Number 98 July 1996

Wisconsin TAX BULLETIN

FOCUS ON . . .

New Sales Tax Publication – Hotels

See article on this page and publication on pages 39 to 48.

New Sales and Use Tax Exemption Certificate

A new exemption certificate is available for use by federal and Wisconsin governmental units. It may be used when purchasing tangible personal property or taxable services that are exempt from Wisconsin state, county, and stadium sales and use taxes and local exposition taxes. A copy of this new certificate, Government Sales and Use Tax Exemption Certificate (Form S-209), appears on pages 37 and 38 of this Bulletin.

A retailer making exempt sales to a federal or Wisconsin governmental unit may accept Form S-209 as proof that a sale to the governmental unit is exempt from Wisconsin state, county, and stadium sales and use taxes and local exposition taxes. This certificate may be accepted in lieu of a purchase order or similar written document identifying the governmental unit as the purchaser.

Form S-209 is available from any Department of Revenue office. □

Focus on Publications: Hotels, Motels, and Other Lodging Providers

When must a hotel charge Wisconsin sales tax? When does a hotel owe Wisconsin use tax?

Answers to these questions and more can be found in the Department of Revenue's new Publication 219, *Hotels, Motels, and Other Lodging Providers – How Do Wisconsin Sales and Use Taxes Affect Your Operation?*. A copy of this publication appears on pages 39 to 48 of this Bulletin. The publication is also available from any Department of Revenue office, or by calling the department's Fax-a-form number, (608) 261-6229, from a fax machine and entering retrieval number 10219. □

Do You Have Ideas or Suggestions for 1996 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 mail them to Wisconsin Department of Revenue, Administration Technical Services, P.O. Box 8933, Madison, WI 53708-8933, or fax them to (608) 261-6240. Your suggestions could help make "tax time" easier for taxpayers and practitioners. □

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, nonprofit organizations, or businesses in general.
- What to expect in an audit.
- Common errors discovered in audits.
- Homestead credit.
- Farmland preservation credit.
- Manufacturing property assessment.

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. □

In This Issue

New Laws, Other Sales/Use Tax Changes Explained

The June 1996 *Sales and Use Tax Report* (2-96), includes information on the following:

- Sales and use tax law changes.
- Changes to the sales and use tax return (Form ST-12) to reflect the stadium tax.
- Stadium tax reporting requirement reminder.

This Report was sent in late June to all persons registered for Wisconsin sales and use tax purposes. A copy of the Report appears on pages 49 and 50 of this Bulletin. □

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Fees Required for Business Tax Registration

Persons applying for certain permits or certificates issued by the Department of Revenue may be required to pay a one-time Business Tax Registration (BTR) fee of $20. The BTR fee applies to most permits or certificates relating to withholding, sales and use, fuel, alcohol beverage, cigarette, and tobacco products taxes. The $20 BTR fee is **not** required for obtaining:

- sales and use tax certificates of exempt status.
- consumer's use tax registration certificates.
- local exposition district tax permits.
- medicinal alcohol permits.
- sacramental wine permits.
- tobacco products salesperson permits.
- fuel transporter permits.

The $20 BTR fee does not apply if a person already holds a permit or certificate for which the $20 BTR fee was previously paid, or if, as of December 31, 1995, the person held any active permit or certificate that is subject to the BTR fee. The $20 BTR fee is also not required for out-of-state employers who are not required to withhold Wisconsin taxes but apply for a Wisconsin employer identification number for the conveniences of their employes.

Did You Pay the $20 BTR Fee?

Notices of Amount Due are sent to registrants who do not respond to a letter informing them of unpaid BTR fees. The amount due is generally the $20 fee less any amount paid with the application (e.g., $5 for a seller's permit). As with other Notices of Amount Due, if the amount due is not paid by the due date shown on the Notice, the account will become delinquent and will be subject to a $35 delinquent tax collection fee.

If you receive a Notice of Amount Due for Business Tax Registration fees, and you feel you do not owe

this amount, be sure to contact the department **before** the due date shown on the Notice, so the matter can be resolved before any delinquent tax collection fee is imposed. Use the address or phone number listed on the Notice. Contact the department if, for example, you already paid a $20 BTR fee, or as of December 31, 1995, you held an active permit or certificate, of a type that is subject to the $20 BTR fee.

Note: See *Wisconsin Tax Bulletin* 95 (January 1996), page 9, for more information about Business Tax Registration, including alcohol beverage fees and renewals. □

Did You Know?

- You may have a state use tax liability.
- The most frequent adjustments made in audits involve unreported use tax.

You may owe Wisconsin state use tax if you buy items and services that will be used, stored, or consumed in Wisconsin, without paying Wisconsin state sales tax.

A credit is allowed against Wisconsin state use tax for the state sales or use tax correctly paid to another state on the same items or services.

Examples of use tax liabilities

- You buy items from an out-of-state mail order company. The vendor ships the items to you in Wisconsin. The vendor does not charge you any sales or use tax. You owe Wisconsin state use tax.
- You buy items exempt from sales tax for the purpose of resale. Later you take an item out of inventory for use in your business. You owe Wisconsin state use tax.
- You give taxable items as gifts to clients. If you did not pay sales or use tax on the purchase of the gifts, you owe Wisconsin state use tax. □

Automatic 4-Month Extension Expires August 15

If your 1995 Wisconsin and federal individual income tax returns were due April 15, 1996, 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, 1996. 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 1995 Wisconsin return, ordinarily due April 15, 1996, must be filed by August 15, 1996. In this situation, you should attach a statement to the 1995 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 1995 taxes by April 15, 1996, as a condition for receiving an extension of time to file your Wisconsin tax return.) □

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

□

Wisconsin Tax Bulletin Annual Index Available

Once each year the *Wisconsin Tax Bulletin* includes an index of materials that have appeared in past Bulletins. The latest index available appears in *Wisconsin Tax Bulletin* 96 (April 1996), pages 31 to 58, and

includes information for issues 1 (October 1976) to 95 (January 1996). □

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 fuels, 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 51 of this Bulletin. The order blank may also be used for subscribing to the *Wisconsin Tax Bulletin* and for ordering the Wisconsin Administrative Code. □

Nonfilers Nabbed

Accountant and attorney Gary May, 52, Madison, was sentenced in June 1996, on charges of failure to file Wisconsin income tax returns for 1993 and 1994. Dane County Judge Michael Torphy withheld sentence on the failure to file charge for 1993 and placed May on three years probation. During the period of probation he must file all returns when due. In addition, Judge Torphy fined May $1,500 on the failure to file charge for 1994.

During 1993 and 1994, May's income was from May Law Offices S.C. of Madison. According to the criminal complaint, May has not filed returns on time for 13 consecutive years.

Failure to file a Wisconsin income tax return when due is a crime punishable by up to nine months imprisonment and up to $10,000 in fines. In addition to the criminal penalties, Wisconsin law provides for substantial civil penalties on the civil tax liability. Assessment and collection of the taxes, penalties, and interest due follows conviction for criminal violations.

David L. Comey, 49, Elm Grove, was found guilty in April 1996, of five counts of failure to file state tax returns for corporations that he owned. In a plea agreement, Comey pled no contest to the charges and filed tax returns for the corporations, as well as his own income tax returns for 1991 and 1992. Dane County Circuit Court Judge P. Charles Jones placed Comey on probation for three years and ordered him to pay $1,000 in court costs.

At the time of the conviction, Comey was already incarcerated for past state tax violations, including failure to file income tax returns for 1989 and 1990 and filing fraudulent Wisconsin motor vehicle registrations. The fraudulent registrations were filed to evade the sales taxes due on Mercedes Benz automobiles that he had purchased in 1989 and 1991. In June 1995, he was ordered to serve fifteen months in jail related to those May 1993 convictions.

Self-employed businessman Richard Grenzer, 46, Palmyra, was charged in April 1996, with two counts of failing to file Wisconsin income tax returns. According to the criminal complaint, he lived in Brookfield when he failed to file 1992 and 1993 returns. He had gross income in excess of $109,000 during the two year period, with a tax owing of $5,816. If convicted on both counts, Grenzer faces up to 18 months in jail and up to $20,000 in fines.

Also in April, Bryan J. and Cynthia C. Gore, ages 42 and 38, Grafton, were charged with three counts each of failure to file 1992, 1993, and 1994 Wisconsin income tax returns. Bryan Gore & Associates, Inc., also in Grafton, was charged with two counts of failure to file 1993 and 1994 Wisconsin franchise tax returns.

According to the criminal complaint, during 1992, 1993, and 1994 the Gores' income exceeded $132,000, with a tax liability during the three years of $6,465. The complaint also alleges the gross income of Bryan Gore & Associates, Inc. was $638,000 for 1993 and $380,000 for 1994.

If convicted on all counts, Bryan Gore faces up to 45 months in jail and up to $50,000 in fines. Cynthia

Gore faces up to 27 months in jail and $30,000 in fines.

William Kritter, Hales Corners, was charged, also in April, with one count of filing a false return to evade sales tax. According to the criminal complaint, Kritter filed a false boat application that listed a boat with a full purchase price of $20,000 and showing a sales tax due of $1,100. The complaint alleges he actually paid $55,000 for the boat. Kritter paid additional tax, interest, and penalty in the amount of $3,484.25.

If convicted, Kritter faces up to 30 days in jail and up to $500 in fines. □

Tax Publications Available

The Department of Revenue publishes over 45 publications that are available, free of charge, to taxpayers or practitioners. To order any of the publications, write or call Wisconsin Department of Revenue, Forms Request Office, P.O. Box 8903, Madison, WI 53708-8903 (telephone (608) 266-1961).

Publications can also be ordered by fax, using the department's "Fax-a-form" system by calling (608) 261-6229 from a fax telephone.

Number	Title of Publication (and last revision date)
102	Wisconsin Tax Treatment of Tax-Option (S) Corporations and Their Shareholders (12/95)
103	Reporting Capital Gains and Losses for Wisconsin by Individuals, Estates, Trusts (10/95)
104	Wisconsin Taxation of Military Personnel (8/95)
106	Wisconsin Tax Information for Retirees (11/95)
109	Tax Information for Married Persons Filing Separate Returns and Persons Divorced in 1995 (10/95)
111	How to Get a Private Letter Ruling From the Wisconsin Department of Revenue (3/96)
112	Wisconsin Estimated Tax and Estimated Surcharge for Individual, Estates, Trusts, Corporations, Partnerships (8/94)
113	Federal and Wisconsin Income Tax Reporting Under the Marital Property Act (10/95)
114	Wisconsin Taxpayer Bill of Rights (3/96)
115	Wisconsin Federal/State Electronic Filing Handbook (9/95)
116	Income Tax Payments Are Due Throughout the Year (12/95)
117	Guide to Wisconsin Information Returns (6/95)
118	Electronic Funds Transfer Guide (4/96)
119	Limited Liability Companies (LLCs) (10/95)
120	Net Operating Losses for Individuals, Estates, and Trusts (11/95)
121	Reciprocity (10/95)
200	Sales and Use Tax Information for Electrical Contractors (10/95)
201	Wisconsin State and County Sales and Use Tax Information (9/95)
202	Sales and Use Tax Information for Motor Vehicle Sales, Leases, and Repairs (6/96)
203	Sales and Use Tax Information for Manufacturers (12/94)
205	Do You Owe Wisconsin Use Tax? (Individuals) (9/95)
206	Sales Tax Exemption for Nonprofit Organizations (9/90)
207	Sales and Use Tax Information for Contractors (2/96)
210	Sales and Use Tax Treatment of Landscaping (5/94)
211	Sales and Use Tax Information for Cemetery Monument Dealers (10/91)
212	Businesses: Don't Forget About Use Tax (7/94)
213	Travelers: Don't Forget About Use Tax (3/93)
214	Do You Owe Wisconsin Use Tax? (Businesses) (9/93)
216	Filing Claims for Refund of Sales or Use Tax (9/95)
217	Auctioneers — How Do Wisconsin Sales and Use Taxes Affect Your Operations? (3/96)
218	Refund Interception Guide for Counties and Municipalities (5/96)
219	Hotels, Motels, and Other Lodging Providers — How Do Wisconsin Sales and Use Taxes Affect Your Operations? (6/96)
400	Wisconsin's Temporary Recycling Surcharge (12/95)
410	Local Exposition Taxes (11/94)
500	Tax Guide for Wisconsin Political Organizations and Candidates (9/95)
501	Field Audit of Wisconsin Tax Returns (2/96)
502	Do You Have Wisconsin Tax Questions? (10/95)
503	Wisconsin Farmland Preservation Credit (12/95)

504	Directory for Wisconsin Department of Revenue (10/95)
505	Taxpayers' Appeal Rights of Office Audit Adjustments (10/95)
506	Taxpayers' Appeal Rights of Field Audit Adjustments (10/95)
507	How to Appeal to the Tax Appeals Commission (10/95)
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) □

Question and Answer

Q I sell tangible personal property in Wisconsin. However, none of my sales are subject to Wisconsin sales or use tax because exemptions apply.

Am I required to register for a Wisconsin sellers permit? If not, can I still purchase without Wisconsin sales or use tax on the items I resell?

A If all your sales of tangible personal property or services are exempt from Wisconsin sales or use tax, you are not required to have a Wisconsin seller's permit. You may still purchase the items you will resell, without paying Wisconsin sales or use tax. You should give your supplier a completed Form S-207, Certificate of Exemption, indicating that the items being purchased are for resale.

Q I purchase office supplies of $100 by mail from an out-of-state company that does not charge me sales or use tax. An additional charge of $5 is made by the company for shipping and handling. I understand that I am required to report Wisconsin use tax on the $100 paid for the office supplies.

Is the $5 charge for shipping and handling also subject to Wisconsin use tax?

A Yes. The $5 shipping and handling charge is subject to Wisconsin use tax. The total amount subject to use tax is $105 ($100 for offices supplies plus the $5 shipping and handling charge). □

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, 1996, or at the stage in which action occurred during the period from April 2 to July 1, 1996.

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).

Scope Statement Sent to Revisor

11.002	Permits, application, department determination-A
11.01	Sales and use tax return forms-A
11.35	Occasional sales by nonprofit organizations on or after January 1, 1989-A
11.97	"Engaged in business" in Wisconsin-A

Rules Sent to Legislative Council Rules Clearinghouse

11.28	Gifts, advertising specialties, coupons, premiums and trading stamps-A
11.46	Summer camps-A
11.51	Grocers' guidelist-A
11.83	Motor vehicles-A
11.87	Meals, food, food products and beverages-A
11.95	Retailer's discount-R&R

Rules Sent to Revisor for Publication of Notice

2.47	Apportionment of net business income of interstate motor carriers of property-R&R
11.69	Financial institutions-A

Rules Sent for Legislative Committee Review

2.47	Apportionment of net business income of interstate motor carriers of property-R&R
9.01	Definitions-A
9.06	Affixing of state revenue stamps-A
9.08	Cigarette tax refunds to Indian tribes-A

9.09 Cigarette sales to and by Indians on reservations of tribes that have not entered into a refund agreement with the department-A

9.11 Refunds-A

9.12 Refunds — military-R

9.16 Meter machines-R

9.17 Meter machine settings-R

9.19 Fuson machines and stamps-A

9.21 Shipments to retailers-A

9.22 Drop shipments-A

9.26 Trade or transfer of unstamped cigarettes-A

9.31 Sales out of Wisconsin-A

9.36 Displaying of cigarettes-A

9.41 Vending machines-A

9.46 Purchases by the retailer-A

9.47 Invoicing of sales, including exchanges of cigarettes-A

9.51 Samples-A

9.61 Warehousing of cigarettes-A

9.68 Ownership and name changes-A

Rules Adopted and in Effect (June 1, 1996)

2.09 Reproduction of franchise or income tax forms-R&R

2.105 Notice by taxpayer of federal audit adjustments and amended returns-R&R

2.12 Amended returns-R&R

2.31 Compensation received by nonresident members of professional athletic teams-NR

Rule Repealed (June 1, 1996)

3.94 Claims for refund

Rule on Hold Pending Court Decision

11.04 Constructing buildings for exempt entities-A □

Recently Adopted Rules Summarized

Summarized below is information regarding administrative rules adopted, revised, or repealed, effective June 1, 1996. Sections Tax 2.09 (Reproduction of franchise or income tax forms), 2.105 (Notice by taxpayer of federal audit adjustments and amended returns), and 2.12 (Amended returns) are repealed and recreated. Section Tax 2.31 (Compensation received by nonresident members of professional athletic teams) is created, and sec. Tax 3.94 (Claims for refund) is repealed.

