



# Wisconsin TAX BULLETIN



## NCR Litigation Resolved

See article on this page and  
report on litigation on page 18.

## Vernon County Adopts County Tax

Effective January 1, 1997, the county sales and use tax will be adopted by Vernon County. This brings to 49 the number of counties that have adopted the ½ % county tax.

The September 1996 *Sales and Use Tax Report*, a copy of which appears on pages 37 and 38 of this Bulletin, explains how the county tax applies to retailers and other persons. It includes a listing of the counties that have adopted the county tax. ☐

## Form Changes for 1996

Following are brief descriptions of the major changes to the Wisconsin individual income tax forms for 1996.

- Check boxes and entry spaces relating to whether the taxpayer earned income from personal or professional services performed in Minnesota while a Wisconsin resident are removed from Forms 1, 1A, WI-Z, and 1NPR.

- Entry spaces are provided on line 5 of Form WI-Z to enable the taxpayer to compute the married couple credit on the front of Form WI-Z. In prior years, computation of the credit was done on a separate schedule on the back of Form WI-Z.

Preliminary copies of the 1996 Forms 1, 1A, WI-Z, and 1NPR and the homestead credit and farmland preservation credit claim forms, Schedule H and Schedule FC, are reproduced on pages 39 to 52 of this Bulletin. The copies are subject to further revision. ☐

## 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, and private letter rulings; publications; *Sales Tax Reports*; 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. The cases are listed by type of tax, and then alphabetically by issue.

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

## NCR Litigation Resolved

This article explains the status of the *NCR* litigation.

## Background

NCR Corporation (NCR) appealed a franchise tax assessment made by the Department of Revenue (DOR) for

(Continued on page 5)

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## 1996 Income Tax Changes

Following are brief descriptions of some of the Wisconsin law changes which affect individuals in completing 1996 Wisconsin income tax returns. See *Wisconsin Tax Bulletin 97* (July 1996) for additional information about laws enacted in 1996.

### Wisconsin Tax Bulletin

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Administration  
Document Sales  
P.O. Box 7840  
Madison, WI 53707-7840  
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- **Adoption expenses.** A deduction is allowed to an adoptive parent for adoption fees, court costs, or legal fees relating to the adoption of a child, for whom a final order of adoption has been entered by a Wisconsin court during the taxable year. The deduction is available to a full-year Wisconsin resident for up to \$5,000 of the amount expended during the taxable year in which the final order of adoption is entered and the prior two tax years.
- **Combat pay.** The combat pay exclusion is extended to certain members of the Armed Forces of the United States serving in a qualified hazardous duty area (Bosnia and Herzegovina, Croatia, or Macedonia). In addition, the combat pay exclusion for commissioned officers is increased. (For more information, see the following article titled "Changes in Federal Combat Pay Exclusion Also Apply for Wisconsin.")
- **Viatical settlement contracts.** Income received by the original policyholder or original certificate holder from the sale of a life insurance policy or certificate, or the sale of the death benefit under a life insurance policy or certificate, under a viatical settlement contract is exempt from Wisconsin income tax.
- **Credit for taxes paid to another state by a limited liability company (LLC).** A Wisconsin resident who is a member of an LLC that is treated as a partnership may claim a credit against Wisconsin net income tax for income and franchise taxes paid to another state by the LLC. The credit is allowed only if the income taxed by the other state is also considered income for Wisconsin tax purposes.
- **Earned income credit.** The percentages used in computing the Wisconsin earned income credit

are changed. The credit is equal to 14% of the federal earned income credit if the claimant has two qualifying children and 43% if the claimant has three or more qualifying children. If the claimant has one qualifying child, the Wisconsin earned income credit remains at 4% of the federal credit. (Note: This change is the result of a Wisconsin law change enacted in 1995, and is not described in *Wisconsin Tax Bulletin 97*.) □

### Changes in Federal Combat Pay Exclusion Also Apply for Wisconsin

For federal tax purposes, Public Law 104-117, enacted March 20, 1996, provides that members of the U.S. Armed Forces performing services for the peace-keeping efforts in a "qualified hazardous duty area" are treated as if the area were a combat zone. A "qualified hazardous duty area" means Bosnia and Herzegovina, Croatia, or Macedonia during the period in which any member of the U.S. Armed Forces is entitled to special pay for duty subject to hostile fire or imminent danger.

