 Received in a Trade or Business*. This form must be sent to the IRS within 15 days of the receipt of the payment(s) totalling \$10,000. "Cash" can include not only U.S. coins and currency, but also certain cashier's checks, bank drafts, traveler's checks, and money orders. The cash may be received in one payment or in a series of payments

related to the same sale or contract. Businesses, especially, should be aware of this staggered-payment stipulation. It isn't unusual for businesses to receive smaller payments that, when added to other cash payments made by the same customer, total more than \$10,000. While this may be a common purchasing practice of consumers, it's also a tactic used by money launderers to avoid reporting requirements. It's called "structuring."

Businesses should also file Form 8300 if they feel a cash payment of less than \$10,000 is suspicious.

While businesses are required to report large cash transactions on Form 8300, banks, credit unions and other financial institutions are required to report their large cash transactions of more than \$10,000 on Form 4789, *Currency Transaction Report*. Alternative banking institutions, such as check-cashing centers and currency exchanges, are also required to complete Form 4789. Alternative banking institutions are also required to keep certain records when they receive smaller cash payments. They are required to maintain a chronological log of all transactions greater than \$3,000 but less than \$10,000. This log must be kept for five years from the date the transaction occurred.

What can happen to businesses that don't follow these requirements? They could face civil and criminal penalties.

The civil penalty for intentionally disregarding the law is the greater of \$25,000 or the amount of the cash received in the transaction, not to exceed \$100,000.

Civil penalties can also be assessed for failing to file a Form 8300 or 4789 or for filing a false form. Similar penalties also exist for not keeping the required cash transaction records.

Criminal penalties can include a fine of up to \$250,000. For corporations, that fine could be as much as \$500,000. Criminal penalties can also include a prison sentence of up to five years.

The IRS takes a "Triple E" approach to money laundering: Educate, Enhance, and Enforce. We educate taxpayers with our information publications, such as Publication 1544, *Reporting Cash Payments of Over \$10,000 Received in a Trade or Business*. We also educate taxpayers through our outreach seminars and the information we share with the public through the media and organizational newsletters. Through our compliance checks, like the ones we conducted in June, we enhance awareness of the laws for reporting currency transactions. Although enforcement isn't the sole purpose of these visits, we will not hesitate to begin a criminal investigation if we suspect that a business has intentionally ignored the laws.

Through these and other efforts, we hope to send a message to anyone involved in money laundering and to those businesses that are unfamiliar with the laws for reporting large currency transactions. For both groups, our message is clear: Know and comply with the laws for reporting large cash transactions. Because money laundering is a crime. □

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 July 1, 1995, or at the stage in which action occurred during the period from April 2, 1995 to July 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 Revisor for Publication of Notice

- 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
- 11.04 Constructing buildings for exempt entities-A

Rules Adopted But Not Yet Effective

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

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

- 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

Emergency Rule in Effect

- 11.13 Direct pay-NR

Recently Adopted Rules Summarized

Recent revisions to administrative rules are summarized below. Included is information regarding secs. Tax 2.03, 2.04, 2.08, and 2.10, all repealed and recreated, and sec. Tax 2.39, amended. The effective date for all of the revisions is June 1, 1995.

In addition to the summaries, the text of the recreated rules is reproduced. Notes appearing in the rules and the lists of forms in secs. Tax 2.03 and 2.08 are not reproduced here. See the order blank on page __ of this Bulletin for information about obtaining the Revenue section of the Wisconsin Administrative Code.

Tax 2.03 Corporation returns. Additional statutory references and new forms are included; titles of other forms are updated; and the address for delivering forms is listed. The text of Tax 2.03 is as follows:

Tax 2.03 CORPORATION RETURNS. (ss. 71.24(1), (1m) and (3), 71.365(4) and (5) and 71.44(1)(a) and (c) and (1m), Stats.) (1) FORMS. For the purpose of filing franchise or income tax returns, the secretary of revenue has designated the following forms for the use of corporations, as defined in s. 71.22(1), Stats.:

[Paragraphs (a) through (x) list forms used by corporations.]

(2) INFORMATION RETURNS. Information returns required of corporations are specified in s. Tax 2.04.

(3) SIGNATURES. An officer of the corporation shall sign all returns required to be filed. If a return is prepared by someone other than an employee or officer of the corporation, the person preparing the return shall also sign as preparer.

(4) FILING RETURNS. All forms and information required to be filed or furnished by corporations shall be delivered to the department or mailed to the address specified by the department on the form or in the instructions.

Tax 2.04 Information returns and wage statements. Statutory referenc-

es are updated; the definition of "person" is expanded to include limited liability companies; references to obsolete federal Form W-2P are deleted; rent and royalty reporting requirements for persons other than corporations are clarified; magnetic media requirements are addressed; the requirement to report gambling winnings is addressed; and language and style are updated. The text of Tax 2.04 is as follows:

Tax 2.04 INFORMATION RETURNS AND WAGE STATEMENTS.

(ss. 71.26(3)(e), 71.65(2), 71.67(4) and (5), 71.70, 71.71(2), 71.72, 71.74(4) and 71.80(20), Stats.) (1) DEFINITION. In this section, "person" means an individual, trust, estate, partnership, limited liability company, association or corporation.

(2) COMPENSATION FOR SERVICES. Under ss. 71.65(2), 71.71(2), 71.72 and 71.80(20), Stats., all persons carrying on activities within this state, whether taxable or not under ch. 71, Stats., are required to file with the department, on federal form W-2 or 1099-R, on Wisconsin form 9b or other forms approved by the department, or on magnetic media or in other machine-readable form, a statement of certain payments made within the preceding calendar year. For individuals who are residents of Wisconsin, the statement shall set forth the salaries, wages, bonuses, commissions, annuities, pensions, retirement pay, fees or other remuneration paid for services whether subject to withholding or not. For individuals who are nonresidents, the statement shall include all payments for the performance of personal services in Wisconsin, whether subject to withholding or not, except retirement plan distributions identified in s. Tax 3.085 as being exempt from Wisconsin income tax. A copy of federal form 1099 may be filed in lieu of Wisconsin form 9b. The following shall also apply with respect to compensation for services:

(a) All payments which are wages within the definition under s. 71.63(6), Stats., regardless of amount, shall be reported on federal form W-2 or on magnetic media or in other machine-readable form.

(b) All payments which are not wages within the definition under s. 71.63(6), Stats., but from which Wisconsin income tax has been withheld, shall be reported on federal form W-2 or 1099-R, as appropriate, or on magnetic media or in other machine-readable form.

(c) Payments of \$600 or more which are not wages within the definition under s. 71.63(6), Stats., and from which no Wisconsin income tax has been withheld, shall be reported on Wisconsin form 9b or federal form 1099, or on magnetic media or in other machine-readable form. However, if the payment was to an employee for whom a form W-2 is required under par. (a) or (b), the payment, regardless of amount, shall be included on form W-2.

(d) All statements required shall be filed by January 31, by delivering or mailing them to the department. Form WT-7, "Employer's Annual Reconciliation of Wisconsin Income Tax Withheld From Wages," shall accompany the statements submitted, either on paper or on magnetic media or in other machine-readable form, if the employer is required to be registered to withhold Wisconsin income taxes from employees' wages.

(e) Sections 71.65(5) and 71.73(2), Stats., permit a thirty-day extension of time to file the statements described in this subsection. A written request may be sent to the department and to be effective shall be postmarked on or before the due date of the statements. The department's approval of the extension shall be attached to the statements when they are filed with the department.

(3) RENTS AND ROYALTIES. Under ss. 71.70 and 71.80(20), Stats., except as provided in par. (d), all persons making payments of rents and royalties of \$600 or more to individuals who are residents of Wisconsin, regardless of where the property is located, and to nonresident individuals if the property is located in Wisconsin, shall file with the department, on form 9b or an approved substitute form, or on magnetic media or in other machine-readable form, a statement of payments made in the preceding calendar year. The following shall also apply with respect to rents and royalties:

(a) A copy of federal form 1099-MISC may be filed in lieu of Wisconsin form 9b.

(b) Corporations shall file by March 15 and payers other than corporations shall file by April 15, by delivering or mailing the statements to the department.

(c) No extension of time for filing forms 9b or substitute forms to report payments of rents or royalties may be allowed.

(d) The requirement to file form 9b or a substitute form does not apply to persons other than corporations who do not deduct the payments in determining Wisconsin taxable income.

(4) GAMBLING WINNINGS. (a) Under s. 71.67(4)(c), Stats., the administrator of the gaming commission's lottery division shall file with the department a statement of winnings for each lottery prize of \$2,000 or more paid in the preceding calendar year.

(b) Under s. 71.67(5)(d), Stats., all persons licensed to sponsor and manage races under s. 562.05(1)(b) or (c), Stats., shall file with the department a statement of winnings for each pari-mutuel wager payment of more than \$1,000 paid in the preceding calendar year.

(c) The winnings required to be reported in pars. (a) and (b) shall be reported on federal form W-2G or on an approved substitute form.

(d) The statements required in pars. (a) and (b) shall be filed by January 31, by delivering or mailing them to the department.

(e) No extension of time for filing forms W-2G or substitute forms to report payments of lottery prize winnings or pari-mutuel wager winnings may be allowed.

(5) DISALLOWANCE OF DEDUCTIONS. Items to be reported on forms W-2, 1099-R, 9b or substitute forms may be disallowed as deductions from gross income if not properly reported.

(6) MAGNETIC MEDIA REQUIREMENT. (a) Under s. 71.80(20), Stats., if the internal revenue service requires a person to file wage statements or information returns on magnetic media or in other machine-readable form, comparable wage statements or information returns shall also be filed on magnetic media or in other machine-readable form with the department of revenue.

(b) A person shall be required to file wage statements or information returns on magnetic media or in other machine-readable form with the depart-

ment of revenue only if both of the following conditions apply:

1. Wage statements or information returns comparable to those required to be filed on magnetic media or in other machine-readable form with the internal revenue service are also required to be filed with the department of revenue.

2. The wages or income reported on the wage statements or information returns are required to be reported to Wisconsin.

(c) 1. If fewer than 250 of any one type of wage statement or information return are required to be filed with the department, the department shall waive the requirement to file that type of wage statement or information return on magnetic media or in other machine-readable form.

2. If a payer participates in the combined federal/state filing program for forms 1099, the department shall waive the requirement to file those forms 1099 or comparable information returns on magnetic media or in other machine-readable form.

3. If a payer receives a waiver from the department, the payer is not required to file wage statements or information returns on magnetic media or in other machine-readable form with the department.

(7) **COMBINED FILING PROGRAM.** Payers who participate in the combined federal/state filing program with the internal revenue service and report to the internal revenue service items which are required to be filed on Wisconsin form 9b or a substitute form, are not required to file separate information returns for those items with the department of revenue.