In addition to the summaries, the text of the rules is reproduced, excluding notes and examples. See the order blank on page 51 of this Bulletin for information about obtaining the Revenue section of the Wisconsin Administrative Code.

Tax 2.09 Reproduction of franchise or income tax forms. Statutory references are updated and "franchise" tax is added to the title. The rule is revised to reflect the department's policy and specifications regarding forms reproduction, and for clarity, titles are added to the subsections, the subsections are grouped differently, and language and style are updated. The text of Tax 2.09 is as follows:

Tax 2.09 **REPRODUCTION OF FRANCHISE OR INCOME TAX FORMS.** (ss. 71.03(6)(a), 71.20(1), 71.24(1) and 71.44(1)(a), Stats.) (1) GENERAL. Subject to the provisions of this section, the official Wisconsin franchise or income tax forms required to be filed with the department may be reproduced and the reproductions may be filed in lieu of the corresponding official forms. Any reproduction which varies from the official version in any particular, except as authorized in this section, shall be submitted to the department for approval before it is used. The department may reject any reproduction which is in whole or in part illegible or which is of a format that has not been approved by the department.

(2) SPECIFICATIONS. The following specifications shall apply:

(a) Printing of reproductions shall be by conventional printing processes, photocopying, computer graphics or similar reproduction processes and shall duplicate the font sizes, graphics and format of the official form. Reproductions may be printed on one side or both sides of the paper.

(b) Reproductions of optical character reader-scannable, or OCR-scannable, documents shall bear an OCR-scannable line as prescribed for the specific document type. Photocopies of OCR-scannable forms may not be filed.

(c) The reproductions shall be on paper of substantially the same weight and texture, and of quality at least as good as that used in the official forms.

(d) In the reproduction of tax forms, official forms printed on colored paper may be reproduced on white paper, and black ink may be substituted for colored ink.

(e) The size of the reproduction, both as to dimensions of the paper and image reproduced on it, shall be the same as that of the official form, except that full-page official forms which are other than 8½ inches by 11 inches in size may be reproduced on 8½ inch by 11 inch paper.

(f) Except for returns executed by fiduciaries as provided in sub. (3) or returns filed electronically, all signatures required on returns which are filed with the department shall be original, affixed subsequent to the reproduction process.

(3) FIDUCIARIES. A fiduciary or the fiduciary's agent may use a facsim-

ile signature in filing a tax return on form 2, subject to the following conditions:

(a) Each group of returns forwarded to the department shall be accompanied by a letter signed by the person authorized to sign the returns declaring, under penalties of perjury, that the facsimile signature appearing on the returns is the signature adopted by the person to sign the returns filed and that the signature was affixed to the returns by the person or at the person's direction. The letter shall also list each return by name and identifying number.

(b) A signed copy of the letter shall be retained by the person filing the returns and shall be available for inspection by the department.

(c) If returns are reproduced by photocopying or similar reproductive methods, the facsimile signature shall be affixed subsequent to the reproduction process.

Tax 2.105 Notice by taxpayer of federal audit adjustments and amended returns. References to temporary recycling surcharge are added as appropriate. In sub. (2), the definition of "taxpayer" is expanded to include partnerships and limited liability companies. Subsection (4) is changed to reflect a 1991 change to sec. 71.76, Wis. Stats., regarding when a taxpayer must notify the department of federal changes, and to clarify reporting requirements regarding federal adjustments and amended returns. Subsections (5), (6), and (7) are rearranged, for clarity, and obsolete material is deleted. Language, style, and format are updated. The text of Tax 2.105 is as follows:

Tax 2.105 **NOTICE BY TAXPAYER OF FEDERAL AUDIT ADJUSTMENTS AND AMENDED RETURNS.** (ss. 71.75(2), 71.76, 71.77(2) and (7) and 77.96(4), Stats.) (1) PURPOSE. This section clarifies the time periods for a taxpayer to report federal audit adjustments and federal and other state amended returns for Wisconsin franchise or income tax and temporary recycling surcharge purposes, and the result if a taxpayer fails to report the adjustments or amended returns.

(2) DEFINITION. In this section, "taxpayer" includes individuals, estates, trusts, partnerships, limited liability companies and corporations.

(3) GENERAL. (a) Under ss. 71.76 and 77.96(4), Stats., a taxpayer meeting the conditions described in sub. (4) shall report to the department changes or corrections made to a tax return by the internal revenue service, or file with the department amended Wisconsin franchise or income tax returns or amended temporary recycling surcharge returns reporting any information contained in amended returns filed with the internal revenue service, or with another state if there has been allowed a credit against Wisconsin taxes for taxes paid to that state.

(b) Except as provided in sub. (5), the department may give notice to the taxpayer of assessment or refund within 90 days of the date the department receives the taxpayer's report of federal adjustments or amended return described in par. (a). The 90-day limitation does not apply to instances where the taxpayer files an incorrect franchise or income tax return or temporary recycling surcharge return with intent to defeat or evade the franchise or income tax or temporary recycling surcharge assessment.

(4) TAXPAYER REQUIRED TO REPORT. (a) *Federal adjustments*. If the federal net income tax payable, a credit claimed or carried forward, a net operating loss carried forward or a capital loss carried forward on a taxpayer's federal tax return is adjusted by the internal revenue service in a way which affects the amount of Wisconsin net franchise or income tax or temporary recycling surcharge payable, the amount of a Wisconsin credit or a Wisconsin net operating loss, net business loss or capital loss carried forward, the taxpayer shall report the adjustments to the department within 90 days after they become final. The following shall also apply with respect to federal adjustments:

1. 'Finality of federal adjustments.' For the purpose of determining when the federal adjustments become final, the following shall be deemed a final determination:

a. Payment of any additional tax, not the subject of any other final determination described in subd. 1. b., c., d. or e.

b. An agreement entered into with the internal revenue service waiving restrictions on the assessment and collection of a deficiency and accepting an overassessment. Federal form 870, "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment," or 870-AD, "Offer to Waive Restrictions on Assessment and Collection of Tax Deficiency and to Accept Overassessment," are the forms prescribed for this purpose.

c. Expiration of the 90-day time period, or the 150-day period in the case of a notice addressed to a person outside the United States, within which a petition for redetermination may be filed with the United States tax court with respect to a statutory notice of deficiency issued by the internal revenue service, if a petition is not filed with that court within that time.

d. A closing agreement entered into with the internal revenue service under s. 7121 of the internal revenue code.

e. A decision by the United States tax court or a judgment, decree or other order by a court of competent jurisdiction which has become final, or the date the court approves a voluntary agreement stipulating disposition of the case. A court of competent jurisdiction includes a United States district court, a court of appeals, a court of claims or the United States supreme court.

2. 'Information to report to department.' The taxpayer shall submit to the department a copy of the final federal audit report issued by the internal revenue service together with any other documents or schedules necessary to inform the department of the adjustments as finally determined. The report shall be included with an amended Wisconsin return if a Wisconsin refund is being claimed and may be, but is not required to be, included with an amended return if additional Wisconsin tax or temporary recycling surcharge is due or if there

is no change in tax or temporary recycling surcharge.

3. 'Agreement with adjustments.' A taxpayer shall be deemed to concede the accuracy of the federal adjustments for Wisconsin franchise or income tax or temporary recycling surcharge purposes unless a statement is included with the report to the department stating why the taxpayer believes the adjustments are incorrect.

(b) *Amended returns.* If a taxpayer files an amended federal tax return and the changes on the amended federal tax return affect the amount of Wisconsin net franchise or income tax or temporary recycling surcharge payable, the amount of a Wisconsin credit or a Wisconsin net operating loss, net business loss or capital loss carried forward, the taxpayer shall file with the department an amended Wisconsin return reflecting the same changes. A taxpayer filing an amended return with another state shall file an amended Wisconsin return if a credit has been allowed against Wisconsin taxes for taxes paid to that state and if the changes affect the amount of Wisconsin net franchise or income tax or temporary recycling surcharge payable, the amount of a Wisconsin credit or a Wisconsin net operating loss, net business loss or capital loss carried forward. The amended Wisconsin return shall be filed within 90 days after the date the amended return is filed with the internal revenue service or other state.

(c) *Where and how to submit report or amended return.* An amended Wisconsin return or a taxpayer's report of federal adjustments submitted with an amended Wisconsin return shall be filed in accordance with the provisions of s. Tax 2.12(5) and (6). A taxpayer's taxpayer's report of federal adjustments submitted to the department without an amended return shall be identified as reflecting federal adjustments made by the internal revenue service and shall be mailed to Wisconsin Department of Revenue, Audit Bureau, P.O. Box 8906, Madison, WI 53708-8906. The report submitted without an amended return may not be made a part of or attached to any Wisconsin tax return.

(5) ASSESSMENTS AND REFUNDS BY DEPARTMENT. If a taxpayer reports federal adjustments or files an amended Wisconsin return with the department within 90 days after the adjustments become final or after an amended return is filed with the internal revenue service or another state, the department may make an assessment or issue a refund relating to the report or amended return as follows:

(a) *Assessments.* Under s. 71.77(2), Stats., the department may make an assessment within 4 years from the date the original Wisconsin franchise or income tax return was filed. However, under s. 71.77(7)(a), Stats., if the taxpayer reported less than 75% of the correct net income and the additional tax for the year exceeds $200 for a joint return, or $100 for a return other than a joint return, an assessment may be made within 6 years after the return was filed.

(b) *Refunds.* Under s. 71.75(2), Stats., the department may issue a refund if an amended return is filed within 4 years of the unextended date the original Wisconsin franchise or income tax return was due.

(c) *Exceptions.* 1. An assessment may be made later than the 4- and 6-year periods provided in par. (a) if notice of the assessment is given to the taxpayer within 90 days of the date the department receives a timely report of federal adjustments or an amended Wisconsin return. However, the assessment made after the expiration of the 4- and 6-year periods shall only relate to those federal adjustments or the changes on the amended Wisconsin return.

2. If a taxpayer reports federal adjustments to the department after the expiration of the 4-year period for filing an amended Wisconsin return as described in par. (b), a refund based upon federal adjustments reducing the taxpayer's federal tax liability, which are applicable to the taxpayer's Wisconsin tax or temporary recycling surcharge liability, may still be made if notice of the refund is given to the taxpayer within 90 days of the date the department received a timely report of the federal adjustments.

3. The 90-day period for the department's giving notice of an assessment or issuing a refund may be extended if a written agreement is entered into by the department and the taxpayer prior to the expiration of the 90 days.

4. If federal adjustments or changes on an amended return filed with the internal revenue service or another state pertain to a year which has been previously field audited by the department and the field audit has been finalized, an assessment or refund nevertheless may be made. However, the assessment or refund shall only relate to those federal adjustments or the changes on the amended return. Notice of the assessment or refund shall be given to the taxpayer within 90 days of the date the department received the report of federal adjustments or an amended Wisconsin return from the taxpayer.

(6) TAXPAYER'S FAILURE TO REPORT FEDERAL ADJUSTMENTS OR FILE AMENDED WISCONSIN RETURNS. (a) *Adjustments and amended returns relating to taxable year 1987 and thereafter.* If a taxpayer fails to report federal adjustments or the filing of an amended federal or other state return, relating to the taxable year 1987 and thereafter, within the 90-day period described in sub. (3)(b), the department may assess additional Wisconsin franchise or income tax or temporary recycling surcharge relating to the adjustments or amended return within 4 years after discovery by the department.

(b) *Adjustments and amended returns relating to 1986 and prior taxable years.* If a taxpayer fails to report federal adjustments or the filing of an amended federal or other state return which related to 1986 or prior taxable years within the 90-day period described in sub. (3)(b), the department may assess additional Wisconsin franchise or income tax relating to the adjustments or amended return within 10 years after the date the original Wisconsin return for the year was filed or within 2 years after the date when the federal determination of tax becomes final, whichever is later. A return filed before the last date prescribed by law, commonly April 15 for

an individual reporting on a calendar-year basis, is considered as filed on the last date prescribed by law under s. 71.77(8), Stats.

Tax 2.12 Amended returns. Throughout the rule, references to credit claims, temporary recycling surcharge, and partnership returns are added as appropriate. Many of the subsections are rearranged, for clarity. Some of the provisions of Tax 3.94 are made part of Tax 2.12, including the definition of "timely filed," as part of sub. (2) and the manner in which amended forms must be filed, as part of sub. (6). Subsections (5) and (6) clarify that amended forms must be filed on the proper form and in the proper manner, and a listing of forms is provided.

In addition, the rule is expanded to include many new provisions, such as: subs. (1) – the scope of the rule; (3)(b) – claims for refund must be made on an amended form; (3)(c) and (d) – when and how a taxpayer must report federal audit changes and amended federal or other states' returns; (4)(b) – exceptions to the 4-year filing limitation; (5)(b) – the department may prescribe special amended forms; and (6)(c) and (d) – amended returns must be mailed to a specific address and may not be attached to original returns. The text of Tax 2.12 is as follows:

Tax 2.12 **AMENDED RETURNS.** (ss. 71.30(4), 71.74, 71.75, 71.76, 71.77, 71.80(18) and 77.96(4), Stats.) (1) SCOPE. This section applies to amended Wisconsin franchise or income tax returns, amended partnership returns, amended temporary recycling surcharge returns and amended farmland preservation credit and homestead credit claims.

(2) DEFINITION. In this section, "timely filed," in the case of an amended return or credit claim, means the amended return or credit claim is actually in the possession of the department prior to the expiration of the statutory limitation period or extended limitation period, or it is mailed in a properly addressed envelope with postage prepaid and is received by the department within 5 working days after the last day of the statutory limitation period or extended limitation period.

(3) GENERAL. (a) The department shall accept amended returns and credit claims to correct previously filed original, other amended or adjusted Wisconsin franchise or income tax returns, partnership returns, temporary recycling surcharge returns or farmland preservation credit or homestead credit claims.

(b) Under s. 71.75(6), Stats., and as provided in this section, a refund of taxes or credits under ch. 71, Stats., or temporary recycling surcharge under s. 77.96(4), Stats., may be claimed only by filing an amended return or credit claim.

(c) An amended Wisconsin return shall be filed with the department if either an amended federal return is filed or an amended return is filed with another state for which a credit for taxes has been allowed against Wisconsin taxes, and the changes to the amended federal or other state return affect the amount of Wisconsin net franchise or income tax or temporary recycling surcharge payable, a Wisconsin credit or a Wisconsin net operating loss, net business loss or capital loss carried forward.