In addition, Public Law 104-117 increased the combat pay exclusion for commissioned officers from \$500 per month to the sum of (1) the highest rate of basic pay for that month payable to an enlisted member of the U.S. Armed Forces in the highest enlisted pay grade (currently \$4,254.90 but \$4,158.60 for 1995), and (2) the amount of special pay for duty subject to hostile fire or imminent danger.

For federal tax purposes, these provisions in Public Law 104-117 apply retroactively to service performed on and after November 21, 1995.

For Wisconsin tax purposes, the changes in the combat pay provisions were adopted by 1995 Wisconsin Act 380, *effective at the same time as for federal tax purposes (i.e., November 21, 1995)*.

The U.S. Army, U.S. Navy, U.S. Air Force, and U.S. Coast Guard will issue Form W-2c, Statement of Corrected Income and Tax Amounts, to all members of the U.S. Armed Forces who served in the qualified hazardous duty area in 1995 (for any period on or after November 21, 1995).

A taxpayer who receives the Form W-2c can use it to file his or her 1995 Wisconsin income tax return if it has not been filed. If the taxpayer previously filed a 1995 Wisconsin income tax return, he or she should file an amended 1995 return (Form 1X) to claim a refund. □

### Some Federal Law Changes Do Not Apply For Wisconsin

Two federal laws enacted during 1996 result in a difference in the Wisconsin and federal tax treatment of numerous items. These two new federal laws are the Small Business and Job Protection Act of 1996 (Public Law 104-188 enacted on August 20, 1996), and the Health Insurance Portability and Accountability Act of 1996 (Public Law 104-191 enacted on August 21, 1996).

Many of the provisions in these new federal laws apply retroactively to taxable years beginning before 1997 (i.e., 1996 and prior tax years). Under current Wisconsin law, these provisions do not apply for 1996 or prior years for Wisconsin income and franchise tax purposes.

The following is a listing of some of the new federal provisions enacted in

1996 which do not apply for Wisconsin purposes for 1996 and prior years:

- Exclusion for up to \$5,250 of employer-provided educational assistance benefits (effective federally for taxable years beginning after December 31, 1994)
- Deduction for business use of a residence for expenses allocable to space used to store product samples (effective federally for taxable years beginning after December 31, 1995)
- Repeal of the \$5,000 employee death benefit exclusion (effective federally with respect to decedents dying after August 20, 1996)
- Treatment of property acquired to replace investment or business property involuntarily converted as a result of a Presidentially declared disaster (effective federally for disasters for which a Presidential declaration is made after December 31, 1994, in taxable years ending after that date)
- Treatment of lessor improvements abandoned at termination of lease (effective federally for leasehold improvements disposed of after June 12, 1996)

In addition to the five provisions listed above, there are many other provisions in these two federal laws that do not apply for Wisconsin for 1996 or prior years. The department is currently reviewing these laws and will provide a comprehensive listing of the differences in the January 1997 *Wisconsin Tax Bulletin*.

Other provisions in these new laws, such as changes in the rules relating to S corporations, first apply for federal purposes to taxable years beginning in 1997. Whether or not these provisions will be adopted for

Wisconsin tax purposes will be considered by the Wisconsin Legislature in their 1997 session. It likely will not be known until mid-1997 whether any of these federal provisions will be adopted for Wisconsin for taxable years beginning in 1997.

In addition, the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Public Law 104-193) was enacted into law on August 22, 1996. This new federal law makes various changes to the earned income credit.

For example:

- Individuals not authorized to work in the U.S. are not eligible for the earned income credit (effective for returns due more than 30 days after enactment)
- Earned income credit phaseout based on modified adjusted gross income rather than adjusted gross income (effective for taxable years beginning after December 31, 1995)
- Capital gains and passive activity income count as investment income that can trigger loss of earned income credit (effective for taxable years beginning after December 31, 1995)

The changes to the earned income credit apply for computing the Wisconsin earned income credit at the same time as for the federal earned income credit. The reason these changes apply is because Wisconsin law, for purposes of computing the Wisconsin earned income credit, follows current federal law. □

## Educational Assistance Payments

The Small Business and Job Protection Act of 1996 (Public Law 104-188) was enacted August 20, 1996.