Tax 2.08 Returns of persons other than corporations. For clarity, titles are created for each subsection; new forms are included, and titles of other forms are updated; instructions for who may file various tax forms is updated; the lists of forms are grouped by type of entity; and the address for mailing forms is updated. The text of Tax 2.08 is as follows:

Tax 2.08 RETURNS OF PERSONS OTHER THAN CORPORATIONS. (ss. 71.03(2), 71.20(1) and

71.55(3), Stats.) (1) **FORMS.** For the purpose of filing income tax returns and credit claims, the secretary of revenue has designated the following forms for the use of persons other than corporations:

(a) *Individuals and fiduciaries.* [Subdivisions 1 through 28 list forms used by individuals and fiduciaries.]

(b) *Partnerships and limited liability companies treated as partnerships.* [Subdivisions 1 through 6 list forms used by partnerships and limited liability companies treated as partnerships.]

(2) **INFORMATION RETURNS.** Information returns required of persons other than corporations are specified in s. Tax 2.04.

(3) **FILING RETURNS.** All forms and information required to be filed or furnished by persons other than corporations shall be filed or furnished by providing the information requested on the appropriate forms, signing the returns or forms as appropriate, and delivering them to the department or mailing them to the address specified by the department on the form or in the instructions.

Tax 2.10 Copies of federal returns, statements, schedules, documents, etc. to be filed with Wisconsin returns. Additional statutory references are included; the treatment of limited liability companies treated as partnerships is explained; and the department's policy regarding the filing of federal forms with partnership returns is explained. The text of Tax 2.10 is as follows:

Tax 2.10 COPIES OF FEDERAL RETURNS, STATEMENTS, SCHEDULES, DOCUMENTS, ETC. TO BE FILED WITH WISCONSIN RETURNS. (ss. 71.03(5) and 71.20(1), Stats.) (1) **INDIVIDUALS AND FIDUCIARIES.** At the time of filing Wisconsin income tax returns by individuals and fiduciaries, a complete copy of the federal income tax return for the same taxable year, including all schedules, statements, documents and computations which affect the computation of Wisconsin income, credits or penalties, shall be included and filed with the Wisconsin return. Copies of the short form federal returns 1040A and 1040EZ are not required to be filed

if a Wisconsin form 1A or WI-Z is being filed for the same taxable year. If the federal form is filed electronically, a copy of the electronic material as contained in replicas of the official forms or on forms designated by the electronic filer shall be included and filed with the Wisconsin return.

(2) **PARTNERSHIPS AND LIMITED LIABILITY COMPANIES TREATED AS PARTNERSHIPS.** (a) Except as provided in par. (b), at the time of filing Wisconsin income tax returns by partnerships and limited liability companies treated as partnerships under s. 71.20(1), Stats., a complete copy of the federal income tax return for the same taxable year, including all schedules, statements, documents and computations which affect the computation of Wisconsin income, deductions and credits, shall be included and filed with the Wisconsin return. If the federal form is filed electronically, a copy of the electronic material as contained in replicas of the official forms or on forms designated by the electronic filer shall be included and filed with the Wisconsin return.

(b) Copies of the federal schedules K-1 are not required to be filed for those partners or members for whom a Wisconsin schedule 3K-1 is being filed for the same taxable year. A Wisconsin schedule 3K-1 shall be filed in lieu of federal schedule K-1 for a partner or member if any of the following applies:

1. The computation of the Wisconsin income or deductions differs from the federal amount.

2. The partner or member is a non-resident of Wisconsin and the partnership or limited liability company has activities within and without Wisconsin.

3. The partnership or limited liability company calculates any Wisconsin income tax credits.

Tax 2.39 Apportionment method. Tax 2.39(2)(f), (4)(c), (4)(cm)2.a., and (4)(f) are amended to reflect proper grammar, punctuation, and style. Tax 2.39(6)(b)2.b, relating to throwback sales and the requirement to follow other states' nexus standards, is repealed, and Tax 2.39(6)(b)2.c is renumbered Tax 2.39(6)(b)2.b. □



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

Estoppel

Interest — erroneous written advice

Private letter ruling

Steven J. and Mary Ann

Hogan (p. 11)

Tax home

Travel expenses — substantiation

Richard and Karen Cody

(p. 13)

Write of mandamus

Assessments — due process of law

Retirement pay

William E. Currier (p. 13)

Homestead Credit

Homestead credit — property taxes
accrued — joint ownership

Edna Leitgeb (p. 14)

Corporation Franchise and Income Taxes

Allocation of income — business
income

Port Affiliates, Inc. (p. 15)

Insurance companies — addback of
exempt or excluded interest and
dividends received deduction

Heritage Mutual Insurance

Company (p. 16)

Sales and Use Taxes

Admissions

Landscaping

City of Madison (p. 16)

Auctions

Terry Locke (p. 17)

Statute of limitations — nonfilers

Manufacturing — exemption of
property consumed or destroyed

Occasional sales

Penalties — negligence — failure
to file

Zignego Company, Inc.

(p. 17)

Gift Taxes

Gift tax — foregone interest

Alyssa Alpine, Edith Phillips,

and Eileen Cohen (p. 19)

additional taxes and interest because of the taxpayers' reliance upon written representations made in a letter from the department, where the department issued refund checks for three of the years under review as a result of that letter and then audited the returns subsequent to the issuance of those refunds.

- C. Whether the department should have absolved the taxpayers of liability for interest due under sec. 73.03(47), Wis. Stats., because the underlying taxliabilities owing may have resulted from their reliance on an erroneous, written statement made by an employee of the department acting in an official capacity in response to adequate and accurate information provided by the taxpayers.

Taxpayer Steven J. Hogan served in the United States Navy from February 1969 until his retirement in March 1989. On account of that service, pension payments were issued to him from the U.S. military retirement system during each year at issue, 1989, 1990, 1991, and 1992. Mr. Hogan claimed the pension payments he received during each of those years as taxable income on his income tax returns.

During early 1992, the taxpayers read or heard various media accounts of a United States Supreme Court decision (*Barker v. Kansas*), which dealt generally with state income taxation of federal military retiree pension payments. In an effort to obtain more information concerning its relevance to his personal circumstances, Mr. Hogan wrote a letter to Mr. Mark

INDIVIDUAL INCOME TAXES

Estoppel; Interest — erroneous written advice; Private letter ruling. *Steven J. and Mary Ann Hogan vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 29, 1995). The issues in this case are:

- A. Whether a letter to the taxpayers, signed by the Secretary of the Wisconsin Department of Revenue, constituted a private letter ruling issued under the authority of sec. 73.035, Wis. Stats., in a form prescribed by the department.
- B. Whether the department may be equitably estopped from assessing

Bugher, Secretary of the Wisconsin Department of Revenue, on April 22, 1992. The letter did not contain all the facts pertinent to the legal conclusion sought by him. Material information omitted included the beginning date of Mr. Hogan's military service. The letter also did not contain a declaration that the facts which were disclosed were presented by the requestor under penalty of perjury.

On April 30, 1992, Secretary Bugher responded by letter to Mr. Hogan's inquiry. The text of one paragraph of Mr. Bugher's letter read as follows:

"You first ask how the *Barker* decision affects the taxability of your 1992 military pension payments. Our response is that this decision has no affect on your 1992 military pension payments. We now exempt from state income tax, as we have since 1989 when our legislature created this exemption in § 71.05(1)(a), Wis. Stats. (1989-90), all payments received from the U.S. military employe retirement system."

Shortly after receiving Secretary Bugher's letter, Mr. Hogan filed amended 1989 and 1990 Wisconsin income tax returns, and the taxpayers jointly filed an amended 1991 return, eliminating Mr. Hogan's military pension payments from each year's income. They attached a copy of Secretary Bugher's April 30, 1992 letter to each amended return and incorporated it in their explanation of changes in income on each return. The taxpayers received refund checks from the department as a result of the amended returns as filed.

The taxpayers filed a 1992 joint income tax return, in which they excluded the federal retirement benefits. A copy of the April 30, 1992 letter from Secretary Bugher was attached.

The taxpayers wrote a letter to the department on February 22, 1993, which included statements to the effect that they regarded Secretary Bugher's April 30, 1992 letter as a private letter ruling, and that they had at some point requested from the department a retraction of the letter, according to the procedures set forth in Department of Revenue Publication 111 "How To Get a Private Letter Ruling from the Wisconsin Department of Revenue."

In April and May, 1993, the department issued notices of amount due to Mr. Hogan for additional 1989 and 1990 taxes and interest due, and to both taxpayers for additional 1991 taxes and interest due, as a result of an audit of the amended 1989 to 1991 returns, and to both taxpayers for additional 1992 taxes and interest due (effectively denying the refund claimed on their 1992 return).

Mr. Hogan filed a letter which the department deemed to be a petition for redetermination of the assessment for 1989 and 1990, contending that the April 30, 1992 letter from Secretary Bugher was a private letter ruling. Mr. Hogan also noted that he considered the assessment for 1989 and 1990 to be an effective withdrawal of the purported private letter ruling and asked that the additional tax and interest be forgiven, because of his contention that these amounts would otherwise constitute a retroactive revocation of the department's supposed position in Secretary Bugher's letter.

The taxpayers jointly filed a letter, which was deemed to be a petition for redetermination of the assessment for 1991. This letter reiterated many of the arguments raised in the petition for 1989 and 1990 and added a request that an interest abatement be granted them under sec. 73.01(47), Wis. Stats., based upon what they considered to be erroneous written

advice given to them by the department.

The taxpayers also petitioned the department for a redetermination of its assessment and refund denial for 1992. The letter renewed their interest abatement claim and raised a claim that the department should be equitably estopped from its assessment actions for each of the tax years 1989 to 1992, in accordance with the taxpayers' interpretation of Secretary Bugher's April 30, 1992 letter.

The Commission concluded as follows:

- A. The April 30, 1992 letter written to the taxpayers and signed by Mr. Mark D. Bugher in his capacity as Secretary of the Wisconsin Department of Revenue did not constitute a private letter ruling issued under the authority of sec. 73.035, Wis. Stats. The taxpayers did not comply with the requirements of form prescribed in the department's Publication 111. They failed to provide material facts which were pertinent to the issue of inquiry, particularly, the date of Mr. Hogan's entry into military service, and they failed to include in their original request letter a declaration under penalty of perjury that the facts presented were true, correct, and complete.
- B. The department may not be equitably estopped from assessing additional taxes and interest due because of the taxpayers' reliance upon written representations made by the Secretary of the department in a letter dated April 30, 1992. The letter specifically cites the section of the statutes which limits the exemption to participants or retirees as of December 31, 1963, whereas Mr. Hogan did not join the military service until 1969. Furthermore, the issuance of

refunds after initial processing of amended returns, and before audit, is not a binding determination on which a taxpayer may rely as final. The taxpayers' reliance on the department's representations or actions was not reasonable under the facts and circumstances presented.

- C. The department had no duty to absolve the taxpayers of liability for interest due under sec. 73.03(47), Wis. Stats. The underlying tax liabilities owing did not result from the taxpayers' reliance on an erroneous, written statement made by an employee of the department, and the department's April 30, 1992 letter did not constitute a response to adequate and accurate information provided by the taxpayers. The omission of information regarding the military service starting date constitutes a failure to provide adequate information.