(d) An amended Wisconsin return filed to report internal revenue service adjustments as provided in s. Tax 2.105(4)(a) shall include a copy of the final federal audit report.

(e) An amended return or credit claim does not begin or extend the statute of limitation periods for assessing additional tax or temporary recycling surcharge or claiming a refund.

(4) TIMELY FILING. (a) Except as provided in par. (b), if an amended return or credit claim shows a refund, it shall be filed within 4 years of the unextended due date of the original return.

(b) The 4-year filing limitation in par. (a) does not apply in the following situations:

1. Except as provided in subds. 3 and 4, an amended Wisconsin return or credit claim requesting a refund may not be filed for any year covered by a field audit which resulted in a refund or no change in the tax owed, or in an assessment that has become final under s. 71.88(1)(a) or (2)(a), 71.89(2), 73.01 or 73.015, Stats., provided the department advises the taxpayer that the field audit is final unless the taxpayer appeals the result.

2. Except as provided in subds. 3 and 4, an amended Wisconsin return or credit claim requesting a refund may not be filed for any item of income or deduction assessed as a result of an office audit, provided the assessment has become final under s. 71.88(1)(a) or (2)(a), 71.89(2), 73.01 or 73.015, Stats.

3. An amended Wisconsin return or credit claim requesting a refund of the tax or temporary recycling surcharge paid as a result of an office audit or field audit assessment may be filed within 2 years of the date the tax or temporary recycling surcharge was assessed if no petition for redetermination was filed.

4. An amended Wisconsin return requesting a refund of an overpayment attributable to a capital loss carryback may be filed by a corporation within 4 years after the due date, or extended due date, for filing the return for the taxable year of the capital loss that is carried back.

5. If the limitation period for making an assessment or refund has been extended by written agreement between a taxpayer and the department, an amended Wisconsin return or credit claim requesting a refund relating to the year or years covered by the extension agreement may be filed during the extension period.

6. An amended Wisconsin return filed under the provisions of sub. (3)(c) shall be filed with the department within 90 days after the date the amended federal or other state return is filed.

7. An amended Wisconsin return filed under the provisions of sub. (3)(d) shall be filed with the department within 90 days of the date on which the federal audit adjustments become final.

8. An amended Wisconsin return filed under the provisions of s. 71.30(4), Stats., to claim a reduction of income resulting from a renegotiation or price redetermination of a defense contract or subcontract shall be filed within one year of the final determination.

(5) FORMS. (a) Except as provided in par. (b), an amended Wisconsin return or credit claim requesting a refund shall be filed on the proper form as shown in the following table, in the manner prescribed in sub. (6). An amended return filed for a purpose other than to request a refund is not required to be filed on the forms indicated below.

ORIGINAL FORM	AMENDED FORM
1, 1A, WI-Z	1X
1NPR	1NPR
1 or 1A with Schedule H	1X + corrected H*
1 with Schedule FC	1X + corrected FC*
1NPR with Schedule H or FC	1NPR + corrected H or FC*
Schedule H alone	Schedule H
2	2
3	3
3S	3S
4	4X
4I	4I
4T	4T
5	4X
5S	5S
1CNP	1CNP
1CNS	1CNS

* If H or FC is changed.

(b) The department may prescribe a special form for taxpayers to use in claiming a refund, to address a specific tax issue. In this situation, the special form may be used in lieu of the amended form prescribed in par. (a).

(6) MANNER. (a) An amended return or credit claim shall be in writing, indicate the reporting period for which the change was made and contain a statement setting forth the specific grounds upon which the amended form is based.

(b) An amended return or credit claim other than form 1X or 4X shall be identified as an amended form by checking the "amended return" box if one is provided on the form or by marking "AMENDED" across the top of the first page of the amended form.

(c) An amended return or credit claim requesting a refund may not be made a part of or attached to any original Wisconsin return or credit claim.

(d) An amended return or credit claim shall be mailed to the department at the address specified on the form or in its instructions or at the address provided for mailing amended Wisconsin returns or credit claims.

Tax 2.31 Compensation received by nonresident members of professional athletic teams. This rule is created to provide a fair and equitable method of allocating and apportioning to Wisconsin, compensation received by nonresident members of professional athletic teams. The rule is based on the uniform regulations developed by the Federation of Tax Administrators (FTA) Task Force on Nonresident Income Tax Issues, and adopted by the FTA Membership in June 1994. The text of Tax 2.31 is as follows:

Tax 2.31 **COMPENSATION RECEIVED BY NONRESIDENT MEMBERS OF PROFESSIONAL ATHLETIC TEAMS.** (ss. 71.02 and 71.04(1)(a) and (11), Stats.) (1) SCOPE. This section apportions and allocates to Wisconsin, in a fair and equitable manner, a nonresident employe's total compensation for services rendered in Wisconsin as a member of a professional athletic team. The section does not apply to employes domiciled in a state with which Wisconsin has a reciprocity agreement.

(2) DEFINITIONS. In this section:

(a)Except as provided in subds. 1 and 2, "duty days" means all days during the taxable year from the beginning of a professional athletic team's official pre-season training period through the last game in which the team competes or is scheduled to compete and days on which a member of a professional athletic team renders a service for a team on a date outside this time period. Rendering a service includes conducting training and rehabilitation activities at the facilities of the team. Included within duty days shall be game days, practice days, days spent at team meetings, promotional caravans and preseason training camps, days spent participating in instructional leagues, days spent at special games such as the "Pro Bowl" or an "all-star" game and days served with the team through all post-season games in which the team competes or is scheduled to compete. The following exceptions to this definition apply:

1. Duty days for any person who joins a professional athletic team after the beginning of the team's official pre-season training period shall begin on the day the person joins the team. Conversely, duty days for any person who leaves a professional athletic team before the last scheduled game shall end on the day the person leaves the team. Where a person switches professional athletic teams during a taxable year, separate duty day calculations shall be made for the periods the person was with each team.

2. Days for which a member of a professional athletic team is not compensated and is not rendering services for the team in any manner, including days when the member has been suspended without pay and prohibited from performing any services for the team, may not be treated as duty days.

(b) "Member of a professional athletic team" includes employes who are active players, players on the disabled list or any other persons such as coaches, managers and trainers, and who are required to and do travel with

and perform services on behalf of a professional athletic team on a regular basis.

(c) "Professional athletic team" includes, but is not limited to, any professional baseball, basketball, football, hockey or soccer team.

(d) "Total compensation for services rendered as a member of a professional athletic team" means the total compensation received during the taxable year by the member for services rendered from the beginning of the official pre-season training period through the last game in which the team competes or is scheduled to compete during that taxable year, and during the taxable year on a date outside this time period. The compensation includes, but is not limited to, salaries, wages, bonuses as described in sub. (3)(c) and any other type of compensation paid during the taxable year to a member of a professional athletic team for services performed in that year. The compensation may not include strike benefits, severance pay, termination pay, contract or option year buy-out payments, expansion or relocation payments or any other payments not related to services rendered for the team.

(3) METHOD OF ALLOCATION. (a) *General.* The allocation to Wisconsin of income earned by a nonresident employe as total compensation for services rendered as a member of a professional athletic team shall be made on the basis of a fraction, the numerator of which is the number of duty days spent within Wisconsin rendering services for the team in any manner during the taxable year and the denominator of which is the total number of duty days spent both within and outside Wisconsin during the taxable year.

(b) *Duty days during the taxable year.* Duty days shall be included in the fraction described in par. (a) for the taxable year in which they occur, including where a team's official pre-season training period through the last game in which the team competes, or is scheduled to compete, occurs during more than one taxable year. The following additional provisions apply:

1. Days during which a member of a professional athletic team is on the disabled list, does not conduct rehabilitation activities at facilities of the team and is not otherwise rendering services for the team in Wisconsin, may not be considered duty days spent in Wisconsin. However, all days on the disabled list shall be included in the total duty days spent both within and outside Wisconsin.

2. Travel days that do not involve either a game, practice, team meeting, promotional caravan or other similar team event may not be considered duty days spent in Wisconsin but shall be considered in the total duty days spent both within and outside Wisconsin.

(c) *Bonuses.* Bonuses which shall be included for purposes of the allocation described in par. (a) are:

1. Performance bonuses earned as a result of play during the season, including bonuses paid for championship, playoff or "bowl" games played by a team or for selection to all-star league or other honorary positions.

2. Bonuses paid for signing a contract, unless all of the following conditions are met:

a. The payment of the signing bonus is not conditional upon the signee playing any games for the team or performing any subsequent services for the team, or even making the team.

b. The signing bonus is payable separately from the salary and any other compensation.

c. The signing bonus is nonrefundable.

(4) ALTERNATIVE METHODS OF ALLOCATION. It is presumed that application of the provisions of this section will result in a fair and equitable apportionment of compensation received by nonresident members of professional athletic teams. Where it is demonstrated that the method provided under this section does not fairly and equitably apportion the compensation, the department may require the member of a professional athletic team to apportion and allocate the compensation under a method which the department prescribes, provided the prescribed method results in a fair and equitable apportionment. A nonresident member of a professional athletic team may submit a proposal for an alternative method to apportion compensation where the member demonstrates that the method provided under this section does not fairly and equitably apportion the compensation. The proposed method shall be fully explained on the member's Wisconsin income tax return.

Tax 3.94 Claims for refund. This rule is repealed, and many of the provisions are made a part of Tax 2.12, as explained in the summary of Tax 2.12. The claims for refund provisions are made part of the amended return rule, to reflect a 1994 change to sec. 71.75(6), Wis. Stats., providing that claims for refund must be filed on forms and in the manner prescribed by the department. □

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

Assessments – due process; Assessments – jurisdiction; Assessments – writ of mandamus; Tax Appeals Commission – powers; Bankruptcy – false claim. *William E. Currier vs. Wisconsin Department of Revenue* (Court of Appeals, District I, April 9, 1996). This is an appeal from an order of the Circuit Court for Milwaukee County, dated April 6, 1995. For a summary of that decision, see *Wisconsin Tax Bulletin* 92 (July 1995), page 13. The issues on appeal are:

A. Whether the department lacked jurisdiction to assess taxes against the taxpayer, and the Tax Appeals Commission (Commission) lacked jurisdiction to review the assessment.

B. Whether the department's action was barred by claim preclusion.

C. Whether the taxpayer was denied due process.

D. Whether the department filed a false claim against the taxpayer in his bankruptcy action.

This case arises out of the taxpayer's failure to file Wisconsin income tax returns for the tax years 1982 through 1990. In February 1992, the department issued an estimated income tax assessment for those years. The taxpayer filed a petition for redetermination and requested an informal conference. The department denied both the petition and the request for an informal conference.

The taxpayer filed a petition for review with the Commission. The Commission affirmed the department's denial of the taxpayer's petition for redetermination and determined that he had failed to establish that the department's tax assessment was incorrect. The taxpayer appealed to the Circuit Court, which affirmed the Commission's order.

The taxpayer claims that the department did not have jurisdiction to assess taxes against him, and the Commission did not have jurisdiction to review the assessments. He also claims that this action was barred by the doctrine of claim preclusion, alleging that a writ of mandamus sought by the department in 1984 to compel him to file his 1982 and 1983 Wisconsin income tax returns precludes the department from enforcing the assessment at issue in this case. The taxpayer next claims that he was denied due process when the department denied his request for an informal conference, and that the Commission evidenced bias towards him in rendering its decision. Finally, the taxpayer claims the department filed a false claim for a tax lien against him in his bankruptcy action.

The Court of Appeals concluded as follows:

A. Both the department and the Commission had proper jurisdiction. The department is expressly authorized by statute (secs. 71.74(3) and 71.80(1)(a), Wis. Stats.), to assess taxes against the taxpayer under the circumstances present in this case. The Commission's statutory authority to review the assessment (sec. 73.01(5), Wis. Stats.), was invoked when the taxpayer filed his petition for review.

B. Claim preclusion does not apply. Claim preclusion bars relitigating the same cause of action when a valid, final judgment on the merits is rendered. The cause of action in the two cases is different. The 1984 action sought to compel the taxpayer to file tax returns. The action at issue here assessed taxes against him for the years 1982 through 1990. Further, there was no final judgment rendered in the 1984 action.

C. The taxpayer was not deprived of his due process rights.

   In arguing he should have been granted an informal conference, the taxpayer relies on sec. Tax 3.91(5), Wis. Adm. Code, which he interprets to mean that an informal conference is mandatory. The only mandatory language relates to the time and place of the conference if the department decides to grant the taxpayer's request.

   In arguing that the Commission was biased against him, the taxpayer cites the following paragraph from the Commission's decision:

   "Each year, the respondent, Wisconsin Department of Revenue, endures untold numbers of appeals filed by pro se taxpayers who, in the tortured logic of their discourse, imagine that they have scoured the statutes, cut the Gordian knot, and magically freed themselves from state income tax liability. This is such a case."

   This quotation is a conclusion regarding the position fo the parties based on the evidence in the record; it does not display evidence of bias.

D. The claim filed by the department in the bankruptcy action was not false. It does not represent that a tax lien has been filed but shows that it is an unsecured claim and that liability is contested.

The taxpayer appealed this decision to the Wisconsin Supreme Court, which denied the petition for review. □

Compensation for services; Penalties — fraud. *Edward and Patricia Mulloy vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 19, 1996). The issues in this case are:

A. Whether the department properly included amounts received from Advance Consulting, Inc., in the taxpayers' taxable income for 1984, 1985, and 1986, or whether the amounts were nontaxable loans.

B. Whether the department properly assessed penalties pursuant to sec. 71.11(6)(b), Wis. Stats. (1985-86) and sec. 71.83(1)(b)1, Wis. Stats. (1987-88), for intentionally attempting to defeat or evade the tax for the period under review.

Taxpayer Edward Mulloy ("the taxpayer") was a 50% shareholder, vice president, and secretary of Advance Consulting, Inc. ("the corporation") during the entire period under review, which includes calendar years 1984 through 1988. The taxpayers filed no income tax returns with the department for 1982, 1983, 1984, 1985, or 1986 until after the department began collection action on delinquent estimated (doomage) assessments against them for those years. The

department then began a formal investigation and audit of the taxpayers as non-filers, and they filed their 1987 and 1988 returns in 1990.

The late-filed returns all showed no taxable income, due to substantial claimed losses and loss carryforwards from prior years, most of which were disallowed on audit and ultimately conceded by the taxpayers. The audit further determined that substantial additional income had not been reported, including gains on sales of stock in 1982 and 1983, as well as wages received from the corporation in each of the years under review, as follows: $11,349.96 in 1984; $22,801.20 in 1985; $20,000.00 in 1986; $1,000.00 in 1987; and $3,500.00 in 1988. Although the years 1982 and 1983 are not at issue, the conceded gains for those years substantially decreased claimed losses carried forward into the period under review, which were disallowed.

As a result of the investigation and audit findings, the department assessed the taxpayers not only additional taxes but also the statutory penalties provided for by sec. 71.11(6)(b), Wis. Stats. (1985-86) and sec. 71.83(1)(b)1, Wis. Stats. (1987-88), for intentionally attempting to defeat or evade the tax for each of the five years during the period under review.