One of the provisions in this Act retroactively restores for taxable years beginning after December 31, 1994, the federal exclusion for up to \$5,250 of employer-provided educational assistance under section 127 of the Internal Revenue Code (IRC).

For a specific tax year, Wisconsin generally follows the federal IRC as amended to December 31 of the previous year. For example, for taxable years beginning in 1996, under existing law Wisconsin follows the IRC as amended to December 31, 1995. Because the federal extension of the exclusion for employer-provided educational assistance was enacted during 1996, it does not apply for Wisconsin for taxable years beginning in either 1995 or 1996.

### Effect of Wisconsin Not Following Federal Law

*Taxable years beginning in 1995* — Although certain employees may file an amended 1995 federal return to obtain a refund of federal tax previously paid on educational assistance benefits, a refund may not be claimed for Wisconsin. The retroactive exclusion for educational assistance benefits does not apply for Wisconsin. Therefore, an amended return should not be filed for Wisconsin purposes.

**Exception:** If an employee files an amended federal return and the reduction in federal adjusted gross income affects the federal earned income credit, this will also affect the Wisconsin earned income credit. The Wisconsin earned income credit is a percentage of the federal earned income credit. Therefore, any change in the federal earned income credit will result in a change in the Wisconsin earned income credit. To claim any additional credit available for Wisconsin, a 1995 Wisconsin

amended return (Form 1X) should be filed.

*Taxable years beginning in 1996* — For Wisconsin, educational assistance payments do not qualify for the \$5,250 exclusion under IRC section 127. As a result, for Wisconsin purposes employers must treat educational assistance payments made in 1996 as additional wages to the employee, unless the payment qualifies as a “working condition fringe benefit,” as explained below.

Employees who receive educational assistance benefits treated as wages must include the amount of the benefits in taxable income on their 1996 Wisconsin income tax returns.

### Working Condition Fringe Benefit Not Treated as Wages

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

For example, payments for review courses to prepare for the bar examination or the certified public accountant (CPA) examination, and courses required as part of an apprenticeship program, do not qualify as a “working condition fringe benefit.” Ex-

penses for these courses are not deductible as a trade or business expense because the courses qualify the person for a new profession (in the case of the bar and CPA examination courses), or are needed to meet the minimum requirements for the job (in the case of the apprenticeship program).

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

### Notify Employee on W-2 Wage Statements

Employer educational assistance payments made during 1996 which represent additional wages to an employee for Wisconsin purposes, can be reported to employees by either: (1) including the amount which is taxable for Wisconsin purposes (but not taxable for federal purposes) in Box 17 of Form W-2, or (2) providing employees with a supplemental "Wisconsin only" W-2 with the taxable educational assistance benefits shown in Box 17.

The employee is required to include taxable educational assistance payments in taxable income on his or her 1996 Wisconsin income tax return. If the employee receives such payments and the taxable amount is different for Wisconsin and federal, the employee should use Wisconsin Schedule I (titled "Adjustments to Convert 1996 Federal Adjusted Gross Income And Itemized Deductions To The Amounts Allowable Under the December 31, 1995 Internal Revenue Code"). □

## NCR Litigation Resolved

*(continued from page 1)*

tax years 1975 through 1980. There were two principal issues in contention, which are described below. The Wisconsin Tax Appeals Commission (WTAC) ruled in favor of NCR on both issues. The DOR appealed the WTAC's decision to the Circuit Court for Dane County. The Circuit Court ruled for NCR on the dividends issue and for the DOR on the apportionment treatment of income from foreign subsidiaries issue. Both the DOR and NCR appealed the Circuit Court's decision to the Court of Appeals. The Court of Appeals declined to issue a ruling, but instead certified the case to the Wisconsin Supreme Court on July 31, 1996. For a summary of the Court of Appeals action, see page 18 of this Bulletin.