The taxpayers have not appealed this decision. ☐

— Tax home; Travel expenses — substantiation. *Richard and Karen Cody vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, February 2, 1995). The issues in this case are whether the Department of Revenue ("the department") properly determined:

- The taxpayer's tax home during the years at issue.
- The amount of additional taxable income for the year 1984.
- That unsubstantiated travel expenses should be disallowed.

During the years 1981 through 1985 ("the years at issue"), taxpayer Richard Cody ("the taxpayer") resided in Lake Mills, Wisconsin. During 1981

through 1984, he worked as an outside salesman for corporations which operated cemeteries in Madison, Beaver Dam, Ixonia, and Milwaukee. He was not an employee but received commissions on the sale of cemetery lots. From time to time, he also helped prospect for new cemeteries to purchase and helped recruit and train new salespeople.

The taxpayer worked in Madison during the period January through August 1981, in Milwaukee during the period September 1981 through September 1982, and in Beaver Dam during the period October through December 1982. During the period 1983 and 1984, the taxpayer worked primarily in Milwaukee but made several trips to southern Wisconsin, Illinois, and Minnesota, prospecting for cemeteries to purchase. During 1985 he worked for himself in Sheboygan, where he acquired a cemetery.

On audit, the department determined the taxpayer's tax home to be Madison for the period January through August, 1981, Milwaukee for the period September 1981 through 1984, and Sheboygan for 1985. The taxpayer disputes the determination that Milwaukee was his tax home for any of the years at issue. Although he claims that his work in Milwaukee from 1981 through 1984 was "temporary," the evidence did not substantiate this claim and in fact showed his work assignment in Milwaukee during those years was of indefinite duration.

During the years at issue, the taxpayer claimed but did not substantiate travel expenses. He was not reimbursed for this travel expenses, except that in 1984 he received \$750 per week as a "draw" against travel expenses for his trips away from Milwaukee. He did not report this draw on his 1984 income tax return. The department disallowed the taxpayer's unsubstantiated travel

expenses and added to 1984 income the difference between the taxpayers' bank deposits and the amount of income actually reported on their return.

The Commission concluded as follows:

- The department properly determined the taxpayer's tax home for 1981 through 1985.
- The department properly determined that the taxpayer's unsubstantiated travel expenses should be disallowed.
- The department properly determined the taxpayers' additional taxable income for 1984.

The taxpayers have not appealed this decision. ☐

— Writ of mandamus; Assessments — due process of law; Retirement pay. *William E. Currier vs. Wisconsin Department of Revenue* (Circuit Court for Milwaukee County, April 6, 1995). The issues in this case are:

- Whether the department's failure to pursue its petition for a writ of mandamus, after a remand to Clark County Circuit Court, bars assessment for taxable years 1982 and 1983.
- Whether the department failed to provide administrative due process of law when it denied the taxpayer's request for a conference relating to an assessment it made for failure to file income tax returns for 1982 to 1990.
- Whether retirement pay the taxpayer received in 1984 to 1990 is taxable income, and whether taxing that income violates the

Equal Protection clause of the Fourteenth Amendment to the United States Constitution.

The taxpayer seeks review of a ruling and order of the Wisconsin Tax Appeals Commission (Commission), which granted the department's motion for summary judgment and affirmed the assessment for 1982 to 1990.

The taxpayer contends that the department is barred from issuing an assessment for 1982 and 1983, because the department failed to pursue a lawsuit in Clark County Circuit Court, in which it sought a writ of mandamus compelling the taxpayer to file 1982 and 1983 tax returns. That Court entered a default judgment against the taxpayer, which the Court of Appeals reversed and remanded for further proceedings. Neither the Circuit Court nor the department pursued the mandamus action.

The taxpayer also contends that the department failed to provide administrative due process of law when it denied his request for a conference in response to the assessment for 1982 to 1990. He had requested the informal conference in his petition for redetermination of the assessment, which was issued for failure to file income tax returns for those years. The department instead further explained its basis for the assessment, denied the conference request, and denied the petition for redetermination.

As an alternative argument, it is the taxpayer's position that his retirement benefits earned as a result of his service as a police officer for the City of West Allis are not taxable income.

The Circuit Court concluded as follows:

A. The mandamus action and the department's failure to further litigate the action do not bar the

assessment for 1982 and 1983. There is no requirement for the department to pursue the action, and there is no bar to relitigation for 1982 and 1983 because no issues were decided in a court of law.

B. The department's denial of the taxpayer's request for a conference does not constitute a failure to provide administrative due process of law. Due process was adequately afforded him through the appeal process to the Commission and to this Court.

C. The taxpayer's retirement benefits are taxable because they are not included in the statutory list of specifically exempt retirement benefits. Furthermore, the law does not support his position that he is denied equal protection.

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

HOMESTEAD CREDIT

— Homestead credit — property taxes accrued — joint ownership. *Edna Leitgeb vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, January 23, 1995). The issue in this case is whether the department appropriately adjusted the claimant's allowable homestead credit by recharacterizing the portion of property taxes accrued corresponding to the ownership percentages of the joint owners (who did not reside in the homestead) as rent constituting property taxes.

During the year at issue, 1992, the claimant lived in one unit of a two-family dwelling. Her daughter, Mrs. Judith Petroff, lived in the rental unit.

On May 6, 1992, the claimant conveyed her ownership in the property to herself and five of her children

(including Judith Petroff) as joint tenants. The claimant paid the entire 1992 property tax bill, in the amount of \$3,408.05. One-half of the total property taxes, or \$1,704.00, was deemed by the claimant to be applicable to the portion of the property in which she lived during 1992.

The department adjusted the claimant's 1992 homestead credit claim, allowing her a pro rata portion of taxes corresponding to the days she was sole owner of the property, as well as her 1/6 fractional share for the days the property was held in joint tenancy. The department also allowed 25% of the fractional portion (4/6) of property taxes attributable to nonresident owners (i.e., all children other than Judith Petroff) during the days after joint tenancy, treated as "rent paid — heat not included." After the hearing was held in this case, the department recalculated the homestead credit, allowing an additional 1/6 share of the property taxes as rent constituting property taxes, since Judith Petroff resided in the rental portion rather than the claimant's homestead.

The Commission concluded that as modified, the department acted appropriately in adjusting the claimant's allowable homestead credit by recharacterizing the portion of property taxes accrued corresponding to the ownership percentages of joint owners, who did not reside in the claimant's homestead, as rent constituting property taxes.

The claimant has not appealed this decision.

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

CORPORATION FRANCHISE AND INCOME TAXES

— Allocation of income — business income. *Port Affiliates, Inc., vs. Wisconsin Department of Revenue* (Court of Appeals, District I, December 20, 1994). The taxpayer appeals from the Circuit Court judgment affirming a decision of the Wisconsin Tax Appeals Commission. The Commission affirmed a franchise tax assessment made by the department with respect to the taxpayer's taxable years 1984 through 1987. For summaries of the Circuit Court's and Commission's decisions, see *Wisconsin Tax Bulletins* 84 (October 1993), page 13, and 78 (July 1992), page 6.

At issue in this appeal is the department's determination that the computation of the taxpayer's apportionable income should include: (1) certain interest, dividends, and gains derived by the taxpayer from its investment portfolio of marketable securities, and (2) only a certain portion of rental losses incurred by the taxpayer in connection with an office building it owned.

The taxpayer originally was organized and incorporated in Wisconsin in 1918 as The Milwaukee Gear Company (MGC). Through approximately 1980, MGC's sole business activity was manufacturing and selling gears and gear drives. From about 1950 until the events involved in this case, MGC's activities were carried out at its manufacturing facility in Glendale, Wisconsin, where it also had its principal offices. In 1980, MGC developed an investment portfolio and, in 1983, MGC constructed an office building called the MG Atrium Building (Atrium) immediately in front of its Wisconsin facility. In 1984, MGC acquired a boat house and marina business in Florida. Later in 1984, MGC changed its name to

Port Affiliates, Inc. (Port), and moved its principal offices to Florida.

In 1986, Port spun off the Milwaukee gear division of its operation into a wholly-owned subsidiary, incorporated in Wisconsin, called Milwaukee Gear Company, Inc. (MGC Inc.). The MGC Inc. subsidiary included not only the gear manufacturing business, but also the boat house and marina business. Port retained ownership of the gear manufacturing plant but rented it to the subsidiary. Port also transferred six executives — five located in Wisconsin, and one in Florida — to the subsidiary.

The Commission determined that Port's investment activities were integrated with the rest of its activities. Therefore, the Commission concluded that the investment income was derived from an activity constituting "an integral part of a unitary business" and, thus, that the income was apportionable. The Court of Appeals held that the Commission correctly concluded that the investment activity was an integral part of Port's unitary business.

Port's own summary of the circumstances leading to the establishment of the investment portfolio demonstrates the integral relationship, from the very beginning, between the investments and Port's overall operations. To maintain its economic strength, Port sought to diversify and created the portfolio for that purpose. Further, throughout the time period considered in this case, the chief executive officer made the major decisions for Port and its MGC Inc. subsidiary, including those decisions relating to the investment portfolio. The computer system located in the Wisconsin office processed the data for both Port's investment activities and its other operations. Port's casualty and property insurance policies covered all the activities related to

Port, the MGC Inc. subsidiary, and the investment activities. Port's retirement plan and health insurance policy covered all employees, including those connected to the investment activities. Finally, the investment income came primarily from short-term investments that remained within Port's control and that were always available as working capital.

The facts of this case demonstrate far more than "the mere flow of funds arising out of a passive investment." As stated in the January 1, 1986, "Management Agreement" between Port and MGC Inc., "Port shall, from time to time, advance to Gear sums of money necessary to finance capital equipment purchases and its working capital requirements." In 1987, the investment portfolio loaned MGC Inc. \$500,000 in March and another \$483,000 in April, at least in part for capital acquisitions.

The Commission held that the Atrium was used in Port's business. The rental loss was apportionable because of Port's ownership of and close financial connection to the Atrium, and because of Port's active participation in the management of the Atrium.

The Court of Appeals concluded that the Commission reasonably held that the Atrium did constitute real property used in Port's business.

Port's own brief to the Court explains that the Atrium was "another step in its diversification efforts." The purpose, according to Port, was "to take advantage of a large unused parcel of land" adjacent to its manufacturing facility. The Atrium was physically connected to that facility with a "bridge" or "passageway" and Port's chief executive officer maintained an office there and its staff participated in the ongoing operations of the Atrium. Port does not dispute that the

Atrium was a part of its overall, diversified business. Various funds, facilities, employees, and activities of Port and the Atrium were intermixed, and Port's chief executive officer had responsibility for all major decisions regarding the Atrium, its contracts, brokers, and expenditures.

The taxpayer appealed the decision to the Wisconsin Supreme Court, which denied its petition for review on February 21, 1995. The matter is now final. □

✦ **Insurance companies — addback of exempt or excluded interest and dividends received deduction.** *Heritage Mutual Insurance Company vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 31, 1995). The issue in this case is whether under sec. 71.45(2)(a)3 and 4, Wis. Stats. (1987-88), the federal reduction in losses incurred, by 15 percent of tax-exempt interest income and 15 percent of the deductible portion of the dividends received, is used to reduce the Wisconsin addition modification for interest received or accrued during the taxable year and dividend income received during the taxable year.