The taxpayers have conceded all of the department's additional tax assessments for the period under review except the following amounts paid to the taxpayer by the corporation, which the taxpayer maintains were loans: $11,349.96 paid in 1984; $11,400.00 paid in 1985; and $16,000.00 paid in 1986. No promissory notes were signed for any of the 1984 or 1985 payments, nor were there any repayments of these amounts or collection efforts undertaken by the corporation. Although the taxpayer did sign a promissory note for the 1986 payment he received in a lump sum, it was not paid on the due date nor at any time thereafter, and no efforts were made by the corporation to collect on the note. The payment in 1986 was apparently first recorded as a "bonus" in the corporation's check register but later crossed out and replaced with the word "loans." Furthermore, the taxpayer acknowledged that the $20,000 was "to bring me up to where I should have been in compensation."

The taxpayers further dispute the imposition of penalties for attempting to defeat or evade the tax assessed.

The Commission concluded as follows:

A. The department properly included the amounts received from Advance Consulting, Inc., in the taxpayer's taxable income for 1984, 1985, and 1986, because those amounts were taxable compensation rather than nontaxable loans.

B. The department properly increased the assessments for 1984, 1985, 1986, and 1988, pursuant to sec. 71.11(6)(b), Wis. Stats. (1985-86), and sec. 71.83(1)(b)1, Wis. Stats. (1987-88), because the taxpayer first failed to make any income tax report and subsequently made an incorrect income tax report, both with intent to defeat or evade the income tax assessment required by law for each of the years during the period under review.

The taxpayers have not appealed this decision. □

Itemized deduction credit – contributions; Itemized deduction credit – interest. *Thomas C. and Dixie Yakes vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 7, 1996). The issues in this case are:

A. Whether the taxpayers are entitled to claim an itemized deduction credit under sec. 71.07(5), Wis. Stats., based upon a federal charitable contribution deduction taken with respect to the conveyance of a right of way to the State of Wisconsin.

B. Whether the taxpayers are entitled to claim an itemized deduction credit under sec. 71.07(5), Wis. Stats., based upon a federal interest deduction taken with respect to interest payments made under an installment purchase agreement for a motor home.

During 1984, the taxpayers acquired approximately 155 acres of land in the Town of Delavan. They operated a farm on the parcel until 1990.

During 1989, the taxpayers began to pursue alternate applications of land use for the parcel. They had a formal land use plan prepared, which was subsequently approved by the Town of Delavan. One of the areas of concern to the taxpayers in pursuing possible sale or development of the parcel related to securing access points along the highway. They already possessed four or five access points which may roughly be described as agricultural use access points to the parcel, but different types of access points would be required to realize the higher residential or commercial use contemplated in the land use plan.

In 1989, the taxpayers initiated discussions with the Wisconsin

Department of Transportation ("DOT"), relating to the granting of residential or commercial access points. The discussions culminated in the conveyance of a right of way consisting of 1.49 acres of property to the DOT, in the area planned for residential or commercial use. The explicit language of the June 1990 conveyance set forth that the transaction was executed for the mutual benefit of the parties, i.e., the DOT received title in and interest to the conveyed acreage, and the taxpayers were conferred authorized and reserved access points from the DOT.

Also during June 1990, the taxpayers acquired a motor home under a retail installment agreement financed over fifteen years. The motor home included a queen bed, a range, toilet and bath facilities, and other amenities. The taxpayers used the motor home on weekends and extended trips, at times parking the vehicle for periods of up to one month while out of state.

In July 1993, the department assessed the taxpayers for additional income taxes and interest due. The department disallowed the itemized deduction credit taken on the taxpayers' 1990 and 1991 income tax returns which were associated with a contribution deduction for the June 1990 conveyance of land to the State of Wisconsin, and a deduction for interest payments relating to the motor home installment purchase agreement.

The Commission concluded as follows:

A. The taxpayers are not entitled to claim an itemized deduction credit under sec. 71.07(5), Wis. Stats., based upon a federal charitable contribution deduction taken with respect to the conveyance of the 1.49 acre right of way to the State of Wisconsin, because the conveyance was entered into for the mutual benefit of the grantor and grantee. The taxpayers received in return for their conveyance a significant property right in the form of the conferred access points, which were necessary for commercial development under their land use plan.

B. The taxpayers are entitled to claim an itemized deduction credit under sec. 71.07(5), Wis. Stats., based upon a federal interest deduction taken with respect to interest payments made under the installment purchase agreement for the motor home, because the motor home qualifies as a "second residence" under the applicable federal regulations interpreting Internal Revenue Code section 163. In particular, Treas. Reg. 1.163-10T(p)(3)(ii), indicates that a qualifying "residence" generally contains sleeping space, cooking facilities, and toilet facilities, features present in the taxpayers' mobile home.

Neither the department nor the taxpayers have appealed this decision.

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

Retirement funds exempt. *James R. and Zoe E. Connor vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, November 14, 1995). The issue in this case is whether James R. Connor was a member of the State Teachers Retirement System (STRS) as of December 31, 1963. If Mr. Connor is a member of the STRS as of December 31, 1963, then the annuity income received from the STRS is exempt from the Wisconsin income tax.

The taxpayer, James E. Connor, was employed by the University of Wisconsin-Madison beginning in July of 1962, up until his termination from employment on August 23, 1963. By virtue of his employment, Mr. Connor became a member of the STRS beginning in July of 1962. Mr. Connor was a member of the "combined group."

Shortly after his termination, on September 6, 1963, Mr. Connor filed with the STRS an Application for Withdrawal of Members Deposits With Interest ("Withdrawal Application"). The Withdrawal Application executed by Mr. Connor provided, in part: "I hereby apply for the accumulation from my members deposits ... and agree that payment of said accumulation shall constitute a full and complete discharge and release of all right, interest and claim on my part to state deposit accumulations based on teaching service performed after June 30, 1957."

The Withdrawal Application was granted and payment approved on November 1, 1963. Upon the withdrawal of his member accumulation, Mr. Connor had no credit in the STRS retirement deposit fund and no reserve in the STRS annuity reserve.

On July 1, 1974, Mr. Connor returned to teaching in Wisconsin, became a member of the STRS, and, as required by law, became a member of the "formula group." Upon his return, the STRS did not grant any credit to Mr. Connor for his employment in 1962 and 1963.

In 1982, the STRS was succeeded by the Wisconsin Retirement system (WRS).

In 1989, the Wisconsin Supreme Court held that sec. 42.245(1)(c), Wis. Stats. (1965-66), required the Department of Employe Trust funds (DETF) to credit one-half of their creditable service to STRS members of the combined group between 1957 and 1965 who subsequently took withdrawal of their member deposits. *Schmidt v. Wisconsin Employe Trust Funds Board,* 153 Wis. 2d 35, 49, 449 N.W.2d 268 (1990).

Mr. Connor was a member of the class affected by the *Schmidt* decision. Despite the *Schmidt* decision, DETF did not initially credit Mr. Connor with his pre-1965 creditable service. DETF believed that sec. 40.08(10), Wis. Stats., required persons in Mr. Connor's position to submit a written challenge to DETF's annual retirement account statement containing the DETF summary of the amount of creditable service within seven years of first having notice of DETF's failure to grant credit for pre-1965 service. Mr. Connor did not file a written challenge to the DETF summary of his creditable service within this seven-year period.

On April 5, 1991, Mr. Connor filed a Forfeited Service Purchase Estimate/Application with DETF seeking the purchase of years of creditable service based upon his public employment in 1962 and 1963 under the STRS. Mr. Connor's public employment in 1962 and 1963 translated into 1.32 years of creditable service. Mr. Connor paid $5,228.63 for the purchase of this service.

Mr. Connor terminated his teaching employment on June 30, 1991 and became an annuitant under the WRS on July 1, 1991.

In 1994, the Wisconsin Court of Appeals held that the statute of limitations under sec. 40.08(10), Wis. Stats., commences on the date DETF calculates and pays retirement benefits to the plan beneficiary. *Benson v. Gates*, 188 Wis. 2d 389,405,525 N.W.2d 278 (Ct. App. 1994). The Court of Appeals rejected DETF's policy of requiring a written challenge within seven years of first having notice of DETF's failure to grant credit for pre-1965 service.

As a result of the *Benson* decision, on September 6, 1995, DETF refunded a portion of the amount Mr. Connor paid for the purchase of his forfeited service. This amount was calculated as the cost for one-half year of forfeited service purchased, plus interest.

When the taxpayers filed their state income tax returns for 1990, 1991, and 1992, they failed to include in their Wisconsin adjusted gross income the annuity payments Mr. Connor received during those years from the WRS.

On October 25, 1993, the department assessed the taxpayers $4,201.89 for income taxes during 1990 to 1992. The taxpayers filed a timely petition for redetermination.

The taxpayers assert that because Mr. Connor purchased creditable service based on his employment with the University of Wisconsin in 1962 and 1963, and because of the *Schmidt* and *Benson* cases, he should be considered a member of the STRS as of December 31, 1963. The department argues that Mr. Connor does not qualify for the exemption under sec. 71.05(1)(a), Wis. Stats., because he did not have a STRS member account as of December 31, 1963.

The exemption at issue in this case was enacted by the Legislature in Chapter 267, Laws of 1963. At the time of its enactment, the term "member" for purposes of the STRS had the following meaning:

> "Member" means a person who, as a result of having been engaged in Wisconsin teaching, has a credit in the retirement deposit fund or a reserve in the annuity reserve fund, or who is or may be entitled to a present or future benefit under the teachers' insurance and retirement laws as provided by s. 42.51.

Section 42.20(6r)(a), Wis. Stats. (1963-64). There is neither an assertion nor evidence by the taxpayers that Mr. Connor was entitled to a benefit under sec. 42.51, Wis. Stats., in 1963. There is no dispute that Mr. Connor was engaged in Wisconsin teaching. Therefore, Mr. Connor falls within this definition of "member" only if he had a credit in the retirement deposit fund or a reserve in the STRS annuity reserve fund.

Mr. Connor did not have a reserve in the annuity reserve fund because he had not used his member's deposits or state deposits to purchase an annuity or annuities. Moreover, Mr. Connor did not have a credit in the retirement deposit fund because he had taken his members accumulation and waived "all right, interest or claim ... to state deposit accumulations." Therefore, the Commission concluded that Mr. Connor cannot be considered a member of the STRS as of December 31, 1963.

By virtue of Mr. Connor's return to public service (and the mandatory membership in the formula group that accompanied his return), the impact of the *Schmidt* decision is that he is entitled to one-half of the creditable service to which he would otherwise be entitled based on his public employment in 1962 and 1963.

This effect, however, does not make Mr. Connor a member of the STRS as of December 31, 1963. The enactment of sec. 42.245, Wis. Stats. (1965-66), simply granted to him credit under the formula group plan for his prior service upon his return to the STRS. This grant by the Legislature two years after he left the STRS does not make him a member of the STRS as of December 31, 1963 because it did not reinstate his credit in the retirement deposit fund. In fact, the Wisconsin Supreme Court in *Schmidt* specifically held that this statute does not reinstate any right to state money he forfeited when he withdrew his members accumulation in 1963.

This result was not affected by Mr. Connor's purchase of 1.32 years of creditable service. Again, all this purchase accomplished was adding 1.32 years to his years of creditable service. It did not reinstate his credit in the retirement deposit fund.

The *Benson* decision likewise had no effect on Mr. Connor's status as a member of the STRS as of December 31, 1963. The *Benson* decision dealt only with the statute of limitations for persons who wanted to challenge DETF's denial of their creditable service contrary to sec. 42.245(1), Wis. Stats., and the *Schmidt* decision. The *Benson* court merely held that the statute of limitations commences on the date DETF calculates and pays retirement benefits to the plan beneficiary, not when the participant first has notice of DETF's failure to grant credit.

This decision did not make Mr. Connor a member of the STRS as of December 31, 1963 because it did not reinstate his credit in the retirement deposit fund.

The taxpayer has not appealed this decision.

Note: This decision does not affect the department's position regarding the taxable status of retirement benefits as expressed in the tax release titled "Eligibility for the Wisconsin Income Tax Exemption for Members of the Wisconsin State Teachers Retirement System," which appears on page 30 of this Bulletin. □

Retirement funds exempt — other state's retirement system. *Arthur A. and Betty L. Van Aman vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 13, 1996). The issue in this case is whether sec. 71.05(1)(a), Wis. Stats., impermissibly discriminates against persons receiving payments from public employe retirement systems sponsored by other states.

The taxpayers have been Wisconsin residents since February 1990. Prior to their retirement and their move to Wisconsin, both were employed as public school teachers in Illinois.

During the years 1990 through 1993, the taxpayers received annuity payments from a public employe retirement system in Illinois ("Illinois annuity payments"). When filing their 1990 through 1993 Wisconsin income tax returns, they included their Illinois annuity payments and paid tax on those payments.

In November 1994, the taxpayers filed a claim for refund for tax years 1990 through 1993, asserting that the Illinois annuity payments are exempt pursuant to sec. 71.05(1)(a), Wis. Stats. The department denied their claim for refund.

Section 71.05(1)(a), Wis. Stats., exempts payments from certain public employe retirement systems to persons who were members of these systems as of December 31, 1963. This exclusion does not apply to any public employe retirement system sponsored by the State of Illinois. The taxpayers argue that failure of this exclusion to apply to payments from Illinois public employe retirement systems is invalid.

The Commission concluded that the taxpayers do not qualify for the exclusion under sec. 71.05(1)(a), Wis. Stats. There is no evidence that they were members of any retirement system on December 31, 1963. In addition, the failure of sec. 71.05(1)(a), Wis. Stats., to exclude payments from an Illinois public employe retirement system is neither unconstitutional under *Davis v. Michigan*, 489 U.S. 803 (1989), nor a violation of equal protection.

The intergovernmental immunity that is the subject of the *Davis* decision is between the federal government and the state governments. There is nothing in *Davis* that requires one state to tax its own public employe annuitants in the same manner it taxes public employe annuitants deriving payments from other jurisdictions.

The taxpayers have not appealed this decision. □

Tax Appeals Commission — class action claims; Petition for judicial review — timeliness. *Wisconsin Department of Revenue vs. J. Gerard and Delores M. Hogan, et al.* (Court of Appeals, District IV, December 21, 1995). This decision was summarized in *Wisconsin Tax Bulletin* 96 (April 1996), page 15. That summary indicated the taxpayers had appealed the decision to the Wisconsin Supreme Court.

The Wisconsin Supreme Court denied the taxpayers' petition for review. The taxpayers have filed a

petition for writ of certiorari with the United States Supreme Court. At the time of publication of this Bulletin, it was unknown whether the Untied States Supreme Court would hear the case. □

CORPORATION FRANCHISE AND INCOME TAXES

Bad debts; Statute of limitations — 6-year. *The Capital Group, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, January 3, 1996). The issues in this case are as follows:

A. Whether the department correctly adjusted the taxpayer's 1985 loss carryforward of $25,000 as that carryforward reflected a bad debt deduction to be used in years subsequent to 1985, or whether the department was barred from making such an adjustment by the 6-year statute of limitations found in sec. 71.77(7)(a), Wis. Stats.

B. Whether the department correctly disallowed the taxpayer's $84,000 Seattle First National Bank bad debt carryforward originating in 1986, on the alternative grounds that reserve bad debt deductions were not allowed by law in 1986 or that the deduction was not adequately substantiated by the taxpayer under sec. 166 of the Internal Revenue Code (IRC) and applicable treasury regulations or sec. Tax 3.14 of the Wisconsin Administrative Code.

C. Whether the department correctly disallowed the taxpayer's $76,150 Custardo bad debt claimed during 1987, on the alternative grounds that reserve bad debt deductions were not allowed by law in 1987 or that the deduction was not adequately substantiated by the taxpayer under IRC sec. 166 and applicable treasury regulations.