The two issues in this case are as follows:

### 1. Dividends Received Deduction

For tax years beginning before January 1, 1993, a corporation could deduct dividends received from a payor corporation that (a) was subject to Wisconsin franchise or income tax law, (b) filed a Wisconsin tax return, (c) did not deduct the dividends in computing its net income, and (d) used 50% or more of its net income or loss for the prior tax year in computing its Wisconsin taxable income.

Both the WTAC and the Circuit Court held that it was unconstitutional to grant NCR a deduction for dividends received from Wisconsin-based payor corporations, without also granting a deduction for dividends received from out-of-state payor corporations. Accordingly, all of the dividends received by a corporation are deductible in computing

Wisconsin franchise or income tax for tax years beginning before 1993. The law was changed for tax years beginning January 1, 1993, and thereafter to correct the unequal tax treatment of dividends received.

### 2. Apportionment Treatment of Income From Foreign Subsidiaries

Under Wisconsin law, a corporation doing business in and outside Wisconsin generally must use the apportionment method to determine its income taxable by Wisconsin. Under the apportionment method, a corporation multiplies its apportionable income by a 3-factor apportionment percentage. Apportionable income includes interest and royalties received from foreign subsidiaries.

The apportionment percentage is the weighted average of the following 3 ratios:

- (a) Wisconsin tangible property to total company tangible property,
- (b) Wisconsin payroll to total company payroll, and
- (c) Wisconsin sales to total company sales (this ratio is double-weighted).

NCR claimed that it was unconstitutional to include the interest and royalties it received from its overseas subsidiaries in its Wisconsin apportionable income. Alternatively, if this foreign-source income was apportionable, NCR should be entitled to "factor relief" by including the property, payroll, and sales of its foreign subsidiaries in the denominators of its apportionment factors.

The Circuit Court ruled in favor of the DOR's position that NCR's foreign-source income was apportionable income and concluded that NCR had not proven that the

income attributed to Wisconsin using the regular 3-factor apportionment formula led to a grossly distorted result. Thus, the income from foreign subsidiaries was includable in apportionable income and NCR was not entitled to "factor relief."

### Current Status of Litigation

In September 1996, the Department of Justice (DOJ) and NCR Corporation agreed to a resolution of the case, which was submitted to the Wisconsin Supreme Court. (**Note:** DOJ provides legal counsel for DOR in tax cases at the Circuit Court, Court of Appeals, and Supreme Court.)

In an order dated September 24, 1996, the Wisconsin Supreme Court stated the following:

"The parties to this certified appeal and cross appeal having filed a Stipulation and Motion for Suspension of Briefing Schedule and the court having treated the stipulation as a notice of voluntary dismissal pursuant to sec. (Rule) 809.18 and 809.63 which does not require the approval of this court;

"IT IS ORDERED that the notice of voluntary dismissal is duly noted and the appeal and cross-appeal are accordingly dismissed.

"IT IS FURTHER ORDERED that the motion to suspend is dismissed as moot."

As a result of the resolution of the NCR case, the DOR will determine at a later date how it will proceed with over 3,000 claims for refund filed by taxpayers relating to the NCR issues. ☐



## Wanted: Your Comments About the Wisconsin Tax Bulletin

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

How could the department improve on the information it publishes? What topics do you want covered or expanded? Do you have particular likes or dislikes about the WTB? Do you have ideas, comments, or suggestions you'd like to share?

Please take a few moments to give us your comments or ideas, and be a part of improving **your** WTB. Send your comments or ideas to Mark Wipperfurth, Wisconsin Department of Revenue, Administration Technical Services, P.O. Box 8933, Madison, WI 53708-8933. If you prefer, you may fax your comments to him at (608) 261-6240, or you may call him at (608) 266-8253. We'd like to hear from you! ☐

## IRS 1996 Mileage Rates Apply for Wisconsin

The 1996 optional standard mileage rates specified by the Internal Revenue Service (IRS) for computing automobile expenses for business, charitable, medical, and moving expense purposes also apply for Wisconsin.

For 1996 the IRS increased the business standard mileage rate from 30¢ per mile to 31¢ per mile for all business miles driven. The 31¢ per mile rate is allowed without regard to

whether the automobile was previously considered fully depreciated.