The taxpayer is organized as a Wisconsin mutual insurance corporation under ch. 611, Wis. Stats. The taxpayer is engaged in the business of selling property and casualty liability insurance in Wisconsin.

During the years 1987 and 1988, sec. 71.43(2), Wis. Stats. (1987-88), imposed a franchise tax on the "net income" of insurance companies. Under sec. 71.45(2), Wis. Stats. (1987-88), "net income" was defined as "the federal taxable income as determined in accordance with the provisions of the internal revenue code" with various modifications and

adjustments listed in such section of the statutes.

In calculating its Wisconsin taxable income on its initially filed franchise tax returns for the calendar years 1987 and 1988, the taxpayer added back to its federal taxable income 100% of its interest income which was tax exempt under sec. 103 of the Internal Revenue Code of 1986, as amended (the "Code"), and 100% of its dividend income which was deducted pursuant to sec. 243 of the Code, less the allowable dividend deduction under sec. 71.45(2)(a)8, Wis. Stats. (1987-88).

In determining its federal taxable income for 1987 and 1988, as required by sec. 832(b)(5) of the Code, the taxpayer took into account 15% of the tax-exempt interest income received on obligations acquired on and after August 8, 1986, and 15% of deductible dividends received on stock acquired on and after August 8, 1986. A portion of the taxpayer's tax-exempt interest and dividends were received on pre-August 8, 1986 stock and obligations and, therefore, were not required to be included in the taxpayers federal taxable income under sec. 832(b)(5) of the Code.

In preparing its original Wisconsin franchise tax returns for 1987 and 1988, the taxpayer added back 100% of its tax-exempt interest income and deductible dividends less the allowable dividend deduction under sec. 71.45(2)(a)8, Wis. Stats. (1987-88), in calculating its Wisconsin taxable income, which therefore included the tax-exempt interest income and deductible dividends described above.

The taxpayer filed a claim for refund for 1987 and 1988, in which the taxpayer added back to its federal taxable income the tax-exempt interest and deductible dividends only to the extent that such amounts were not

used in calculating its federal taxable income and, therefore, did not include the 15% portion of tax-exempt interest income and deductible dividends described above.

The department denied the claim for refund because the statutes require the addback for Wisconsin purposes of 100% of federally exempt interest and dividend income even though 15% of such income was applied to reduce a loss deduction in arriving at federal taxable income pursuant to sec. 832 of the Code.

The Commission concluded that the department improperly determined that sec. 71.45(2)(a)3 and 4, Wis. Stats. (1987-88), requires the addition for Wisconsin franchise tax purposes of the 15% portion of interest and dividend income which never effectively reduced the taxpayer's federal taxable income as carried forward for Wisconsin purposes. To require the addback would tax the same income twice, first as federal taxable income (the Wisconsin starting point), and second as an addition modification.

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

SALES AND USE TAXES

✦ **Admissions; Landscaping.** *City of Madison vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, January 12, 1995). The issues in this case are:

- A. Whether the taxpayer is liable for sales tax on its receipts for issuance of golf I.D. cards, junior cards, and senior cards.
- B. Whether the taxpayer is liable for sales tax on its receipts from special assessments of private landowners for planting trees on the terrace portion of each landowner's property.

The taxpayer is a municipal corporation which was required to hold, and did hold, a seller's permit during the period under review.

The taxpayer sought to recover the costs for its golf courses by charging for their use. The taxpayer sold various golf course admission cards, including annual resident and nonresident passes, on which it collected sales tax, as well as annual resident photo golf I.D. cards — new and renewal — and junior/senior cards, on which no sales tax was collected.

The taxpayer's purpose in issuing the golf I.D. cards was to provide its residents with hassle-free admission to its golf courses as residents, who were thereby entitled to pay lower green fees than nonresidents. Without the resident card, a user was admitted as a nonresident and paid the higher nonresident fees.

The taxpayer planted trees on "terraces" (real estate between the street and sidewalk) of residents of the city. The terraces are subject to public easement and such other appurtenant rules and regulations promulgated pursuant to the taxpayer's police power.

The taxpayer controlled almost all aspects of the tree planting in the terrace property: the property owner was limited in the choice of tree, if choice was available, in the size of tree, and in the location of the planting. The taxpayer could plant a type of tree it chose in a location it chose, even over the objection of the property owner. The taxpayer's crews did the planting.

The taxpayer enacted ordinances to recover the costs of planting the trees by the issuance and collection of special assessments to the property owners. These special assessments would become liens upon the property if unpaid, similar to real estate taxes.

The taxpayer assessed only an amount calculated to recover its actual costs, including an anticipated 15% loss factor for trees which had to be replaced later.

The Commission concluded:

- A. The taxpayer's receipts for issuance of resident golf cards are taxable. The facts show no other purpose or purposes for which the resident golf cards were issued than to allow the purchasers of such cards to be admitted to the taxpayer's golf courses as residents, with attendant rate privileges.
- B. The taxpayer's receipts from tree planting activities are taxable. Section Tax 11.05(2)(p) and (s), Wis. Adm. Code, expressly include receipts from tree sales and landscaping services by governmental units as taxable under sec. 77.52(2)(a)20, Wis. Stats.

The taxpayer has not appealed this decision. ☐

— Auctions. *Terry Locke vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, January 11, 1995). The issue in this case is whether the taxpayer's gross receipts from auction sales held in 1991 are subject to sales tax.

Since 1982, the taxpayer, as a sole proprietor, has been engaged in the business of making sales at auction of tangible personal property owned by others.

The taxpayer sells at auction mostly household goods belonging to the estates of deceased persons. However, on occasion he sells business assets, such as equipment of restaurants that have gone out of business. In 1987 he applied for and was issued

a seller's permit, which he held in 1991.

During the early years of his business, the taxpayer conducted the bulk of his auction sales at the homes where the goods were located. As the years progressed, his method of operations changed from holding the sales in homes to conducting them in rented spaces in local commercial locations. Usually the taxpayer held his auctions on weekends, after advertising the previous week.

During the first eight months of 1991 he conducted 16 of his 20 auction sales at a ballroom. During the last four months of 1991, the taxpayer conducted 12 of his 14 auctions in an empty store located in a mall.

The sales tax at issue is from auction sales made at the ballroom and at the mall.

The Commission concluded that the taxpayer's receipts in 1991 from auction sales held at commercial locations in Wisconsin are subject to sales tax under the provisions of sec. 77.52(1), Wis. Stats., and sec. Tax 11.50(3)(a), Wis. Adm. Code. Gross receipts from sales of tangible personal property are subject to sales tax under sec. 77.52(1), Wis. Stats., unless specifically exempt. The taxpayer has failed to bring himself within the terms of an express provision granting exemption.

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

— Statute of limitations — nonfilers; Manufacturing — exemption of property consumed or destroyed; Occasional sales; Penalties — negligence — failure to file. *Zignego Company, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, May 2, 1995). The issues are:

- A. Whether the statute of limitations prevents the department from assessing sales and/or use tax against the taxpayer for the period of April 1, 1984 through March 31, 1988.
- B. Whether the taxpayer is entitled to a sales and use tax exemption pursuant to sec. 77.54(2), Wis. Stats., for the materials it purchased which became ingredients or component parts of tangible personal property the taxpayer manufactured or which lost their identity in the taxpayer's manufacture of ready-mixed concrete which the taxpayer incorporated into real property improvements.
- C. Whether the taxpayer's sales and rental of tangible personal property and the rendering of certain services by the taxpayer are exempt from sales and use tax as occasional sales within the meaning of sec. 77.54(7)(a), Wis. Stats.
- D. Whether the taxpayer's failure to file sales and use tax returns was due to reasonable cause and not due to neglect.

The taxpayer is a Wisconsin corporation which is primarily engaged in the business of real property construction of roads and highways, primarily for the State of Wisconsin and Wisconsin municipalities. The taxpayer also sold some of its equipment and machinery and rented out some of its equipment and machinery (without an operator), primarily to other contractors, and provided some non-real-property-construction services, primarily repairs.

As part of the taxpayer's road and highway construction activities, the taxpayer manufactures ready-mixed concrete which it incorporates into its paving projects. Ready-mixed concrete is manufactured by mixing

together cement, aggregate (i.e., crushed stone or gravel), water, and other ingredients either in a machine known as a batch plant or in specially designed trucks. After the mixing process, the ready-mixed concrete is in a semi-liquid form and constitutes tangible personal property. The ready-mixed concrete in the semi-liquid state is transported in either dump trucks or in the special ready-mix trucks to the taxpayer's construction sites, where it is poured into forms, is finished by the taxpayer's employees, and dries and hardens, forming the concrete road surface or curb and gutter. The ready-mixed concrete is incorporated into real property by the taxpayer. The title to the resulting real property improvement, including the concrete road surface, curb and gutter made from the ready-mixed concrete, does not pass to the owner of the real estate prior to the time that the ready-mixed concrete is affixed to and becomes part of the real estate.

During the period under review, the taxpayer manufactured only the ready-mixed concrete it needed to fulfill its real property construction contracts, and all of the ready-mixed concrete the taxpayer manufactured was used in its own real property construction activities and was installed by the taxpayer in fulfilling its real property construction contracts. All or substantially all of the construction contracts in which the taxpayer used the ready-mixed concrete were with entities such as the State of Wisconsin and municipalities, sales to which are exempt from the sales and use tax pursuant to sec. 77.54(9a), Wis. Stats.

During the period under review, the taxpayer purchased cement, aggregate, and other ingredients for its manufacture of ready-mixed concrete. The ingredients, including the cement and aggregate, became component parts of or lost their identity in the

taxpayer's manufacture of ready-mixed concrete.

The taxpayer had not paid any Wisconsin sales or use tax on the ingredients prior to the department's issuing a notice of assessment. The taxpayer did not use any resale certificates or other exemption certificates when purchasing any of the ingredients.

The taxpayer paid sales tax on purchases of other materials and ingredients (such as cement, hardware, piping, etc.) it bought from Wisconsin vendors and incorporated into the real property improvements it made.

The taxpayer did not hold a Wisconsin seller's permit at any time during the period under review, nor did the taxpayer charge any sales tax on any of its sales or rentals, file any sales and use tax returns, or pay any sales or use tax directly to the department during that period. The taxpayer did not have any exemption certificates for the rentals, sales, and services.

The machinery and equipment the taxpayer sold and rented to others was purchased by the taxpayer and used regularly by the taxpayer in its own real property construction activities. The parts involved in the alleged taxable sales were purchased by the taxpayer and resold to its employees.

Some of the rentals were for use of the taxpayer's machinery and equipment by other contractors at the construction sites where the taxpayer was also working, since the taxpayer wanted to keep the construction job moving in order to continue to perform its contracts and avoid delays due to other contractors' machinery and equipment breakdowns or lack of equipment. Other rental equipment was used by the lessee in some location other than on the taxpayer's construction site. The services (generally repairs) were performed in the taxpayer's shop.