The taxpayer in this matter was, during the period under review, from 1985 through 1987, a Wisconsin corporation specializing in corporation finance and litigation support consulting activities. For each of the years during the period under review, the taxpayer filed federal and state income tax returns on an accrual basis.

The taxpayer filed its 1985 Wisconsin franchise or income tax return on or around April 22, 1986, and included with the state return a copy of its corresponding 1985 federal corporation income tax return. On its federal return for 1985, the taxpayer claimed a Schedule F bad debt deduction of $25,000 as an increase in the corresponding bad debt reserve for the year ended December 31, 1985. This particular debt or uncollectible receivable was associated with services which the taxpayer alleged to have performed for an entity known as Wykoff Farms.

The existence of the federal Schedule F $25,000 bad debt deduction gave rise to a reported 1985 taxable loss of $40,670, which formed part of a loss balance of $47,153.09 that the taxpayer carried over in a schedule accompanying its 1986 Wisconsin franchise or income tax return.

No addition or subtraction modifications to federal income were made by the taxpayer in its 1985 Wisconsin franchise or income tax return.

The taxpayer filed its 1986 Wisconsin franchise or income tax return on or around November 25, 1987, and once again included a copy of its 1986 federal income tax return, along with typed supporting schedules detailing its income statement and loss carryforwards as of the close of 1986. The taxpayer claimed a bad debt deduction for 1986 of $154,511.75, resulting in a taxable loss for the year of $20,962. The full amount of the 1986 bad debt deduction was reported on the taxpayer's federal income tax return, thus increasing the taxpayer's bad debt reserve as of the close of 1986.

The income statement prepared by the taxpayer and submitted with its 1986 income tax returns indicated that the bad debt deduction was comprised of 3 separately written off debts, as follows:

Seattle First National Bank	$84,000
Patrick Custardo	$50,000 (Streamwood)
J.E. Burkhardt	$20,000 (expenses)

The statement of the components of the taxpayer's 1986 bad debt deduction was followed with the statement "Bad debts may be recovered as a result of legal action now in progress. Earnings will be booked in 1988 if recovered."

Also included with the taxpayer's 1986 Wisconsin franchise or income tax return was a typed schedule summing up a net loss balance of $47,153.09 carried forward from prior years with the 1986 net loss of $20,962.61, resulting in a total available carryforward of $68,115.70.

The taxpayer made no addition or subtraction modifications to federal income in its 1986 Wisconsin franchise or income tax return.

The taxpayer filed its 1987 Wisconsin franchise or income tax return on June 9, 1988. The taxpayer's 1987 federal income tax return indicated taxable income before net operating loss deduction and special deductions

of $146,680. From this figure, the taxpayer deducted its deemed carryover losses of $68,115.70 and a "special reserve for bad and doubtful debt" of $76,150, to arrive at federal taxable income of $2,414.30.

In a typed schedule accompanying its 1987 profit and loss statement for the year ended December 31, 1987, the taxpayer included a note indicating, with respect to the special reserve for bad and doubtful debt, that "reserves are for Patrick Custardo d/b/a/ Streamwood who has judgements against him 5/88 in excess of $4 million. Recovery prospects are nil. Reserve is for legal costs plus accrued portion of fee." The $76,150 associated with the so-called Custardo loan was added to the taxpayer's allowance for bad debts as disclosed in the balance sheet disclosures in its 1987 federal income tax return.

The taxpayer made no addition or subtraction modifications to federal taxable income on its 1987 Wisconsin franchise or income tax return.

On April 9, 1990, the department assessed the taxpayer for additional taxes and interest due for the 1987 taxable year. In calculating its adjustment to the 1987 income reported by the taxpayer, the department began with the taxpayer's pre-loss offset federal taxable income as reported of $146,680. The department then allowed in its calculation the net business losses carried forward from 1985 of $40,671 and from 1986 of $20,962, resulting in allowed deductions to 1987 income of $61,633. The adjustment created a taxable income for the taxpayer of $85,047, rather than the $2,414.30 previously reported. The department's adjustment resulted in the effective denial of the 1987 so-called Custardo bad debt addition to reserve of $76,150, for the stated reason that bad debts are not allowed by law to be deducted based upon the reserve method.

The taxpayer filed its petition for redetermination with the department in a letter dated April 18, 1990, in which it re-asserted the deductibility of the Custardo bad debt, arguing that it reported its income on the cash basis and that the IRS had previously allowed the Custardo deduction in full.

The department attempted to obtain substantiation of the taxpayer's bad debt deductions for the years 1984 through 1987 by soliciting financial accounting data detailing the specific receivables of the taxpayer relating to each debt written off for each year the write-offs gave rise to an income tax deduction by the taxpayer. Not having received the requested substantiation, the department issued its letter of action denying the taxpayer's petition for redetermination on April 6, 1992.

On November 22, 1993, the department issued a second assessment against the taxpayer for additional taxes and interest for the years 1986 and 1987. The department's adjustments in the second assessment were based upon a removal of the carryforward effect of the bad debt deductions associated with the taxpayer's Wykoff Farms write-off originating in 1985 of $25,000 and the effect of the bad debt associated with the Seattle First National Bank write-off originating in 1986 of $84,000. The adjustments decreased available carryforwards and, accordingly, increased Wisconsin taxable income and interest for the years 1986 and 1987. The audit worksheet accompanying the assessment indicated that the adjustments were based upon the taxpayer's failure to substantiate the debts in question and also cited sec. 71.77(7)(a), Wis. Stats., the 6-year statute of limitations for adjustments to income for what the department deemed in its second assessment to be a material understatement of income on the part of the taxpayer.

The Commission reached the following conclusions:

A. The department correctly adjusted the taxpayer's 1985 loss carryforward of $25,000 as that carryforward reflected a bad debt deduction to be used in years subsequent to 1985, because the department was not barred from making such an adjustment by the 6-year statute of limitations found in sec. 71.77(7)(a), Wis. Stats., where the adjustment did not involve an assessment of additional tax liability for 1985 but only reflected the propriety of deductions carried forward for tax effect in subsequent years.

B. The department correctly disallowed the taxpayer's $84,000 Seattle First National Bank bad debt carryforward originating in 1986, on the alternative grounds that reserve bad debt deductions were not allowed by law in 1986 and that the deduction was not adequately substantiated by any direct proof offered by the taxpayer as required under IRC sec. 166 and applicable treasury regulations or sec. Tax 3.14, Wis. Adm. Code.

C. The department correctly disallowed the taxpayer's $76,150 Custardo bad debt claimed during 1987, on the alternative grounds that reserve bad debt deductions were not allowed by law in 1987 and that the deduction was not adequately substantiated by the taxpayer as required under IRC sec. 166 and applicable treasury regulations.

The taxpayer has not appealed this decision. □

Insurance companies – addback of exempt or excluded interest and dividends received deduction; Interest from United States government obligations; Loss carryovers. *American Family Mutual Insurance Company vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, April 11, 1996). The issues in this case are as follows:

A. *Add Modifications for Federally Nontaxable Interest and Dividends.* Did the department properly determine that the taxpayer was required, for Wisconsin income tax purposes, pursuant to secs. 71.01(4)(a)4 and 5, Wis. Stats. (1985-86), 71.45(2)(a)3 and 4, Wis. Stats. (1987-88), and 71.45(2)(a)3, Wis. Stats. (1989-90), to increase its income by those 15% increments of interest and dividends which were subject to an addback under sec. 832(b)(5) of the Internal Revenue Code (IRC) in calculating federal taxable income?

B. *Taxation of U.S. Interest.* Did the department properly determine, pursuant to secs. 71.01(2), Wis. Stats. (1985-86), and 71.43(2), Wis. Stats. (1987-88), that the taxpayer must include interest from federal obligations in the measure of income subject to the Wisconsin corporate franchise tax?

C. *Loss Carryforward.* Did the department properly reduce the taxpayer's net business loss carryforward by the dividends received deduction?

D. *Dividends Received Deduction.* Did the department properly determine that the taxpayer was not entitled to deduct dividends received by it from various corporations which did not use 50% or more of their net income or loss in computing taxable Wisconsin income within the meaning of sec. 71.26(3)(j), Wis. Stats. (1987-88) [formerly sec. 71.04(4), Wis. Stats. (1985-86)]?

The taxpayer and the department agree to hold open the dividends received deduction issue, based upon the eventual outcome in the *NCR* case (*NCR Corporation v. Wis. Dept. of Revenue*, WTAC Docket Nos. I-8669 and 87-I-359 [February 10, 1992]), which is currently pending at the Wisconsin Court of Appeals. The "eventual outcome" of the case includes any final determination by the highest court to which it is appealed.

The taxpayer is organized as a mutual insurance company under ch. 611, Wis. Stats., and is engaged in the business of selling automobile, homeowner, health, and business insurance coverage. The taxpayer is subject to federal income tax under IRC secs. 831-848 and to Wisconsin franchise tax under secs. 71.42-71.49, Wis. Stats. [formerly sec. 71.01(4), Wis. Stats. (1985-86)].

American Family Mutual Insurance Company (AFMIC) is a mutual nonstock insurance company with the following subsidiaries: AmFam, Inc.; American Family Brokerage, Inc.; American Standard Insurance Company of Wisconsin; American Family Life Insurance Company; and American Family Financial Services, Inc.

The taxpayer timely filed Forms 4I, Wisconsin Insurance Franchise Tax Return, for the calendar years 1984 through and including 1991. On or about February 24, 1994, after a field audit of the years 1984 through 1991 ("the years at issue"), the department issued an assessment notice.

A. Add Modifications for Federally Nontaxable Interest and Dividends

During the years at issue, the taxpayer received interest income on state and local bonds, which interest was excludable from federal taxable income under secs. 832(c)(7) and 103, IRC. During the years at issue, the taxpayer received dividend payments which were deductible from federal taxable income under secs. 832(c)(12) and 243, IRC.

In preparing its 1987-1991 Wisconsin franchise tax returns, the taxpayer calculated its interest income "add modification" to federal taxable income under sec. 71.01(4)(a)4, Wis. Stats. (1985-86), renumbered as sec. 71.45(2)(a)3, Wis. Stats. (1987-88), and amended commencing with the taxpayer's year 1989, as follows: The taxpayer added to its federal taxable income for the year 100% of the interest income excludable from federal taxable income under secs. 832(c)(7) and 103, IRC, less the amount of such interest income that was used on its federal tax return to reduce its deduction for losses on insurance contracts under sec. 832(b)(5)(B), IRC, as amended by the Tax Reform Act of 1986.

In preparing its 1987-1990 Wisconsin franchise tax returns, the taxpayer calculated its dividend income "add modification" to federal taxable income under sec. 71.01(4)(a)5, Wis. Stats. (1985-86), renumbered as sec. 71.45(2)(a)4, Wis. Stats. (1987-

88), as follows: The taxpayer added to its federal taxable income for the year 100% of its dividend income deductible from federal taxable income under secs. 832(c)(12) and 243, IRC, less the amount of such dividend income that was used on its federal income tax return to reduce its deduction for losses on insurance contracts under sec. 832(b)(5), IRC, as amended by the Tax Reform Act of 1986. In preparing its 1991 Wisconsin franchise tax return, the taxpayer followed the same procedure, except that it added 100% of its federally deductible dividend income without reduction for the amount thereof used to reduce its federal loss under sec. 832(b)(5), IRC.

The department determined that the taxpayer was not entitled to reduce its interest income add modification or its dividend income add modification by the amounts of interest and dividend income used to reduce its federal deduction for losses on insurance contracts under sec. 832(b)(5), IRC. The department's position is that because the federal reduction in the taxpayer's interest and dividends deduction occurs as the result of a reduction in the taxpayer's federal loss reserve deduction, which is computed separately on the federal form, it is "separate" and therefore not subject to Wisconsin's addition modification exception language under sec. 71.45(2), Wis. Stats.

B. Taxation of U.S. Interest

During the years at issue, the taxpayer received interest on obligations of the United States government. The taxpayer, in preparing its 1984-1989 Wisconsin franchise tax returns, subtracted such interest on United States obligations from its federal taxable income for each year. In its original 1990-1991 Wisconsin franchise tax returns, which are involved in this case, the taxpayer subtracted a portion of such interest on United States obligations. The department determined that the amounts were not properly subtracted from federal taxable income in determining the taxpayer's net Wisconsin income.

The taxpayer contends that the department may not tax federal obligations because Wisconsin's franchise tax is not "a nondiscriminatory franchise tax" within the meaning of 31 USC sec. 3124(a). The taxpayer argues that because part of the language in sec. 71.43(2), Wis. Stats., provides that a corporation is subject to the "special franchise tax" in the year it is dissolved or ceases doing business, according to or measured by its entire Wisconsin taxable income for the year of business cessation or dissolution, the entire scheme of sec. 71.43(2), Wis. Stats., is rendered an income tax rather than a franchise tax.

The taxpayer also attacks the franchise tax as discriminatory because it includes income from federal obligations while exempting interest on certain state, local, and corporate obligations from the tax. In particular, the taxpayer points to statutory sections which exempt certain state and local bonds "from all taxes" and other sections which allow a subtraction for certain corporate dividends received.

C. Loss Carryforward

The taxpayer incurred a Wisconsin net business loss in 1985 and 1990. In preparing its Wisconsin franchise tax returns, the taxpayer carried this loss forward and subtracted it from 1986 and 1991 income, respectively, under sec. 71.06, Wis. Stats. (1985-86), and sec. 71.45(4), Wis. Stats. (1991-92), respectively.

In calculating its Wisconsin net business loss carryforward, the taxpayer included the deduction for dividends received to which it was entitled under sec. 71.01(4)(a)7, Wis. Stats. (1985-86), and sec. 71.45(2)(a)8, Wis. Stats. (1991-92), respectively, and did not add such dividends back into income. Thus, the taxpayer carried forward to 1986 and 1991 the amount of loss reported in 1985 and 1990, respectively. The department reduced the taxpayer's loss carryforwards by adding back into income for the taxpayer's years 1986 and 1991 the amount of the taxpayer's dividend deductions (as determined by the department) in 1985 and 1990.

The loss carryforward statute applicable for 1986, sec. 71.06(3), Wis. Stats. (1985-86), provides in part that the "Wisconsin net business loss shall be determined under s. 71.01(4), except that s. 71.01(4)(a)7 ... may not apply." At issue is the meaning of the words "may not apply," which the department interprets as mandatory and which the taxpayer insists has no plain meaning, is therefore ambiguous, and produces an absurd result.

The loss carryforward statute applicable for 1991, sec. 71.45(4), Wis. Stats. (1991-92), states in part that insurers may subtract from Wisconsin net income "any Wisconsin net business loss sustained in any of

the next preceding taxable years to the extent not offset by Wisconsin net business income of any year between the loss year and the taxable year for which an offset is claimed and computed without regard to sub. (2)(a)8 and 9 of this subsection ..."

The taxpayer also challenged the constitutionality of the loss carryforward statutes under the Equal Protection Clause of the United States and Wisconsin Constitutions. The taxpayer's challenge is grounded on the proposition that there is no rational basis either for the legislature's disparate tax treatment of insurance companies compared to other business corporations or for its discriminating against insurance companies who receive dividends in net loss years.