If the standard mileage rate of 31¢ per mile is used, depreciation is considered to be allowed at 12¢ per mile for 1996, the same rate as for 1995. However, no portion of the 31¢ per mile rate is considered to be depreciation after the adjusted basis of the automobile reaches zero.

For 1996 the mileage rate allowed for calculating automobile expenses for charitable deduction purposes remains at 12¢ per mile, and the rate for medical expense and moving expense deductions is increased from 9¢ per mile to 10¢ per mile. ☐

## Wisconsin Electronic Filing

The Wisconsin Electronic Filing (ELF) Program is expanding each tax season. In 1995 Wisconsin was number one in the nation in increased volume, and in 1996 ELF returns increased by another 55%! Wisconsin also had:

- one of the fastest electronic refunds in the nation, with an average of 3 business days from receipt of the return until the refund was direct-deposited in the taxpayer's bank account,
- filing of balance due returns, allowing early return filing with tax payments not due until April 15, and
- electronic filing allowed through October 15, for returns with extensions.

The adjustment rate on electronically filed 1995 returns was less than 1%. Electronic returns are more accurate because the software checks the returns for common errors. Other

benefits of electronic filing include acknowledgment of all ELF returns, increased efficiency, and reduced cost of doing business.

To join the Wisconsin ELF Program, all you need to do is:

- **Sole Proprietors** — If you are authorized by the IRS to file electronically in Wisconsin, you will automatically be included in the Wisconsin ELF Program. No further action is necessary.
- **All Others** — Provide the Wisconsin Electronic Filing Unit with your firm's name, the Electronic Filing Identification Number (EFIN) assigned to you by the IRS, and a listing of your officers'/partners' names, addresses, and social security numbers. This information may be faxed to (608) 264-6884 or mailed to:

Wisconsin Electronic Filing  
P.O. Box 8977  
Madison, WI 53708-8977.

If you have any questions about the Wisconsin ELF Program, call the Electronic Help Line at (608) 264-9959. The ELF Program staff members are looking forward to working with you in filing 1996 returns. ☐

## Focus on Publications: Grocers

What items sold by a grocery store are subject to Wisconsin sales tax? When does a grocery store owe Wisconsin use tax?

Answers to these questions and more can be found in the Department of Revenue's new Publication 220, *Grocers — How Do Wisconsin Sales*

*and Use Taxes Affect Your Operations?* This publication is available to the public at 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 10220. ☐

### 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 . . . . .	267-1266
Corporation Franchise and Income . . . . .	266-1143
Delinquent Taxes . . . . .	266-7879
Electronic Filing . . . . .	264-9959
Estimated Taxes . . . . .	266-9940
Fiduciary, Estate . . . . .	266-2772
Forms Request:	
Taxpayers . . . . .	266-1961
Practitioners . . . . .	267-2025
Fax-A-Form . . . . .	261-6229
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



## Postcards to Be Mailed

Continuing a practice started in 1993, the department will again mail some taxpayers postcards instead of tax booklets.

When the 1996 Wisconsin income tax booklets are mailed in December 1996, more than 800,000 individuals will receive a postcard instead of a booklet. These will be individuals who used a paid preparer to file their 1995 Wisconsin income tax return.

The postcards will contain a removable name and address label, which taxpayers are to take to their preparers so the preparer can place that label on the return filed. Postcard recipients who need a tax booklet can use the detachable order blank included, to request that a booklet be mailed to them. ☐

## Magnetic Media Filing Required for Some Forms

Employers and payors may be required to file wage statements and information returns on magnetic media with the Wisconsin Department of Revenue. Wisconsin magnetic media filing is required if all of the following apply:

- Comparable wage statements or information returns are required to be filed on magnetic media with the Internal Revenue Service or Social Security Administration.
- The income on the form is required to be reported to Wisconsin.
- The number of any one type of form required to be filed with Wisconsin is 250 or more.

- The Combined Federal/State Filing Program is not being used.
- No waiver has been granted by the department.