The taxpayer concedes that the rental of a water truck and the rental of a dump truck are subject to the Wisconsin sales tax since the occasional sale exemption does not apply to these types of motor vehicles.

The amount and number of the taxpayer's sales and rentals of, and services to, tangible personal property during the period under review ranged from 2 to 9 sales and from \$476 to \$30,470 per fiscal year.

The Commission concluded:

- A. The department's assessment is not barred by the 4-year statute of limitations in sec. 77.59(3), Wis. Stats., where the taxpayer failed to file the required sales and use tax returns.
- B. The taxpayer is not entitled to the "ingredients" exemption under sec. 77.54(2), Wis. Stats., because it is the end consumer of the tangible personal property incorporated by it in real property improvements.
- C. The taxpayer's miscellaneous sales and rentals of tangible personal property and its incidental sales of repair services do not qualify for the occasional sales exemption under sec. 77.54(7)(a), Wis. Stats.
- D. The taxpayer was negligent in failing to file the required Wis-

consin sales and use tax returns. The Commission was provided no factual basis to find the reasonable cause contended by the taxpayer.

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

GIFT TAXES

I— Gift tax — foregone interest.

Alyssa Alpine, Edith Phillips, and Eileen Cohen vs. Wisconsin Department of Revenue. (Wisconsin Tax Appeals Commission, March 9, 1995). The issue in this case is whether the interest foregone on an interest-free demand loan made between family members and certain trusts set up for the benefit of their heirs constitutes an assessable gift for purposes of Wisconsin gift tax law as it existed in the years 1979-1984.

Alyssa Alpine ("Alyssa") was a minor at all times during the years 1979 through 1984 ("the period under review"). During the years 1977-83, three trusts were established for the benefit of Alyssa. During the period under review, Alyssa's grandmother, Eileen Cohen ("Eileen"), and her great-grandmother, Edith Phillips ("Edith"), made a number of interest-free demand loans to the trusts. Neither Alyssa, Eileen, nor Edith intended that any foregone interest should have been deemed to have constituted a gift to Alyssa and, accordingly, did

not report the foregone interest associated with the loans on any gift tax reports.

In March 1991, the department issued Notices of Gift Tax Assessment to Alyssa, for gift taxes attributable to additional taxable gifts of foregone interest alleged to have been made to Alyssa by Edith and Eileen, under the loans previously discussed. The department also issued "Donor copies" of the Notices of Gift Tax Assessment to Edith and Eileen, in which it asserted against them joint and several liability for the taxes alleged due.

The Commission concluded that there was no authority for the department to issue the assessments under review. It held that for the years 1982 through 1984 the department acted after the statute of limitations operated to bar additional assessments of gift tax, and that for all other transfers the department lacked the authority to assess a) because there was no clearly completed gift, b) because the department failed to nonacquiesce in at least one case where no taxable gift was found under similar circumstances before the Commission, and c) because Wisconsin gift tax regulations concerning foregone interest are virtually nonexistent.

The department has not appealed this decision but has adopted a position of nonacquiescence in regard to the portion of the decision dealing with the statute of limitations. ☐



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. Application of Statute of Limitations to Tax-Option (S) Corporation Shareholders (p. 20)

Sales and Use Taxes

2. Applying Letters and Insignias on Motor Vehicles (p. 21)
3. Definition of "State" in the Wisconsin Sales and Use Tax Statutes (p. 22)
4. Manufacturing — Equipment and Consumables Used in Quality Control (p. 22)
5. Manufacturing — Testing Incoming Parts for Quality (p. 23)
6. Meals, Food, Food Products, and Beverages Given Away (p. 24)
7. Sales of Education Services and Course Materials (p. 27)

INDIVIDUAL INCOME TAXES

1 Application of Statute of Limitations to Tax-Option (S) Corporation Shareholders

Statutes: Section 71.77(2) and (7)(b), Wis. Stats. (1993-94)

Wis. Adm. Code: Section Tax 2.105, February 1990 Register

Background: The general statute of limitations in sec. 71.77(2), Wis. Stats. (1993-94), permits the Department of Revenue to issue assessments within 4 years after the date the franchise or income tax return was filed. However, one of the exceptions to this provision is sec. 71.77(7)(b), Wis. Stats. (1993-94), which states that if a taxpayer does not report federal audit adjustments to the department within 90 days after the federal determination is final, as required by sec. 71.76, Wis. Stats. (1993-94), the department may make an assessment against the taxpayer within 4 years after the department discovers the federal adjustments.

Facts and Question: A tax-option (S) corporation and its shareholders file Wisconsin franchise or income tax returns on a calendar-year basis. On February 1, 1995, an officer of the corporation notifies the department that the Internal Revenue Service (IRS) had previously audited the corporation's 1989 and 1990 federal income tax returns and adjusted several of the corporation's items of income and expense. Since the corporation is a pass-through entity, these adjustments affected items of income and expense that had passed through to and been reported by the corpora-

tion's shareholders on their individual income tax returns. Neither the corporation nor the shareholders reported the federal changes to the department within 90 days after the federal determination became final.

The corporation's 4-year statute of limitations expired March 15, 1994, for its 1989 return and March 15, 1995, for its 1990 return. For the shareholders, the 4-year statute of limitations expired April 15, 1994, for their 1989 returns and April 15, 1995, for their 1990 returns.

Does either the corporation's or the shareholders' general 4-year statute of limitations bar the department from issuing assessments against the shareholders within 4 years after the department discovers the corporation's federal audit adjustments?

Answer: No, neither the corporation's nor the shareholders' general 4-year statute of limitations bars the department from issuing assessments against the shareholders within 4 years of the department's discovery of the federal adjustments to the tax-option (S) corporation items. Therefore, the department has until February 1, 1999, to adjust the shareholders' 1989 and 1990 Wisconsin income tax returns for the federal adjustments made to tax-option (S) corporation items of income and expense. □

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.

2 Applying Letters and Insignias on Motor Vehicles

Statutes: Sections 77.52(2)(a) and (2m) and 77.54(2), (6)(a), and (6m), Wis. Stats. (1993-94)

Wis. Adm. Code: Sections Tax 11.39 and Tax 11.40, April 1994 Register, Tax 11.41, March 1991 Register, Tax 11.49, April 1993 Register, and Tax 11.67, November 1993 Register

Background: Section 77.52(2m)(b), Wis. Stats. (1993-94), provides that with respect to services subject to Wisconsin sales or use tax under sec. 77.52(2)(a)7, 10, 11, and 20, Wis. Stats. (1993-94), such as painting, producing, fabricating, processing, printing, or imprinting, all property physically transferred to the customer in conjunction with the selling, performing, or furnishing of these services is a sale of tangible personal property. As such, the person providing the service may purchase the property it transfers to the customer without Wisconsin sales or use tax as property for resale.

Section 77.54(2), Wis. Stats. (1993-94), provides, in part, an exemption for property that is consumed or destroyed or loses its identity in the manufacture of tangible personal property destined for sale.

Section 77.54(6)(a), Wis. Stats. (1993-94), provides that machines and specific processing equipment and repair parts or replacement parts thereof, exclusively and directly used

by a manufacturer in manufacturing tangible personal property, are exempt from Wisconsin sales or use tax.

Section 77.54(6m), Wis. Stats. (1993-94), defines "manufacturing" as the production by machinery of a new article with a different form, use, and name from existing materials by a process popularly regarded as manufacturing.

Section Tax 11.49(3)(b), Wis. Adm. Code, provides that a service station operator's purchases of sandpaper, masking paper, masking tape, buffing pads, paint, and lacquer thinner are subject to Wisconsin sales or use tax.

Facts: Company A has two major products it offers to customers. It paints signs on large pieces of wood according to a customer's specifications. It also applies letters and logos on motor vehicles owned by customers, using paint and/or adhesive-backed vinyl.

Company B contracts with Company A to have Company B's logo and name applied to its fleet of motor vehicles. Company A develops several ideas and designs. Company B selects several from the group including:

1. Adhesive logos and letters cut from adhesive-backed vinyl. The letters and designs are cut from the vinyl material with a plotting machine and are applied to the surface of the motor vehicle.
2. A design painted on the motor vehicle within a masking tape outline.
3. Letters painted on the motor vehicle with a stencil cut from adhesive-backed vinyl. The letters are cut from the material with a plotting machine and discarded. The resulting stencil is applied to

the motor vehicle prior to painting and removed and discarded afterwards.

Company A uses ladders and paint applicators, such as rollers, brushes, air brushes, and spray paint machines, in applying the lettering and logos to the motor vehicles. This equipment is also used by Company A when it makes signs painted on large sheets of wood to be sold to customers.

Company A also uses paint thinner, sandpaper, masking paper, and other consumables in applying the lettering and logos to the motor vehicles.

Question 1: Are the gross receipts from the charge for applying signs to motor vehicles subject to Wisconsin sales or use tax?

Answer 1: Yes. Section 77.52(2)(a)10, Wis. Stats. (1993-94), imposes Wisconsin sales or use tax on gross receipts from the repair, service, alteration, painting, and coating of tangible personal property.

Question 2: Is Company A engaged in manufacturing when making the signs painted on large sheets of wood and when making the letters or stencils with the plotting machine?

Answer 2: Yes. Company A is using machinery to produce new articles with a different form, use, and name from existing materials by a process popularly regarded as manufacturing.

Question 3: Is Company A engaged in manufacturing when it applies lettering and insignias to motor vehicles provided by the customer?

Answer 3: No. Manufacturing is the production by machinery of a new article with a different form, use, and name from existing materials by a process popularly regarded as manufacturing. Company A is not produc-

ing a new article when it applies lettering and insignias to motor vehicles.

Question 4: Are Company A's purchases of ladders and paint applicators, such as rollers, brushes, air brushes, and spray paint machines exempt from Wisconsin sales or use tax as machines and processing equipment used exclusively and directly in manufacturing?

Answer 4: No. This equipment is subject to tax because it is not used exclusively in manufacturing. This equipment is used in the manufacturing operation of painting large pieces of wood, however, the equipment is also used to apply lettering and logos to motor vehicles, which is not manufacturing.

Question 5: Are Company A's purchases of adhesive-backed vinyl from which stencils are made subject to Wisconsin sales or use tax?

Answer 5: Yes. Section 77.54(2), Wis. Stats. (1993-94), provides an exemption for property that is consumed or destroyed or loses its identity in the manufacture of tangible personal property destined for sale. However, the stencils are not sold but, rather, are consumed by Company A when applying signs to motor vehicles.

Question 6: Are Company A's purchases of masking tape, paint thinner, sandpaper, masking paper, and other consumables used in applying lettering and insignias to motor vehicles provided by customers subject to Wisconsin sales or use tax?

Answer 6: Yes. These items are not physically transferred to Company A's customers. Company A is the consumer of the property used in providing the service and is subject to Wisconsin sales or use tax on its purchases of the property.