The Commission reached the following conclusions:

A. The department did not properly determine that the taxpayer was required, for Wisconsin income tax purposes, to increase its income by those 15% increments of interest and dividends which were subject to an addback under sec. 832(b)(5), IRC, in calculating federal taxable income. Wherever placed on the federal tax form or however characterized by the department, the amounts at issue were plainly not "used as a deduction in determining federal taxable income" and therefore fall squarely within the exception to addition modifications required to arrive at Wisconsin taxable income.

B. The department properly determined that the taxpayer must include interest from federal obligations in the measure of income subject to the Wisconsin corporate franchise tax. The "franchise tax" which was assessed here by the department against the taxpayer is a true franchise tax and not an income tax, notwithstanding the "special franchise tax" language in the same statutory subsection. In addition, the taxpayer has not shown by evidence in the record or otherwise that the department has ever applied the franchise tax in a manner which discriminates in favor of state and local obligations, including during the period under review.

C. The department properly reduced the taxpayer's net business loss carryforward by the dividends received deduction. The language of sec. 71.06(3), Wis. Stats. (1985-86), is mandatory. The plain meaning of sec. 71.45(4), Wis. Stats. (1991-92), which uses "without regard to" the dividends received deduction rather than the earlier "may not apply," makes it even clearer that the department properly excluded the deduction for dividends received in auditing the taxpayer's 1991 claimed loss carryforward. The taxpayer's arguments challenging the constitutionality of the loss carryforward statutes are insufficient to overcome the strong presumption of constitutionality attached to taxation statutes.

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

Insurance companies — addback of exempt or excluded interest and dividends received deduction; Interest from United States government obligations. *American Standard Insurance Company of Wisconsin vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, April 11, 1996). The two issues in this case are identical to issues A and B in *American Family Mutual Insurance Company vs. Wisconsin Department of Revenue*, which are described above.

The taxpayer is a Wisconsin corporation engaged in the business of writing high-risk coverage for individuals who are unable to qualify for select risk coverage offered by the taxpayer's parent, American Family Mutual Insurance Company (AFMIC). The taxpayer reinsures all of its coverage with its parent company.

American Standard Insurance Company of Wisconsin (ASIC) was organized in 1961 under the laws of Wisconsin. On October 1, 1982, ASIC transferred its unpaid losses, loss expenses, and unearned premium reserves to AFMIC. All business written by ASIC subsequent to September 30, 1982, is reinsured 100% by AFMIC. ASIC is a wholly-owned subsidiary of AmFam, Inc. (a holding company), which in turn is owned 100% by AFMIC.

The Commission's conclusions of Law and Opinion on the issues are identical to conclusions A and B in the *AFMIC* case above.

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

Leases — 1986 and prior — safe harbor rules. *Northern States Power Company vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, May 30, 1996). The issue in this case is whether the taxpayer's cash purchases of tax benefits can be amortized and deducted under the Wisconsin franchise tax law.

The taxpayer, a Wisconsin corporation, is a utility in the business of producing, distributing, and selling electric power and distributing natural gas in Wisconsin.

In 1982, the taxpayer, as buyer/lessor, purchased and leased certain property under Internal Revenue Code (IRC) sec. 168(f)(8) for the purpose of (1) acquiring from the seller/lessee the federal income tax benefits related to the property, (2) acquiring the Wisconsin franchise tax benefits at issue in this proceeding, and (3) permitting the taxpayer's parent corporation, which files a unitary Minnesota return that includes the taxpayer, to acquire certain Minnesota tax benefits.

With regard to these transactions, the taxpayer paid $13,782,811 in cash to a number of unrelated corporations and paid $262,886 for transactional costs, such as legal fees, for a total 1982 expenditure of $14,045,697. In the course of these transactions, the taxpayer entered into 13 safe harbor leases, 8 of which had a 15-year term. The remaining safe harbor leases were of shorter and longer terms, the longest term being 22.5 years. The cost of the equipment covered by the safe harbor leases was about $50 million.

For purposes of this proceeding, the taxpayer's safe harbor lease with General Dynamics Corporation is representative, in all material respects, of all 13 safe harbor leases. The General Dynamics transaction consisted of the following steps, all of which General Dynamics and the taxpayer agreed were undertaken "for income tax purposes only":

a. General Dynamics sold to the taxpayer certain items of equipment, for a total purchase price of $2,495,114. The taxpayer paid $736,058.63 to General Dynamics at closing on December 30, 1982, and the balance of the purchase price was the taxpayer's purchase money obligation payable to General Dynamics in 60 equal quarterly installment payments commencing March 29, 1983, with an annual interest rate of 22.999%.

b. The taxpayer also incurred in 1982 $17,045.78 in transactional costs, such as legal fees, in connection with the General Dynamics transaction.

c. The taxpayer immediately leased the items of equipment back to General Dynamics for a lease term of 15 years. General Dynamics agreed to pay annual rent of $419,209.50 to the taxpayer in equal quarterly installments commencing March 29, 1983.

d. General Dynamics and the taxpayer understood and agreed that the taxpayer's payments on its purchase money obligation and General Dynamics' rent payments would be (1) equal to each other in timing and amount, (2) contingent on each other, and (3) made by offset so that no actual cash would trade hands after the closing. As of May 18, 1995, all payments/offsets have been made as scheduled.

The federal tax consequences to the taxpayer of the General Dynamics transaction were:

a. For its 1982 taxable year, the taxpayer claimed an investment tax credit against its federal income tax liability equal to 10% of the cost of the equipment under IRC sec. 38.

b. Commencing with its 1982 taxable year, the taxpayer depreciated the cost of the equipment as 5-year property under IRC sec. 168.

c. Commencing with its 1983 taxable year, the taxpayer deducted the interest accrued on its purchase money obligation to General Dynamics.

d. Commencing with its 1983 taxable year, the taxpayer included in its income rentals accrued from General Dynamics.

e. Commencing with its 1983 taxable year, the taxpayer amortized its transactional costs ratably over the lease term. Because the General Dynamics transaction occurred so late in 1982, the amortization of the transactional expenses properly began in 1983. In other transactions that closed earlier in 1982, the transactional expense amortization began in 1982.

In February of 1983, the taxpayer calculated the projected cost and tax benefits to the taxpayer of entering into all 13 safe harbor leases from 1982 through 2005, the year in which the last safe harbor lease will expire. The taxpayer will be able to realize federal tax benefits in each year of each lease, although in some years, the tax benefits will be outweighed by certain tax costs as a result of entering into the lease. The taxpayer expected to benefit from the 13 safe harbor leases because they would have the effect of generating positive cash flow for approximately 11 years and, thereby, reducing its interest expenses and increasing its income.

For 1982, Wisconsin's franchise tax law incorporated Internal Revenue Code provisions relating to depreciation and amortization of depreciable property, except IRC sec. 168(f)(8), the section recognizing safe harbor leases. By failing to incorporate IRC sec. 168(f)(8), the Wisconsin law does not consider the 13 safe harbor leases to be actual sales and lease-

backs, and each seller/lessee remained the true owner of the equipment at all times. Accordingly, the taxpayer did not claim any depreciation expenses, report any rental income, or claim any interest expenses for Wisconsin franchise tax purposes.

The taxpayer did, however, for Wisconsin franchise tax purposes, claim a deduction for the amortization of its out-of-pocket costs associated with the safe harbor leases, including the payments to sellers/lessees and transaction costs. In each case, the taxpayer's costs were amortized over the term of the lease involved. On its 1982 franchise tax return, the taxpayer claimed $212,762 for the amortization of its investment in the 13 safe harbor leases.

Under the date of January 29, 1985, the department issued a notice of franchise tax assessment against the taxpayer for taxable years 1979 to 1982 for additional tax and interest in the approximate amount of $4 million. In the assessment, the department disallowed, among other things, $209,242 of the $212,762 the taxpayer claimed in its taxable year 1982 for the amortization of the taxpayer's investment in the safe harbor leases. The department allowed $3,520 of the $212,762 the taxpayer claimed, representing the amortization of the taxpayer's legal fees the taxpayer incurred with regard to the 13 safe harbor leases.

The Commission found that while the Wisconsin franchise tax law excluded IRC sec. 168(f)(8), it incorporated IRC sec. 167 for taxable years after 1972. Sec. 71.04(15)(a), Wis. Stats. (1981-82). Internal Revenue Service (IRS) regulations under IRC sec. 167 are incorporated into Wisconsin's Administrative Code in sec. Tax 1.06. Regulation 1.167(a)-3 permits a taxpayer to amortize the cost of an intangible asset if the asset is known from experience or other factors to be of use in the business or in the production of income for only a limited time and this time can be estimated with reasonable accuracy.

Therefore, the Commission concluded that the taxpayer's tax benefits were intangible assets useful to the taxpayer's business and useful in the production of income under IRS Regulation 1.167(a)-3. The taxpayer is entitled to deduct the amounts it paid to each seller/lessee for tax benefits, amortized over the term of the safe harbor lease, under IRC sec. 167 as incorporated into Wisconsin's franchise tax law.

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

SALES AND USE TAXES

Assessments – statute of limitations; Leases and rentals – property affixed to realty; Interest – 18% delinquent rate; Penalties – negligence – failure to file. *Aqua Finance, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, February 26, 1996). The issues in this case are:

A. Whether the department is barred from assessing sales tax because its notice of action was arguably untimely.

B. Whether the taxpayer is liable for sales tax on its sale or lease of water treatment equipment.

C. Whether the taxpayer is liable for delinquent filing fees and interest.

D. Whether the taxpayer is liable for a 25% penalty for failing to file a return in the absence of reasonable cause.

The taxpayer is a Wisconsin corporation, engaged in the business of leasing and selling water treatment equipment. The taxpayer had master agreements with a number of water treatment equipment dealers ("dealers") that provided for the sale from the dealers to the taxpayer of water treatment equipment after the dealers installed the equipment in the property of dealers' customers ("customers").

The following procedures were used by the taxpayer and its dealers:

1. The dealer installed water treatment equipment from its inventory into the property of the customer;

2. At the time of installation, the customer signed a lease agreement, on forms drafted by the taxpayer, to rent the equipment from the taxpayer;

3. The dealer then collected the first and last month's rent from the customer;

4. The taxpayer then paid the dealer for the water treatment equipment in accordance with the terms of the dealer's master agreement with the taxpayer;

5. The taxpayer then collected the remaining payments from the customer under the lease agreement;

6. UCC financing statements were filed with the register of deeds to secure the taxpayer's security interest in the water treatment equipment.

Customers had the option under lease agreements to purchase the

water treatment equipment from the taxpayer for a price established in the lease agreements.

If, at the end of the lease term, a customer did not exercise the option to purchase the water treatment equipment, the dealer involved was obligated to purchase the equipment from the taxpayer for a price in accordance with the lease agreement. If a customer defaulted, the dealer involved was obligated to assist in collection activity, and, if the default lasted 91 days, the dealer would be obligated under the master agreement, at the taxpayer's option, to repurchase the equipment and purchase the lease agreement from the taxpayer.

The lease agreements authorized the taxpayer to remove water treatment equipment in the event of termination of the lease agreement or breach of the lease agreement by customers. The lease agreements provided that the water treatment equipment continued to be the taxpayer's property (unless the customer exercised the option to purchase) and continued to be personal property, notwithstanding the fact that the equipment may be affixed to real property.

The taxpayer considered itself to be the owner of the water treatment equipment, and the taxpayer claimed depreciation expenses with regard to the equipment on its franchise tax returns. The taxpayer did not install any of the water treatment equipment. Water treatment equipment was serviced by dealers.

Mr. Robert D. Chadwell is president, chief financial officer, and founder of the taxpayer. Mr. Chadwell's prior experience includes (1) chief operating officer and 25% owner of Marathon Harvestore, Inc., (2) senior vice-president and senior loan officer for the State Bank of Medford, (3) branch manager and agricultural loan officer for the First National Bank in Appleton, and (4) branch manager of Associates Financial Services in Appleton.

At the time the taxpayer commenced leasing water treatment equipment, Mr. Chadwell and the taxpayer's tax accountant discussed the potential sales tax liability on such receipts and concluded that the transactions involved real property and, therefore, were not subject to the sales tax.

On July 29, 1992, the department issued a notice of assessment to the taxpayer for sales and use taxes due for the period of October 1, 1988 through September 30, 1991. On September 17, 1992, the taxpayer filed a petition for redetermination with the department.

The department's notice of action affirming in part and denying in part the petition for redetermination was mailed on September 15, 1994 and received by the taxpayer's president on September 16, 1994.

The Commission concluded as follows:

A. The department issued its notice of action in a timely manner consistent with sec. 77.59(6)(a), Wis. Stats. The deadline for the department to issue its notice of action, as provided in a stipulation, was extended to September 16, 1994.

B. The taxpayer is liable for sales tax on its gross receipts from the lease and sale of water treatment equipment. The taxpayer is a retailer as that term is defined in sec. 77.51(13), Wis. Stats., because it sold tangible personal property and it derived rentals from the lease of tangible personal property.

   The taxpayer's sales and leases of water treatment equipment were made at retail. Until it is sold to customers or dealers, water treatment equipment installed in a customer's home retains its character as tangible personal property pursuant to sec. 77.51(20), Wis. Stats.

C. The taxpayer is liable for delinquent filing fees and interest at 1.5% per month from the due date of its sales tax returns pursuant to sec. 77.60(2)(b), Wis. Stats., because the taxpayer failed to file sales tax returns even though they were required.

D. The taxpayer is liable for a penalty of 25% of the principal tax assessment for failing to file a return in the absence of reasonable cause under sec. 77.60(4), Wis. Stats.

The taxpayer has not appealed this decision. □

Exemptions — common or contract carrier vehicles. *Millard Feed Mill, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 18, 1996). The issues in this case are:

A. Whether the taxpayer was a common or contract carrier within the meaning of sec. 77.54(5)(b), Wis. Stats., during the period under review.

B. Whether the taxpayer used the truck tractors and semitrailers it purchased exclusively as a common or contract carrier within the meaning of sec. 77.54(5)(b), Wis. Stats., during the period under review.

During the period from October 1, 1987 through September 30, 1991

("the period under review"), the taxpayer was a Wisconsin corporation engaged in the business of buying and selling feed, fertilizer and chemicals, grain, and various other products, and commercial over-the-road trucking.

The taxpayer had four departments. The taxpayer's feed department purchased feed products at wholesale and sold them to the general public, at times blending individual feeds to produce formulated blends for resale. The taxpayer's fertilizer and chemicals department purchased fertilizers and chemicals at wholesale and sold them to the general public, at times also producing formulated blends for resale. The fertilizer department also applied fertilizer to farmers' fields.

The taxpayer's grain department purchased corn and small grains from farmers, dried and stored grain, and sold corn and grain to grain terminals. The taxpayer's trucking department hauled bulk materials for other departments of the taxpayer and for third parties. The taxpayer held licenses with either the federal or state transportation authorities, or both, with respect to its hauling vehicles and carriage activities.

The taxpayer's financial statements indicate that its investment in autos and trucks, some of which were used in the trucking department's hauling activity, totalled no more than 15% of the taxpayer's total investment in fixed assets for any year during the period under review. During the same period of time, the taxpayer's inventory for sale constituted about 33% of the taxpayer's total assets.

Approximately 5% of the taxpayer's total sales were attributable to the trucking department, which included interdepartmental billing for hauling services performed by the trucking department for the taxpayer's other departments. Approximately 66% of the 1990 sales of the trucking department consisted of hauling services provided to the taxpayer's other departments.

The Commission concluded:

A. The taxpayer was not a contract carrier within the meaning of sec. 77.54(5)(b), Wis. Stats., during the period under review, because the taxpayer's primary business was something other than transportation services.