Question 7: Are Company A's purchases of adhesive-backed vinyl used to make letters that are applied to motor vehicles and paint that is applied to motor vehicles provided by customers subject to Wisconsin sales or use tax?

Answer 7: No. Since the adhesive-backed vinyl and paint are physically transferred to the customer, the purchase of these items by Company A is not subject to Wisconsin sales or use tax, provided Company A gives its supplier a properly completed exemption certificate. □

3 Definition of "State" in the Wisconsin Sales and Use Tax Statutes

Statutes: Chapter 77, Subchapters III and V, Wis. Stats. (1993-94)

Question: The word "state" is used throughout Subchapters III and V of Chapter 77, Wis. Stats. (1993-94). What does "state" mean when it applies to a state other than Wisconsin in Subchapters III and V of Chapter 77, Wis. Stats. (1993-94)?

Answer: "State," with one exception, has the same meaning as in sec. 990.01(40), Wis. Stats. (1993-94), which provides that "state" is states of the United States, including the District of Columbia, the Commonwealth of Puerto Rico, and the several territories organized by Congress. The exception is that in sec. 77.53(16), Wis. Stats. (1993-94), which allows a credit for sales tax paid to another state, "state" means states of the United States, including the District of Columbia, but not including the Commonwealth of Puerto Rico or the several territories organized by Congress.

Example 1: Company A purchased building materials in Puerto Rico, which it will use in real property

construction in Wisconsin. Company A paid Puerto Rico sales tax on the materials. Company A is not allowed a credit on its Wisconsin sales and use tax return under sec. 77.53(16), Wis. Stats. (1993-94), for sales tax it paid to Puerto Rico on building materials used in Wisconsin which are subject to Wisconsin use tax. Section 77.53(16), Wis. Stats. (1993-94), specifically excludes from the definition of state, Puerto Rico and other territories organized by Congress.

Example 2: A nonresident of Wisconsin purchased an aircraft in England and paid all appropriate England taxes. The aircraft is hangered in Wisconsin. The storage, use, or consumption of the aircraft in Wisconsin is subject to Wisconsin use tax. The exemption under sec. 77.53(17r), Wis. Stats. (1993-94), does not apply because the aircraft was not purchased in another "state" as defined in sec. 990.01(40), Wis. Stats. (1993-94). □

4 Manufacturing — Equipment and Consumables Used in Quality Control

Statutes: Section 77.54(2) and (6)(a), Wis. Stats. (1993-94)

Wis. Adm. Code: Sections Tax 11.39 and 11.40, April 1994 Register, and Tax 11.41, March 1991 Register

Background: Section 77.54(6)(a), Wis. Stats. (1993-94), exempts from Wisconsin sales or use tax, machinery and equipment used exclusively and directly by a manufacturer in manufacturing tangible personal property.

Section 77.54(2), Wis. Stats. (1993-94), exempts from Wisconsin sales or use tax, tangible personal property which is consumed or destroyed or loses its identity in the manufacture of

tangible personal property destined for sale.

Section Tax 11.39(2), Wis. Adm. Code, provides that testing or inspection throughout the production cycle is a part of a step-by-step manufacturing process.

Facts: Company A manufactures tangible personal property for sale to customers. At several points in the step-by-step manufacturing process, incomplete and completed products are removed from production and taken to Company A's quality control department for testing. Company A's quality control department is exclusively devoted to testing completed and incomplete products from its manufacturing process.

The quality control department tests the products with a variety of equipment. X-ray imaging of certain products is included in the testing program. Company A develops the X-ray film itself.

Question 1: Are Company A's purchases of equipment for its quality control department subject to Wisconsin sales or use tax?

Answer 1: No. The equipment used by the quality control department is exempt from Wisconsin sales or use tax under sec. 77.54(6)(a), Wis. Stats. (1993-94). The equipment is used exclusively and directly in the step-by-step manufacture of tangible personal property.

Question 2: Are Company A's purchases of X-ray film used in its quality control department and chemicals used to develop the film subject to Wisconsin sales or use tax?

Answer 2: No. The X-ray film used in Company A's quality control department and the chemicals used to develop the film are exempt from Wisconsin sales or use tax. Since the

X-ray testing is part of the manufacturing process and the film and chemicals are consumed or destroyed in that testing, the exemption under sec. 77.54(2), Wis. Stats. (1993-94), applies.

Question 3: Are Company A's purchases of equipment used in its quality control department to develop the X-ray film subject to Wisconsin sales or use tax?

Answer 3: No. The equipment used to develop the X-ray film is exempt from Wisconsin sales or use tax under sec. 77.54(6)(a), Wis. Stats. (1993-94), as machinery and equipment used exclusively and directly in manufacturing. The developing of the film is an integral part of the testing process which has been determined to be manufacturing. □

5 Manufacturing — Testing Incoming Parts for Quality

Statutes: Section 77.54(6)(a), (6m), and (6r), Wis. Stats. (1993-94)

Wis. Adm. Code: Sections Tax 11.39 and 11.40, April 1994 Register

Background: Section 77.54(6)(a), Wis. Stats. (1993-94), exempts from Wisconsin sales and use tax, the purchase of machines and specific processing equipment used exclusively and directly by a manufacturer in manufacturing tangible personal property.

Section Tax 11.39(2), Wis. Adm. Code, provides that manufacturing includes the assembly of finished units of tangible personal property and packaging when it is a part of an operation performed by the producer of the product or by another on the producer's behalf. It includes the conveyance of raw materials and supplies from the plant inventory to the work point of the same plant,

conveyance of work in progress directly from one manufacturing operation to another in the same plant, and conveyance of finished products to the point of first storage on the plant premises. It includes testing or inspection throughout the production cycle.

Facts: Manufacturer A purchases tangible personal property (i.e., parts) which will become components of products made in its manufacturing process. The receiving department sends the parts to Manufacturer A's quality control department. The parts are tested by the quality control department to verify that the vendor made them to Manufacturer A's specifications.

Parts that fail to meet Manufacturer A's specifications are returned to the vendor. Those that are within specifications are sent to the inventory department for eventual withdrawal by the production department. The production department withdraws the parts when they are needed in the manufacturing process.

The quality control department is also responsible for testing products throughout the production cycle.

The quality control department uses a variety of equipment to test the items.

Question: Are Manufacturer A's purchases of equipment used in its quality control department subject to Wisconsin sales or use tax?

Answer: Yes. The testing equipment used in Manufacturer A's quality control department to test incoming parts and work in progress is subject to Wisconsin sales or use tax. Since some of the testing performed takes place prior to conveyance of parts from plant inventory to the work point, the testing equipment is not used exclusively in the manufacturing process. Therefore, the testing equip-

ment is not exempt from Wisconsin sales or use tax under sec. 77.54(6)(a), Wis. Stats. (1993-94).

Note: In *Johnsonville Sausage, Inc. v. Wisconsin Department of Revenue* (CCH 202-257, November 11, 1982), the Wisconsin Tax Appeals Commission held that scales used in the taxpayer's inspection area to weigh meat as it entered the plant, were not used exclusively and directly in manufacturing and, therefore, were not exempt from Wisconsin sales or use tax. □

6 Meals, Food, Food Products, and Beverages Given Away

Statutes: Sections 77.51(5), (13)(e), and (14)(k), 77.52(1), (2)(a)1 and (2m)(a), and 77.54(6)(b) and (20), Wis. Stats. (1993-94)

Wis. Adm. Code: Sections Tax 11.28(2)(intro.) and 11.48(2)(e), March 1991 Register, Tax 11.51(1), December 1992 Register, and Tax 11.67(1), November 1993 Register

Background: Section 77.51(13)(e), Wis. Stats. (1993-94), defines "retailer" to include "A person selling tangible personal property to a service provider who transfers the property in conjunction with the selling, performing or furnishing of any service and the property is incidental to the service..."

Section 77.51(14)(k), Wis. Stats. (1993-94), defines "sale at retail" to include "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."

Section 77.52(2m)(a), Wis. Stats. (1993-94), provides in part that with respect to taxable lodging services, no part of the charge for the service may be deemed a sale or rental of tangible personal property if the property transferred by the service provider is incidental to the selling, performing, or furnishing of the service.

Section 77.51(5), Wis. Stats. (1993-94), defines "incidental" to mean "... depending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal; something incidental to the main purpose of the service. Tangible personal property transferred by a service provider is incidental to the service if the purchaser's main purpose or objective is to obtain the service rather than the property, even though the property may be necessary or essential to providing the service."

Section Tax 11.28(2)(intro.), Wis. Adm. Code, provides that persons who make gifts of tangible personal property or distribute tangible personal property gratis to others are the consumers of the property.

Section Tax 11.48(2)(e), Wis. Adm. Code, provides that hotels, motels, and inns are the consumers of all items used to conduct their business.

Section Tax 11.67(1), Wis. Adm. Code, provides that when a transaction involves the transfer of tangible personal property along with the performance of a service, the true objective of the purchaser shall determine whether the transaction is a sale of tangible personal property or the performance of a service with the transfer of property being merely incidental to the performance of the service.

Section 77.54(20)(intro.), Wis. Stats. (1993-94), provides an exemption from Wisconsin sales or use tax for "the gross receipts from the sales of, and the storage, use or other consumption of, food, food products and beverages for human consumption."

Section 77.54(20)(b), Wis. Stats. (1993-94), provides that "food, food products, and beverages" do not include:

- A. Medicines, tonics, vitamins, and medicinal preparations in any form
- B. Fermented malt beverages
- C. Intoxicating liquors
- D. Soda water beverages, bases, concentrates, and powders intended to be reconstituted by consumers to produce soft drinks, and fruit drinks and ades (such as lemonade and orangeade) not defined as fruit juices.

Section 77.54(20)(c), Wis. Stats. (1993-94), provides that gross receipts from the following sales are taxable:

- A. Meals, food, food products, and beverages sold for direct consumption on the premises (except for sales at hospitals, etc.)
- B. Sales of the following items for off-premise consumption:
 1. Meals and sandwiches (heated or not)
 2. Heated food or heated beverages
 3. Soda fountain items such as sundaes, milk shakes, malts, ice cream cones, and sodas
 4. Candy, chewing gum, lozenges, popcorn and confections.

Section 77.54(6)(b), Wis. Stats. (1993-94), provides an exemption from Wisconsin sales or use tax for containers, labels, sacks, cans, boxes, drums, bags, or other packaging and shipping materials for use in packing, packaging, or shipping tangible personal property, if such items are used by the purchaser to transfer merchandise to customers. Also exempt are packaging and shipping materials for use in packing, packaging, or shipping meat or meat products, regardless of whether such items are used to transfer merchandise to customers.

Facts and Questions 1a - 1c: Motel A provides a free breakfast with the purchase of lodging for one night. Motel A purchases fruit, milk, cereal, bakery goods (rolls, bagels, muffins, bread), ground coffee beans, frozen juice, napkins, plastic utensils, and paper plates and cups from a vendor. Motel A prepares the coffee and juice, and the food and beverages are placed on a table in the lobby. Motel A's customers may take as much or as little as they want of the food and beverage items.

Question 1a: When Motel A transfers food and beverages to its customers with the sale of lodging, is Motel A:

- selling food and beverages; or
- selling lodging, with the transfer of the food and beverages being incidental to the lodging?

Answer 1a: Motel A is selling lodging, which is taxable under sec. 77.52(2)(a)1, Wis. Stats. (1993-94). The transfer of food and beverages is incidental to the lodging because a person's primary objective when purchasing lodging services is to have a place to stay, rather than to purchase food or beverages (sec. 77.51(5), Wis. Stats. (1993-94)).

Since Motel A is not selling the food and beverages, it is the consumer of the food and beverages (sec. 77.52(2m)(a), Wis. Stats. (1993-94)).

Question 1b: Are Motel A's purchases of the following food, food products, and beverages subject to Wisconsin sales or use tax?

- Fruit
- Milk
- Cereal
- Bakery goods (rolls, bagels, muffins, and bread)
- Ground coffee beans
- Frozen juice

Answer 1b: No. Motel A's purchases of these items are exempt from Wisconsin sales or use tax under sec. 77.54(20)(intro.), Wis. Stats. (1993-94), as food, food products, and beverages for human consumption that are not for consumption on the premises of the vendor.

Question 1c: Are Motel A's purchases of the following non-food items subject to sales or use tax?

- Napkins
- Plastic utensils
- Paper plates and cups

Answer 1c: Yes. Motel A must pay sales or use tax on its purchases of these items because they are tangible personal property and no exemption applies (sec. 77.52(1), Wis. Stats. (1993-94)).

Facts and Question 2: Tavern A provides pretzels, potato chips, dry roasted peanuts, popped popcorn and napkins to its customers at no charge.

Are Tavern A's purchases of pretzels, potato chips, dry roasted peanuts,

popped popcorn, and napkins subject to Wisconsin sales or use tax?

Answer 2: Tavern A is the consumer of pretzels, potato chips, dry roasted peanuts, popped popcorn, and napkins provided to customers without charge (sec. 77.51(14)(k), Wis. Stats. (1993-94), and sec. Tax 11.28(2)(intro.), Wis. Adm. Code).

Tavern A's purchases of pretzels, potato chips, and dry roasted peanuts are not subject to Wisconsin sales or use tax because they are exempt food items (sec. 77.54(20)(intro.), Wis. Stats. (1993-94)). Tavern A's purchase of popcorn (whether popped or unpopped) is not exempt from Wisconsin sales or use tax (sec. 77.54(20)(c)2.d, Wis. Stats. (1993-94)). Tavern A's purchase of napkins is subject to Wisconsin sales or use tax under sec. 77.52(1), Wis. Stats. (1993-94), because the napkins are tangible personal property and no exemption applies.

Facts and Question 3: Wholesale Distributor A purchases frozen sausage and pepperoni pizzas, bakes them, and provides samples to customers in grocery stores. Wholesale Distributor A transfers the pizza samples to customers on napkins.

Are Wholesale Distributor A's purchases of frozen sausage and pepperoni pizzas and napkins subject to Wisconsin sales or use tax?

Answer 3: Wholesale Distributor A is the consumer of the frozen sausage and pepperoni pizzas and napkins it provides to customers (sec. 77.51(14)(k), Wis. Stats. (1993-94), and sec. Tax 11.28(2)(intro.), Wis. Adm. Code).

Wholesale Distributor A's purchases of the frozen pizzas are not subject to Wisconsin sales or use tax because the frozen pizzas are exempt food items (sec. 77.54(20)(intro.), Wis.

Stats. (1993-94)). Wholesale Distributor A's purchase of napkins is not subject to Wisconsin sales or use tax under sec. 77.54(6)(b), Wis. Stats. (1993-94), because the napkins are used to transfer a meat product. (**Caution:** If the pizzas are vegetarian or cheese, Wholesale Distributor A's purchase of the napkins is subject to Wisconsin sales or use tax.)

Facts and Question 4: Restaurant A provides free meals to its employees. In providing the free meals, Restaurant A uses food and beverage items (e.g., hamburger patties, buns, catsup, mustard, onions, and soda) and disposable items (e.g., napkins, paper wrappers, place mats, and plastic utensils) from its inventory.

Note: It is assumed that Restaurant A is not selling the meals to its employees because all of the following conditions are met: 1) no consideration is given by the employee for the meal because the employee does not pay cash for the meal, 2) no deduction is made from the employee's wages for the meals, 3) the employee does not receive the meals in lieu of cash to bring the employee's compensation up to the legal minimum wage, and 4) the employee does not have the option to receive cash for the meals not consumed (sec. Tax 11.87(2)(i), Wis. Adm. Code). Restaurant A is the consumer of all the food, beverage, and disposable items (sec. 77.51(14)(k), Wis. Stats. (1993-94), and sec. Tax 11.28(2)(intro.), Wis. Adm. Code).

Are Restaurant A's purchases of the food, beverage, and disposable items subject to Wisconsin sales or use tax?

Answer 4: Restaurant A's purchases of the hamburger patties, buns, catsup, mustard, and onions are not subject to Wisconsin sales or use tax because these items are exempt food items not for direct consumption on the vendor's premises (sec.

77.54(20)(intro.), Wis. Stats. (1993-94)). Restaurant A's purchase of soda is subject to Wisconsin sales or use tax because soda is not an exempt food item (sec. 77.54(20)(b), Wis. Stats. (1993-94)). Restaurant A's purchase of napkins, placemats, and plastic utensils is subject to tax under sec. 77.52(1), Wis. Stats. (1993-94), because they are tangible personal property and no exemption applies. Restaurant A's purchase of paper wrappers used to wrap the hamburgers is exempt from tax under sec. 77.54(6)(b), Wis. Stats. (1993-94), because they are used to package a meat product.

Facts and Question 5: Restaurant A provides a coupon to a customer for free french fries because the customer had to wait too long for the food that was ordered. When the customer redeems the coupon, french fries, napkins, and disposable containers are transferred to the customer without charge.

Are Restaurant A's purchases of french fries, napkins, and disposable containers subject to Wisconsin sales or use tax?

Answer 5: Restaurant A is the consumer of all of these items (sec. 77.51(14)(k), Wis. Stats. (1993-94), and sec. Tax 11.28(2)(intro.), Wis. Adm. Code).

Restaurant A's purchase of french fries is not subject to Wisconsin sales or use tax because french fries are an exempt food item (sec. 77.54(20)(intro.), Wis. Stats. (1993-94)). Restaurant A's purchases of napkins and disposable containers are subject to Wisconsin sales or use tax under sec. 77.52(1), Wis. Stats. (1993-94), because they are tangible personal property and no exemption applies.

Facts and Question 6: Motel B provides a free breakfast with the

purchase of a night's lodging. Motel B provides the "guest" with a coupon for a free breakfast at the restaurant located in Motel B. The restaurant is a separate legal entity from Motel B. The restaurant charges Motel B for the breakfast coupons redeemed by Motel B's guests.

Are the sales of the breakfasts by the restaurant to Motel B subject to Wisconsin sales or use tax?

Answer 6: Motel B is the consumer of the breakfasts purchased from the restaurant and provided to the guests without charge (secs. 77.51(5) and 77.52(2m)(a), Wis. Stats. (1993-94)). Motel B is a retailer of lodging, and the breakfasts transferred to customers are incidental to the lodging provided by Motel B.

The restaurant is the retailer of the breakfasts (sec. 77.51(13)(e), Wis. Stats. (1993-94)). The restaurant's sales of the breakfasts to Motel B are taxable under sec. 77.54(20)(c), Wis. Stats. (1993-94), because they are sales for direct consumption on the premises of the restaurant (i.e., the retailer of the breakfasts).

Facts and Questions 7a & 7b: Bank A offers free pizza slices and popcorn to customers who enter the bank. Bank A purchases frozen pizzas and unpopped popcorn from Grocery Store B and heats the pizza and pops the popcorn in the bank's kitchen. In some cases, the pizza offered to customers is purchased prepared and delivered by Pizza Company C.

Question 7a: Are Bank A's purchases of frozen pizza and popcorn subject to Wisconsin sales or use tax?

Answer 7a: Bank A is the consumer of the frozen pizza and popcorn (sec. 77.51(14)(k), Wis. Stats. (1993-94), and sec. Tax 11.28(2)(intro.), Wis. Adm. Code).

Bank A's purchase of the frozen pizza is not subject to Wisconsin sales or use tax because the frozen pizza is an exempt food item (sec. 77.54(20)(intro.), Wis. Stats. (1993-94)). Bank A's purchase of popcorn is subject to Wisconsin sales or use tax under sec. 77.54(20)(c)2.d., Wis. Stats. (1993-94), because popcorn is not an exempt food item.

Question 7b: Is Pizza Company C's sale of the prepared pizza to Bank A subject to Wisconsin sales or use tax?

Answer 7b: Bank A is the consumer of the pizza (sec. 77.51(14)(k), Wis. Stats. (1993-94), and sec. Tax 11.28(2)(intro.), Wis. Adm. Code).

Pizza Company C's sale of the prepared pizza to Bank A is subject to Wisconsin sales or use tax under sec. 77.54(20)(c)2.b., Wis. Stats. (1993-94), because the prepared pizza is a heated food. □

7 Sales of Education Services and Course Materials

Statutes: Sections 77.51(13g) and (15)(a), 77.52(1) and (2)(a), and 77.53(1) and (2), Wis. Stats. (1993-94)

Wis. Adm. Code: Sections Tax 11.67(1) and (2), November 1993 Register and Tax 11.97, March 1991 Register

Facts: Company ABC, a Wisconsin corporation, is in the business of providing education courses and course materials in Wisconsin. The majority of the courses and course materials are purchased from Compa-

ny XYZ, an out-of-state corporation, which is registered to collect Wisconsin sales or use taxes because it has nexus in Wisconsin. Company ABC charges persons a fee to attend the courses in Wisconsin.

The various types of courses and course materials Company XYZ sells to Company ABC are as follows:

A. *Type A Courses:* Company XYZ will provide an instructor and participant manuals to Company ABC for a particular course. Company ABC will pay Company XYZ \$200 per participant in the course, \$1,000 for the instructor furnished by Company XYZ, and actual travel expenses incurred by the instructor. Company ABC charges each participant in the course \$350 to attend.

B. *Type B Courses:* Company XYZ will provide for a specific charge an instructor manual and participant manuals to Company ABC for a particular course. Company ABC provides the instructor. Company ABC charges each participant \$250 to attend.

All course materials provided by Company XYZ to Company ABC are to be used only in the courses provided. If a participant does not attend after course materials have been sent to Company ABC, the materials must be returned to Company XYZ.

Question 1: Is the charge by Company ABC to participants attending its Type A and Type B continuing education courses subject to Wisconsin sales tax?

Answer 1: No. Company ABC is providing an education service which is not a service specifically provided for as being subject to Wisconsin sales tax under sec. 77.52(2)(a), Wis. Stats. (1993-94).