B. The taxpayer did not use the truck tractors and semitrailers it purchased exclusively in contract carriage within the meaning of sec. 77.54(5)(b), Wis. Stats., during the period under review, because private use of the vehicles by the taxpayer in furtherance of its own business activities far exceeded contract carriage for third parties, let alone any standard of de minimis or "infrequent or sporadic" usage allowable under sec. Tax 11.16(am), Wis. Adm. Code.

The taxpayer has not appealed this decision. □

Leases and rentals – personal use of auto by employe. *Skyline Development Corp. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, February 13, 1996). The issue in this case is whether the arrangement between the taxpayer and its employes for the reimbursement for personal use of the taxpayer's vehicles constitutes the rental of tangible personal property subject to sales tax.

The taxpayer is a corporation, engaged in the business of building industrial and commercial buildings in Wisconsin. The taxpayer is not in the business of leasing or renting tangible personal property, including motor vehicles, to others.

The taxpayer's corporate vehicles were used by the taxpayer's employes in carrying out their duties supervising and organizing the taxpayer's construction projects. This use was a necessary and proper part of the taxpayer's business. In addition, each of the corporate vehicles were used by the taxpayer's employes for personal use. The degree of personal use of corporate vehicles varied, but none of the vehicles were used exclusively for an employe's personal use.

The taxpayer required each employe possessing a corporate vehicle to regularly report the number of miles the vehicle was used for business purposes and the number of miles the vehicle was used for personal use. The employe paid the taxpayer for personal use using a reimbursement formula based on the taxpayer's costs for that vehicle. The requirement to report and pay for personal use of vehicles was not in writing.

The taxpayer did not mark up or make a "profit" on the payments received from employes for the personal use of corporate vehicles. Payment for personal use of the vehicles was accomplished by deducting the appropriate amount from the paycheck of each employe possessing a corporate vehicle.

The department's auditors routinely and consistently make sales tax adjustments for payments received by businesses for employes' personal use of company automobiles.

The Commission concluded that the taxpayer is liable for sales tax on its receipts from employes for the use

of corporate vehicles. The taxpayer is a retailer as that term is defined in sec. 77.51(13), Wis. Stats., because it is a person deriving rentals from the lease of tangible personal property. The amounts received by the taxpayer from employes as reimbursement for their personal use of the taxpayer's corporate vehicles are gross receipts as that term is defined in sec. 77.51(4)(a), Wis. Stats.

The arrangement between the taxpayer and its employes for the use and reimbursement for their personal use of the taxpayer's vehicles constitutes the rental of tangible personal property at retail to the taxpayer's employes. The rental of the taxpayer's corporate vehicles to its employes for their personal use is not an occasional sale as that term is defined in sec. 77.51(9), Wis. Stats., because the rental of the corporate vehicles was neither isolated nor sporadic.

The taxpayer has not appealed this decision. □

Rebates; Sovereign immunity. *John Grall, et al. vs. Mark Bugher, Secretary of the Wisconsin Department of Revenue, et al.* (Circuit Court for Dane County, January 30, 1996). This case was remanded to the Circuit Court by the Wisconsin Supreme Court. The dispositive issue in this case is whether the department is immune from suit.

A summary of the Court of Appeals December 16, 1993 decision is contained in *Wisconsin Tax Bulletin* 90 (January 1995), page 24. The taxpayers appealed the Court of Appeals decision to the Wisconsin Supreme Court, which, on May 23, 1995, reversed the Court of Appeals decision and remanded the case to the Circuit Court.

The Circuit Court dismissed the matter, since the taxpayers have indicated that they wish to pursue their administrative remedies prior to pursuing any further action in the Circuit Court. Neither the taxpayer nor the department appealed the Circuit Court dismissal. □

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 Carryforward of Historic Rehabilitation Credits by Claimants Subject to Alternative Minimum Tax

Statutes: Sections 71.07(9m) and (9r), 71.08, and 71.10(4), Wis. Stats. (1993-94), and as affected by 1995 Wisconsin Act 27

Note: This tax release supersedes the tax release with the same title that was published in *Wisconsin Tax Bulletin* 95 (January 1996), page 30. Question and Answer 2 was added to clarify the computation of the carryforward when the individual has a regular Wisconsin income tax liability. In addition, the statutory references were updated to reflect the creation of additional development zones tax credits for taxable years beginning on or after January 1, 1995.

Background: Sections 71.07(9m) and (9r), Wis. Stats. (1993-94), provide for a supplement to the federal historic rehabilitation credit and a state historic rehabilitation credit, respectively. Each of these provisions provides for a 15-year carryforward of unused credits.

For individuals, sec. 71.10(4), Wis. Stats. (1993-94), and as amended by 1995 Wisconsin Act 27, requires computations to be made in the following order for taxable years beginning on or after January 1, 1995:

(a) Income tax under sec. 71.06

(b) Dependent credit and senior citizen credit under sec. 71.07(8)

(c) Itemized deduction credit under sec. 71.07(5)

(d) School property tax credit under sec. 71.07(9)

(e) Supplement to federal historic rehabilitation credit under sec. 71.07(9m)

(f) State historic rehabilitation credit under sec. 71.07(9r)

(g) Alternative minimum tax under sec. 71.08

(h) Married persons credit under sec. 71.07(6)

(i) Enterprise zones jobs credit under sec. 71.07(2dj)

(j) Enterprise zones sales tax credit under sec. 71.07(2ds)

(k) Development and enterprise zones investment credit under sec. 71.07(2di)

(l) Development and enterprise zones location credit under sec. 71.07(2dL)

(m) Development and enterprise zones day care credit under sec. 71.07(2dd)

(n) Development and enterprise zones environmental remediation credit under sec. 71.07(2de)

(o) Payments to other states under sec. 71.07(7)

Section 71.08(1)(intro.), Wis. Stats. (1993-94), and as amended by 1995 Wisconsin Act 27, imposes an alternative minimum tax on individuals, estates, and trusts if the income tax under sec. 71.02, Wis. Stats., not considering the claim of right credit under sec. 71.07(1), development and enterprise zones day care, environmental remediation, investment, jobs, location, and sales tax credits under secs. 71.07(2dd), (2de), (2di), (2dj), (2dL), and (2ds), 71.28(1dd), (1de), (1di), (1dj), (1dL), and (1ds), and 71.47(1dd), (1de), (1di), (1dj), (1dL), and (1ds), farmers' drought property tax credit under secs. 71.07(2fd), 71.28(1fd), and 71.47(1fd), farmland tax relief credit under secs. 71.07(3m), 71.28(2m), and 71.47(2m), married persons credit under sec. 71.07(6), earned income tax credit under sec. 71.07(9e), homestead credit under subch. VIII, farmland preservation credit under subch. IX, and credit for taxes paid to other states under sec. 71.07(7), is less than the tax under sec. 71.08.

Facts and Question 1: Taxpayer A calculates a state historic rehabilitation tax credit of $10,000 for 1995. The individual computes his 1995 Wisconsin tax liability as follows:

Income tax (gross tax)	$ 4,000
Dependent credit	(100)
Itemized deduction credit	(300)
School property tax credit	(200)
State historic rehabilitation credit	(3,400)
Regular income tax	$ 0
Tentative minimum tax	$ 1,600
Alternative minimum tax	$ 1,600

How much of Taxpayer A's 1995 historic rehabilitation credit is available to be carried forward to 1996?

Answer 1: Of Taxpayer A's $10,000 1995 historic rehabilitation credit, $8,200 is available to be carried forward to 1996.

Since the historic rehabilitation credit cannot offset the alternative minimum tax, the credit is considered utilized to the extent that Taxpayer A's regular income tax before subtracting the historic rehabilitation credit exceeds his tentative minimum tax. Thus, $1,800 [$4,000 gross tax - $100 dependent credit - $300 itemized deduction credit - $200 school property tax credit - $1,600 tentative minimum tax = $1,800] of the historic rehabilitation credit is utilized in 1995, and $8,200 [$10,000 - $1,800] may be carried forward.

Facts and Question 2: Taxpayer B calculates a state historic rehabilitation tax credit of $3,800 for 1995. The individual computes her 1995 Wisconsin tax liability as follows:

Income tax (gross tax)	$ 5,000
Itemized deduction credit	(515)
School property tax credit	(200)
State historic rehabilitation credit	(3,800)
Regular income tax	$ 485
Tentative minimum tax	$ 2,225
Alternative minimum tax	$ 1,740

How much of Taxpayer B's 1995 historic rehabilitation credit is available to be carried forward to 1996?

Answer 2: Of Taxpayer B's $3,800 1995 historic rehabilitation credit, $1,740 is available to be carried forward to 1996.

Since the historic rehabilitation credit cannot offset the alternative minimum tax, the credit is considered utilized to the extent that Taxpayer B's regular income tax before subtracting the historic rehabilitation credit exceeds her tentative minimum tax. Thus, $2,060 [$5,000 gross income tax - $515 itemized deduction credit - $200 school property tax credit - $2,225 tentative minimum tax = $2,060] of the historic rehabilitation credit is utilized in 1995, and $1,740 [$3,800 - $2,060] may be carried forward. □

2 Eligibility for the Wisconsin Income Tax Exemption for Members of the Wisconsin State Teachers Retirement System

Note: This tax release supersedes the tax release with the same title, which was published in *Wisconsin Tax Bulletin* 76 (April 1992), page 9. The original tax release has been revised to reference an additional relevant court decision rendered in 1994 (i.e., the Wisconsin Court of Appeals decision in *Benson vs. Gates*). The taxable treatment prescribed for the retirement benefits in Bulletin 76 is not changed by this tax release.

Statutes: Section 71.05(1)(a), Wis. Stats. (1993-94)

Background: Section 71.05(1)(a), Wis. Stats. (1993-94), provides that all payments received from certain retirement systems are exempt from Wisconsin income tax if the payments are paid on the account of a person who was a member of, or who was retired from, one of the specified retirement systems as of December 31, 1963. One of the specified retirement systems is the Wisconsin State Teachers Retirement System which is administered by the Department of Employe Trust Funds (DETF).

Section 42.242(5), Wis. Stats. (1965-66), provides that a member of the State Teachers Retirement System who has ceased to be employed as a teacher may, under certain conditions, withdraw the member's deposits made while a member of the combined group based on teacher service performed after June 30, 1957. Members making such withdrawals forfeited the employer contributions.

DETF considered a withdrawal under sec. 42.242(5), Wis. Stats. (1965-66), to completely close the teacher's account.

However, in the case of *Schmidt v. Department of Employe Trust Funds*, 148 Wis. 2d 844 (Ct. App. 1989), aff'd. 153 Wis. 2d 35 (1990), the court decided that a teacher who returned to teaching after 1963 was eligible for creditable service under sec. 42.245(1)(c), Wis. Stats. (1965-66). This section reduces by one-half the number of years of creditable service when the teacher previously withdrew required member deposits. Therefore, the account of a member making a sec. 42.242(5) withdrawal should not have been completely closed. One-half of the creditable service should have remained in the account, even though there were no contributions remaining in the account to fund a benefit.

Under sec. 40.08(10), Wis. Stats. (1993-94), there is a 7-year statute of limitations on corrections to a member's account. Because of this statute of limitations provision, DETF believed that the *Schmidt* decision only affected individuals who submitted a written challenge to DETF's annual retirement account statement containing the DETF summary of the amount of creditable service within seven years of first having notice of DETF's failure to grant credit for previous service.

In 1994, in the case of *Benson vs. Gates* (188 Wis. 2d 389), the Wisconsin Court of Appeals held that the statute of limitations under sec. 40.08(10) does not commence until the date DETF calculates and pays retirement benefits to a plan beneficiary. As a result of the *Benson* decision, additional individuals are able to have their accounts in the retirement system corrected under the principles set forth in the *Schmidt* case.

Facts and Question: Prior to 1964, a teacher withdrew his deposits in the Wisconsin State Teachers Retirement System as allowed by sec. 42.242(5), Wis. Stats. (1965-66). His account in the retirement system was closed by DETF. The individual returned to teaching in 1964. The individual timely appealed the loss of creditable service to the Department of Employe Trust Funds. As a result of the *Schmidt* and *Benson* decisions, this individual's account was corrected to include one-half of the pre-1964 creditable service forfeited through the withdrawal.

Are the retirement benefits received by this individual exempt from Wisconsin tax?

Answer: Yes. Because of the restoration of one-half of this pre-1964 creditable service, this individual is deemed to have been a member of the Wisconsin Teachers Retirement System as of December 31, 1963. Therefore, payments received by this individual from the Wisconsin State

Teachers Retirement System qualify for the exemption provided by sec. 71.05(1)(a), Wis. Stats. (1993-94).

Note: The Wisconsin Tax Appeals Commission decision, in the *James R. and Zoe E. Connor vs. Wisconsin Department of Revenue* case, involved a fact situation very similar to what is presented in this tax release. However, that decision does not affect the department's position regarding the taxable status of retirement benefits as expressed in this tax release.

(Editor's Note: See page 16 of this Bulletin for a summary of the Connor decision.) □

CORPORATION FRANCHISE AND INCOME TAXES

3 Assessment of Tax to Transferee of Dissolved Corporation

Statutes: Sections 71.74(7) and (12) and 71.82(1)(a) and (2)(a), Wis. Stats. (1993-94)

Background: Section 71.74(7), Wis. Stats. (1993-94), provides that if all or substantially all of the business or property of a corporation is transferred to one or more persons and the corporation is liquidated, dissolved, merged, consolidated, or otherwise terminated, any tax imposed under Chapter 71 (income and franchise taxes) on such corporation may be assessed and collected against the transferee or transferees of such business or property.

Section 71.74(12), Wis. Stats. (1993-94), provides that additional income or franchise taxes assessed under sec. 71.74(7), Wis. Stats. (1993-94), shall become delinquent if not paid on or before the due date stated in the notice to the taxpayer.

Section 71.82(1)(a), Wis. Stats. (1993-94), provides that in assessing taxes, interest shall be added to such taxes at 12% per year from the date on which such taxes if originally assessed would have become delinquent if unpaid, to the date on which such taxes when subsequently assessed will become delinquent if unpaid. Section 71.82(2)(a), Wis. Stats. (1993-94), provides that delinquent income and franchise taxes shall be subject to interest at the rate of 1.5% per month (18% per year) until paid.

Facts and Question: In August 1994, the department issues a notice of assessment to Corporation A showing $5,000 of additional tax due from its 1993 franchise tax return and $300 of regular interest (12% per year) computed from the due date of the return to the due date stated on the notice of assessment. Corporation A does not pay the amount due and the assessment becomes delinquent. The assessment is then subject to delinquent interest (18% per year).

Corporation A dissolves in January 1996. All assets of Corporation A are transferred to the sole shareholder at that time. In March 1996, the department issues an assessment to the shareholder, as transferee of the dissolved corporation, for the delinquent tax owed by Corporation A. At the time of the assessment, Corporation A owes the department $6,700 (tax of $5,000, regular interest of $300, and delinquent interest of $1,400).

May the department issue a notice of assessment to the transferee for the entire $6,700 owed to the department by Corporation A?