Question 2: Is Company XYZ's charge to Company ABC for providing Type A courses (i.e., providing an instructor and participant manuals) subject to Wisconsin sales tax?

Answer 2: No. For Type A courses, Company XYZ is selling an education service to Company ABC when it provides an instructor and manuals, which is not a service specifically provided for as being subject to tax under sec. 77.52(2)(a), Wis. Stats. (1993-94). (Note: Company XYZ is the consumer of the participant manuals used in providing the education services to Company ABC and is subject to Wisconsin sales or use tax on manuals used to provide education services in Wisconsin.)

Question 3: Is Company XYZ's charge to Company ABC for providing Type B courses, (i.e., providing only manuals) subject to Wisconsin sales tax?

Answer 3: Yes. The sale of manuals by Company XYZ to Company ABC is subject to Wisconsin sales or use tax. Company ABC is the consumer of manuals it transfers incidentally in providing nontaxable education services to participants. Company XYZ is a retailer under sec. 77.51(13)(e), Wis. Stats. (1993-94), and is therefore subject to sales tax on its sales of the manuals to the consumer of those manuals (Company ABC). □



Private Letter Rulings

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

The number assigned to each ruling is interpreted as follows: The "W" is for "Wisconsin," the first two digits are the year the ruling becomes available for publication (80 days after the ruling is issued to the taxpayer), the next two digits are the week of the year, and the last three digits are the number in the series of rulings issued that year. The date following the 7-digit number is the date the ruling was mailed to the requestor.

Certain information contained in the ruling that could identify the taxpayer requesting the ruling has been deleted. Wisconsin Publication 111, "How to Get a Private Letter Ruling From the Wisconsin Department of Revenue," contains additional information about private letter rulings.

The following private letter rulings are included:

Sales and Use Taxes

Realty vs. personality —
communication equipment
W9520004 (p. 28)

Services subject to the tax —
bathtub refinishing
W9514003 (p. 31)

✳ **W9520004**, February 28, 1995

Type Tax: Sales and Use

Issue: Realty vs. personality — communication equipment

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

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

This letter responds to your client's request for a private letter ruling.

Facts

XYZ Company (XYZ) is in the business of installing fiber-optic cable networks for computers, telephones, and other similar technology equipment. The majority of XYZ's clients are commercial although, on occasion, XYZ may contract with other entities.

XYZ is a specialist in voice, data, and fiber optic networks. XYZ designs, implements, and installs state of the art communications networks for large and small businesses, specializing in new installation, as well as reuse of existing cabling to retrofit with a new PBX. The process includes installing cables both inside and outside walls. Installed cabling is subject to being removed with a computer that is being replaced, for example.

XYZ will update existing communications records and provide new records as part of its service.

XYZ will bid on jobs in different manners. Bids may be for

- a lump sum, which includes material and labor
- material and labor separately stated
- labor only

Examples of some of the jobs engaged in by XYZ are as follows:

Example 1:

- Tone and tag phones, including documenting all information
- Install necessary cable rack above new frames
- Install new frames per drawings
- Hardwire 360 pair PX type cables for new switch wallfield and label all cables. Use eight 110 C3s and one 110 C4 for final termination for each cable (assuming bays do not come pre-wired)
- Terminate 8,400 pairs to new wallfield
- Y-tap 8,400 existing house pairs to new cable and re-label
- Cut over after hours
- Materials will be provided by customer

Example 2:

- Run 2 category five plenum 4-pair cables from new IDF to 14 locations per blueprint

- Run one category three plenum 4-pair cable from new IDF to 12 locations per blueprint
- Terminate 28 category five cables to RJ45 category five jacks
- Terminate 12 category three cables to RJ45 category three jacks
- Terminate 28 category five cables to category five JP-patch panel
- Terminate 12 category three cables to 110-AB2-100 terminal block
- Run a 50 pair plenum cable from the 7th floor terminal to the 7th floor computer room
- Terminate both ends of the 50 pair cable to 110-AB2-100 terminal blocks
- Run a 50 pair plenum cable from the basement terminal to the new IDF on 1st floor
- Terminate both ends of the 50 pair cable to 110-AB2-100 terminal blocks
- Test out 50 existing pairs for continuity
- Test all cables for continuity
- Inspect products upon completion and provide modifications if necessary
- All materials provided and labor are to be set forth separately on the invoice

Request

You ask what the proper sales and use tax treatment is with respect to the sales by XYZ to customers of property and services described above.

Ruling

Sales by XYZ

1. The charge for the sale, installation, retrofitting, or inspection in connection with communications networks in business, industrial, or commercial buildings, schools, and hospitals is subject to Wisconsin sales or use tax.
2. The charge to customers for the sale, installation, retrofitting, or inspection up to an outlet in connection with communications networks in apartment buildings, convalescent homes, and similar residential buildings is **not** subject to Wisconsin sales or use tax.
3. The charge to customers for the sale, installation, retrofitting, or inspection from an outlet to the communications equipment (e.g., telephone, computer) in connection with communications networks in apartment buildings, convalescent homes, and similar residential buildings is subject to Wisconsin sales or use tax.

Purchases by XYZ

1. Cable and similar materials purchased by XYZ and transferred to customers with the installation, retrofitting, and inspection of communications networks in business, industrial, or commercial buildings, schools, and hospitals may be purchased by XYZ without Wisconsin sales or use tax as property for resale.
2. Cable and similar materials purchased by XYZ and transferred to customers with the installation, retrofitting, and inspection up to an outlet in connection with

communications networks in apartment buildings, convalescent homes, and similar residential buildings are subject to Wisconsin sales or use tax when purchased by XYZ.

3. Cable and similar materials purchased by XYZ and transferred to customers with the installation, retrofitting, and inspection from an outlet to the communications equipment in connection with communications networks in apartment buildings, convalescent homes, and similar residential buildings may be purchased by XYZ without Wisconsin sales or use tax as property for resale.

Analysis

1. *Sale, Installation, Retrofitting, and Inspection in Business, Industrial, or Commercial Buildings, Schools, and Hospitals*

Sales to customers by XYZ

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 77.52(2)(a)10, Wis. Stats. (1991-92), imposes a Wisconsin sales tax on the repair, service, alteration, fitting, cleaning, painting, coating, towing, inspection, and maintenance of tangible personal property.

Section Tax 11.68(6)(a)2, Wis. Adm. Code (April 1994 Register), provides that communication equipment in business, industrial, or commercial buildings, schools, and hospitals retains its character as tangible personal property when installed.

The cabling and related materials sold by XYZ in connection with communications networks are tangible personal property in business, industrial, or commercial buildings, schools, and hospitals. Therefore the sale of the cable in such buildings is subject to Wisconsin sales or use tax under sec. 77.52(1), Wis. Stats. (1991-92). Installation, retrofitting, and inspection of the cable in such buildings is a service subject to tax under sec. 77.52(2)(a)10, Wis. Stats. (1991-92).

Purchases by XYZ

Section 77.51(14)(intro.), Wis. Stats. (1991-92), defines "retail sale," for purposes of imposing Wisconsin sales or use tax, as 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.

The tangible personal property (e.g., cable) purchased by XYZ for the installation, retrofitting, and inspection of communications networks in business, industrial, or commercial buildings, schools, and hospitals is purchased by XYZ for resale and, therefore, is not subject to sales or use tax under sec. 77.52(1), Wis. Stats. (1991-92).

As provided in sec. 77.52(13) and (14), Wis. Stats. (1991-92), XYZ should provide its supplier with an exemption certificate to purchase tangible personal property without Wisconsin sales or use tax as property for resale.

2. *Sale, Installation, Retrofitting, and Inspection in Apartment Buildings, Convalescent Homes, and Similar Residential Buildings*

Sales to customers by XYZ

The performance of a real property construction activity is not a transaction subject to the sales tax law (except landscaping). Consequently, the contractor's charges for labor and the materials incorporated into the real property or otherwise consumed in performing the activity are not subject to sales tax to the owner.

Under sec. Tax 11.68(6)(a)2, Wis. Adm. Code (April 1994 Register), communication equipment affixed to the real estate in apartment buildings, convalescent homes, or other residential buildings is not considered to retain its character as tangible personal property when installed and, therefore, is considered real property.

Cable from the outlet point to the communications equipment (e.g., telephone, computer) retains its character as tangible personal property when installed. If there is no outlet point between the power source and the communications equipment, the entire amount of cable is considered to be a real property improvement.

Therefore, the sale of the cable and related materials and charges for installation, retrofitting, and inspection of the cable in such buildings by XYZ up to the outlet point is not subject to Wisconsin sales or use tax under secs. 77.52(1) and 77.52(2)(a)10, Wis.

Stats. (1991-92). However, the sale of the cable and related materials and charges for installation, retrofitting, and inspection of the cable in such buildings by XYZ from the outlet point to the communications equipment is subject to Wisconsin sales or use tax under secs. 77.52(1) and 77.52(2)(a)10, Wis. Stats. (1991-92).

Purchases by XYZ

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

XYZ is the consumer of cable and related materials it uses to install, retrofit, and inspect communications equipment up to the outlet point in apartment buildings, convalescent homes, or other residential buildings (i.e., real property construction activities). Therefore, XYZ's purchases of such cable and related materials are subject to Wisconsin sales or use tax. Purchases by XYZ of cable and related materials transferred to customers with the installation, retrofitting, and inspection from the outlet point to the communications equipment in connection with communications networks in apartment buildings, convalescent homes, or other residential buildings may be purchased by XYZ without tax as property for resale under sec. 77.51(14)(intro.), Wis. Stats. (1991-92). □

✴ **W9514003**, January 17,
1995

Type Tax: Sales and Use

Issue: Services subject to the tax —
bathtub refinishing

Statutes: Section 77.52(2)(a)10,
Wis. Stats. (1991-92)

This letter responds to your request
for a private letter ruling regarding
the Wisconsin sales and use tax
status of bathtub refinishing services.

Facts

Company A is engaged in the busi-
ness of refinishing bathtubs for its
customers. The Internal Revenue
Service has issued an opinion that
refinishing a bathtub is a capital
improvement.

Ruling Request

You have requested a ruling stating
that the refinishing of a bathtub is
not subject to Wisconsin sales tax.

Ruling

The service of bathtub refinishing is
subject to Wisconsin sales or use tax
under sec. 77.52(2)(a)10, Wis. Stats.
(1991-92).

Analysis

Section 77.52(2)(a)10, Wis. Stats.,
imposes Wisconsin sales tax on the
gross receipts from the repair, ser-
vice, alteration, fitting, cleaning,
painting, coating, towing, inspection
or maintenance of tangible personal
property.

For purposes of imposing sales tax
on the service, alteration, repair,
etc., of tangible personal property,
sec. 77.52(2)(a)10, Wis. Stats.,
specifically lists bathroom fixtures
among the items deemed to retain
their character as tangible personal
property. The refinishing of a bath-
tub is a service or alteration to the
bathtub and is subject to sales tax.
The tax applies to refinishing bath-
tubs, even though for federal and
state income tax purposes the refin-
ishing of a bathtub may be consid-
ered a capital improvement. □