Answer: No. Under sec. 71.74(7), Wis. Stats. (1993-94), the transferee may not be charged delinquent interest until after the due date stated in a notice of assessment issued to the transferee. Therefore, the department may issue a notice of assessment to the transferee for $5,000 (tax due from the 1993 corporate franchise tax return) plus regular interest (12% per year) computed from the due date of Corporation A's 1993 franchise tax return to the due date stated on the notice of assessment to the transferee. The transferee may be charged delinquent interest only if the amount due is not paid on or before the due date stated on the notice of assessment to the transferee. □

SALES AND USE TAXES

4 Bovine Growth Hormone and Vitamins for Farm Livestock

Statutes: Section 77.54(33) and (34), Wis. Stats. (1993-94)

Wis. Adm. Code: Section Tax 11.12(2)(e) and (k), April 1993 Register

Background: Section 77.54(33), Wis. Stats. (1993-94), provides an exemption from Wisconsin sales or use tax for medicines used on farm livestock, not including workstock.

"Farm livestock medicine" is defined in sec. Tax 11.12(2)(e), Wis. Adm. Code, to mean any substance or preparation intended for use by external or internal application to farm livestock in the cure or treatment of disease and which is commonly recognized by veterinarians as a substance or preparation intended for that use. "Farm livestock medicine" does not include vitamins.

Section 77.54(34), Wis. Stats. (1993-94), provides an exemption from Wisconsin sales or use tax for

milk house supplies used exclusively in producing and handling milk on dairy farms.

"Milk house supplies" is defined in sec. Tax 11.12(2)(k), Wis. Adm. Code, to mean items used exclusively in producing and handling milk on dairy farms, including milk filters, soaps, detergents, udder washer and balms, pipeline cleaners, manual cleaners, acid cleaners, disinfectants and sanitizers, teat dips, teat dilators, paper towels, insect strips, cloth udder towels, udder sponges, brushes and brooms, window cleaners, and water softener salt.

Question 1: Is the sale of a bovine growth hormone to persons engaged in farming, which is injected in dairy cows to enhance milk production, subject to Wisconsin sales or use tax?

Answer 1: Yes. The sale of a bovine growth hormone is subject to Wisconsin sales or use tax.

The exemption for farm livestock medicine under sec. 77.54(33), Wis. Stats. (1993-94), does not apply because a bovine growth hormone is not used for the cure or treatment of disease.

The exemption for milk house supplies under sec. 77.54(34), Wis. Stats. (1993-94), does not apply. The statute requires that the supply (e.g., bovine growth hormone) must be used exclusively in both producing **and** handling milk. A bovine growth hormone is not used in **handling** milk and, therefore, the requirements for exemption have not been met.

Question 2: Is the sale of vitamins to persons engaged in farming, which are given to dairy cows, subject to Wisconsin sales or use tax?

Answer 2: Yes. The sale of vitamins is subject to Wisconsin sales or use tax.

The exemption for farm livestock medicine under sec. 77.54(33), Wis. Stats. (1993-94), does not apply because vitamins are specifically excluded from the definition of "farm livestock medicine" in sec. Tax 11.13(2)(e), Wis. Adm. Code.

The exemption for milk house supplies under sec. 77.54(34), Wis. Stats. (1993-94), does not apply to vitamins for the following reasons:

A. Vitamins are intended to improve the overall health of dairy cows, which not only could result in improved milk production, but also in better breeding and lower medical costs. Therefore, vitamins are not used **exclusively** in milk production.

B. Vitamins are not used in **handling** milk. □

WITHHOLDING OF TAXES

5 Penalty for Intentional Failure to Remit Withholding Taxes

Statutes: Section 71.83(1)(b)2, Wis. Stats. (1993-94)

Background: Section 71.83(1)(b), Wis. Stats. (1993-94), provides various civil penalties which may be imposed for "intent to defeat or evade" taxes. Under sec. 71.83(1)(b)2, Wis. Stats., any person who is "required to withhold, account for or pay over any tax imposed" by ch. 71, Wis. Stats. (income and franchise taxes), and who intentionally fails to do one or more of those actions, is liable to a penalty equal to the total amount of the tax (100% penalty), plus interest and penalties on the tax that is not withheld, collected, accounted for, or paid to the department.

In ch. 71, Wis. Stats. (including sec. 71.83(1)(b)2, Wis. Stats.), "person" includes corporations, unless the context requires otherwise. Section 71.22(9), Wis. Stats. (1993-94). Section 71.83(1)(b)2, Wis. Stats., further provides that "person" includes (but is not limited to) an officer, employe, or other responsible person of a corporation or other form of business association, or a member, employe, or other responsible person of a partnership, limited liability company, or sole proprietorship, who as that officer, member, employe, or other responsible person, has a duty to withhold or account for the tax or to pay the tax to the department.

Facts and Question 1: ABC Corporation, a Wisconsin corporation engaged in business in Wisconsin, paid wages to its employes and withheld Wisconsin taxes from their wages during its entire taxable year 1994. Taxpayer X was the corporation's president, and he had primary responsibility for remitting the withholding taxes to the Wisconsin Department of Revenue. Because of cash-flow problems, however, Taxpayer X intentionally failed to remit the taxes to the department. Instead, he used the amounts withheld from employes' wages to pay other bills.

In an audit of ABC Corporation, the department determined that the amount of withholding tax which should have been remitted to the department, but was not remitted, was $10,000. The department will assess ABC Corporation for the $10,000.

Does the department have the authority under sec. 71.83(1)(b)2, Wis.

Stats. (1993-94), to add the 100% penalty to the $10,000 of taxes in its assessment against ABC Corporation?

Answer 1: Yes. The language of sec. 71.83(1)(b)2, Wis. Stats. (1993-94), allows the imposition of the 100% penalty against ABC Corporation. The corporation is a "person required to withhold, account for or pay over" the taxes withheld from the wages of its employes. Since ABC Corporation intentionally did not "pay over" the taxes to the department, it is subject to the 100% penalty.

Facts and Question 2: Based on the facts in Facts and Question 1, the department assessed ABC Corporation for the $10,000 of withholding taxes, a $10,000 penalty under sec. 71.83(1)(b)2, Wis. Stats. (1993-94), and interest computed to the due date shown on the notice of amount due. ABC Corporation neither contested nor paid the assessment, and the amount due became delinquent. Since Taxpayer X, the corporation's president, is a "responsible person" under the "personal liability" provisions of sec. 71.83(1)(b)2, Wis. Stats., the department intends to assess Taxpayer X personally.

May the department include the $10,000 penalty assessed against ABC Corporation in its assessment against Taxpayer X?

Answer 2: Yes. Taxpayer X is a person who had a duty to pay over the withholding tax to the department and intentionally failed to do so. Section 71.83(1)(b)2, Wis. Stats., the same provision that allows the imposition of the of the 100% penalty on the corporation, also allows the department to assess the tax, interest, and penalties against Taxpayer X personally. The department may assess Taxpayer X for $20,000 ($10,000 taxes plus $10,000 penalty), plus interest. □

MOTOR VEHICLE FUEL TAXES

6 Motor Vehicle Fuel Tax Discount

Statutes: Section 78.12(4) and (5)(a), Wis. Stats. (1993-94)

Note: This tax release applies to motor vehicle fuel tax discounts on gasoline received by a licensed supplier on or after April 1, 1994.

Background: Section 78.12(4), Wis. Stats. (1993-94), allows licensed suppliers to reduce the number of gallons of gasoline received by 1.35% to determine the number of gallons on which motor vehicle fuel tax must be paid. This results in a 1.35% tax discount. Section 78.12(5)(a), Wis. Stats. (1993-94), provides that a supplier must credit a wholesaler distributor's account for a 1.25% tax discount when the distributor pays to the supplier the motor vehicle fuel tax on gasoline it has purchased from the supplier. Suppliers may retain the other 0.1% portion of the discount (1.35% - 1.25% = 0.1%). Suppliers must pay the tax to the department by the 15th day of the month, for gasoline received during the previous month.

Question: Is a licensed supplier entitled to the 1.35% gasoline tax discount provided by sec. 78.12(4), Wis. Stats. (1993-94), regardless if the payment of tax is made (1) by the due date for payment to the department, or (2) after the due date?

Answer: Yes. The statutes do not prohibit the discount if the tax is not paid by the due date in sec. 78.12(5)(a), Wis. Stats. (1993-94). (**Note:** Late payments are subject to late fees and interest.) □

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:

W9621001, March 6, 1996

Type Tax: Individual Income

Issue: Marital property law — Keogh deduction

Statutes: Section 71.01(16), Wis. Stats. (1993-94)

This letter is in response to your request for a private letter ruling regarding the proper allocation of a Keogh deduction.

Facts

Taxpayer A (the "taxpayer") was married through June 30, 1994. The taxpayer is a self-employed dentist.

For the year ending December 31, 1994, all income earned prior to the divorce was reported on the taxpayer's and his former spouse's income tax returns under the provisions of the Wisconsin Marital Property Act. The self-employment income and expenses for the first six months of 1994 were allocated to and reported equally, one-half by the taxpayer and one-half by his former spouse. The self-employment income and expenses for the remaining part of the year were reported by the taxpayer.

The taxpayer made a contribution to a Keogh retirement plan for 1994. The contribution was made during 1995, after the divorce date but before the due date of the 1994 income tax return.

The amount of the Keogh contribution was determined under the provisions of the Internal Revenue Code. You indicated that this resulted in a contribution to the Keogh retirement plan for 1994 of $14,211 with $8,934 allocated to the first six months of 1994 and $5,277 allocated to the remainder of 1994.

Request

The question you ask is who is allowed to claim the deduction for the 1994 Keogh contribution for the period of time that the parties were married in 1994.

Ruling

For Wisconsin income tax purposes, the deduction for contributions to a Keogh retirement plan is allocated to the taxpayer who is reporting the related self-employment income. In this instance, the taxpayer and his former spouse are each reporting one-half of the self-employment income earned prior to the divorce. Therefore, each may claim one-half of the Keogh deduction (½ x $8,934 = $4,467) attributable to self-employment income earned prior to the divorce.

Analysis

In this instance, the taxpayer and his former spouse are reporting their income for the period prior to their divorce in accordance with the Wisconsin Marital Property Act. That is, each is reporting one-half of the marital income earned prior to their divorce.

Section 71.01(16), Wis. Stats. (1993-94), provides that "'Wisconsin taxable income' of natural persons means Wisconsin adjusted gross

income less the Wisconsin standard deduction, with losses, depreciation, recapture of benefits, offsets, depletion, deductions, penalties, expenses and other negative income items determined according to the manner that income is or would be allocated, ..."

Based on this statute, because the former spouse is reporting one-half of the self-employment income earned prior to the divorce, she is also allowed one-half of the Keogh deduction attributable to that income.

You raised the issue that the payment into the Keogh account was made after the divorce, when marital property law no longer applied to the marriage. It is true that the presumption that marital property was used to make the payment ended with the June divorce. However, the amount of the Keogh deduction was based in part on marital property income, on which the former spouse is required to pay taxes. Section 71.01(16), Wis. Stats. (1993-94), provides that when a person is required to report marital property income, that same person is entitled to all the deductions associated with the income, which in this case would include the Keogh deduction. That provision is not premised on whether marital funds were used for the payment, or even whether the marriage exists at the time of the payment. It simply requires a matching of deductions to income to which the deductions relate. Here, the Keogh deduction is partly premised upon marital income, one-half of which the former spouse is reporting, and so the deduction must also be shared.

This ruling applies only for Wisconsin income tax purposes. The department does not issue private letter rulings on the federal tax treatment of any item. If the federal treatment of the Keogh deduction is different than the Wisconsin treatment, sec. 71.05(10)(h), Wis. Stats. (1993-94), allows an adjustment for any difference through an addition or subtraction, as appropriate, from federal adjusted gross income when computing Wisconsin taxable income. □

✳ **W9626002**, April 9, 1996

Type Tax: Withholding

Issue: Nonresident entertainer — deposit, bond, withholding requirements

Statutes: Section 71.80(15), Wis. Stats. (1993-94)

This letter responds to your original request for a private letter ruling and your subsequent additional request. The requests relate to whether your client is subject to bond, deposit, or withholding requirements as they relate to nonresident entertainers, and how to compute the amounts subject to withholding if the withholding requirement applies.

Facts

Corporation ABC (the "taxpayer") has an agreement with Corporation DEF ("DEF") to sponsor a series of Broadway-type theatrical productions. DEF has operations in cities outside of Wisconsin. DEF directly negotiates and signs the actual production contracts with Broadway producers (the "producer"). Nearly all performers and production personnel will be nonresidents. They will be under contract to the producer.

Tickets for each production are sold primarily as part of a series subscription, with payment for the subscription made directly to one of DEF's non-Wisconsin offices, which will control that revenue. Single ticket sales are made through TicketMaster and at the taxpayer's own box office. The taxpayer will control that ticket revenue. Some of the shows in the series will be presented at a theater other than the taxpayer's. In those cases, single ticket revenue will be collected by that theater and the taxpayer will have control of no ticket revenue apart from that derived from group sales and from sales of extra single tickets to series subscribers.

Revenues are distributed to the various parties pursuant to the particular contract for each play. In general, the producer will receive a guaranteed amount plus a royalty (computed as a percent of gross receipts) and a percentage of the profit remaining after payment of the guarantee, royalty, and local production costs. Thus, DEF and the taxpayer receive payment for their local expenses and a percent of the overall profit, which is divided pursuant to their contract.

Request

The taxpayer requests a ruling as to what, if any, bond, deposit, or withholding requirements exist pursuant to sec. 71.80(15), Wis. Stats., based on the business arrangement described under "Facts" above. If the taxpayer is required to withhold taxes under sec. 71.80(15)(e), Wis. Stats., how should the amount subject to withholding be computed?

Ruling

The taxpayer is an employer with respect to the entertainment corporations (the producers), pursuant to sec. 71.80(15)(a), Wis. Stats. (1993-94). The taxpayer is required to withhold taxes under sec. 71.80(15)(e), Wis. Stats. (1993-94), if it does not receive proof that the entertainment corporations have provided the bonds or deposits that

they are required to provide under sec. 71.80(15)(b) or (c), Wis. Stats. (1993-94), or that those requirements have been waived under sec. 71.80(15)(d), Wis. Stats. (1993-94).

If the taxpayer is required to withhold taxes under sec. 71.80(15)(e), Wis. Stats., the amount subject to withholding is the total compensation payments made to the producer by the taxpayer under the terms of the contract. "Total compensation payments" includes, but is not limited to, the guaranteed amount, the royalty computed as a percentage of gross receipts, and the percentage of the profit remaining after payment of the guarantee, royalty, and local production costs.

Analysis

The agreement between the taxpayer and DEF establishes a joint venture between the two entities, to present a series of Broadway-type theatrical productions, to be held primarily on the premises of the taxpayer.

The producers that execute contracts to produce the theatrical productions are entertainment corporations as defined in sec. 71.22(2), Wis. Stats. (1993-94). As such, the producers are subject to the bond or deposit requirements of sec. 71.80(15)(b) or (c), Wis. Stats. (1993-94).

The taxpayer, in its capacity as coventurer in the joint venture between it and DEF, is an employer with respect to the producers, pursuant to sec. 71.80(15)(a), Wis. Stats. (1993-94). As such, the taxpayer is required to withhold taxes under sec. 71.80(15)(e), Wis. Stats. (1993-94), if the taxpayer does not receive proof that the entertainment corporation (the producer) has provided the bond or deposit as required of it under sec. 71.80(15)(b) or (c), Wis. Stats. (1993-94), or that the department has waived those requirements, as provided in sec. 71.80(15)(d), Wis. Stats. (1993-94). (**Note:** The taxpayer is not an employer with respect to the entertainers (the nonresident performers). The producer is the employer of the entertainers.) □