Wisconsin Publication 509, *"Filing Wage Statements and Information Returns on Magnetic Media,"* provides more information about magnetic media filing. You can order Publication 509 by: writing to Wisconsin Department of Revenue, Forms Request Office, P.O. Box 8903, Madison, WI 53708-8903; phoning (608) 266-1961; or using the department's "Fax-A-Form" system by phoning (608) 261-6229 from a fax telephone. □

## Guidelines for Substitute Tax Forms

Tax returns may generally be filed on forms that have been reproduced or on substitute forms that have been approved by the department. However, certain guidelines must be followed to ensure that the reproduced or substitute forms are compatible with the department's processing system and present information in a uniform manner.

A copy of the "Guidelines for Reproduced and Substitute Tax Forms" appears on pages 53 and 54 of this Bulletin. □

## Forms Available by Fax

The Wisconsin Department of Revenue offers a Fax-A-Form document retrieval system. This retrieval system enables taxpayers and tax practitioners to obtain tax forms and publications via their facsimile machine or fax modem.

### *What is Available Via Fax-A-Form?*

Wisconsin individual income, homestead credit, partnership,

corporation, estate, fiduciary income, withholding tax, and sales and use tax forms are available, along with the instructions for the forms. Beginning in January 1997, both 1995 and 1996 forms and instructions will be available.

Publications published by the department are also available. See the article titled "Tax Publications Available" on page 10 of this Bulletin for a list of the publications.

The catalog of retrieval codes for the forms and publications is updated throughout the year as forms and publications are added and revised. For updated information, order the current catalog using Fax-A-Form.

### *How Does it Work?*

- From the handset on your fax machine or the touch-tone keypad of your fax modem call the Fax-A-Form telephone number (608)261-6229 (at this point do not enter "start" on your fax machine).
- If you have a newer model fax machine without a handset, you may use the keypad if tones are transmitted; if tones are not transmitted you must connect a touch-tone telephone to your fax machine to retrieve a document.
- Follow the voice prompts, then use the touch-tone keypad on your fax machine or telephone to enter the proper retrieval codes for the items desired.
- Receive the items you select, via your fax, by pushing the start, send, or copy button of your fax machine (**on most fax machines use the start button**). Fax modem users will need to click on manual receive.

### *When Can Fax-A-Form Be Used?*

The Fax-A-Form retrieval system is available 24 hours a day, 7 days a week.

### *How Much Does it Cost?*

The Department of Revenue does not charge a fee for using the Fax-A-Form service. Your only costs are the normal telephone charges, plus fax machine operating costs, if applicable.

### *Questions?*

If you have questions about Fax-A-Form, you may call Mary Diaz, the department's Fax-A-Form coordinator, at (608)267-2025. □

## 1996 Package WI-X Available in January

The 1996 edition of Wisconsin's Package WI-X will be available by January 31, 1997. Package WI-X will contain actual size copies of most 1996 Wisconsin individual and fiduciary income tax, corporation franchise and income tax, partnership, estate tax, motor vehicle fuel tax, sales and use tax, and withholding tax forms.

The cost of the 1996 Package WI-X is \$7.00 plus sales tax, for each copy. It may be ordered on the bulk order blank (Form P-744). The bulk order blank is being mailed in October. See the following article titled "Tax Form Order Blanks Mailed," for more information on bulk orders.

If you do not receive an order blank and you wish to purchase copies of 1996 Package WI-X, mail your request indicating the number of copies, along with the amount due, to Wisconsin Department of Revenue, Forms Request Office, P.O. Box 8903, Madison, WI 53708-8903. □



## Tax Form Order Blanks Mailed

During October, the department is mailing order blanks (Form P-744) to 9,000 tax preparers. Use these original order blanks (not copies) to request bulk orders of 1996 Wisconsin tax forms that require payment. Forms that do not require payment are not listed on the order blank.

Some of the forms you order will be accompanied by additional information. For example, your order will include instructions for the forms you request; Schedules 2K-1 and WD for Form 2 will be included with fiduciary Form 2 orders; and Schedules 3K-1 will be included with partnership Form 3 orders.

The department is also mailing order blanks (Forms P-744b and P-744L) to banks, post offices, and libraries for their use in requesting bulk orders of 1996 Wisconsin income tax forms. No charge is made for forms used for distribution to the general public (for example, in a bank, library, or post office).

If you do not receive an order blank by October 31, 1996, you may request one by: contacting any department office; writing to Wisconsin Department of Revenue, Forms Request Office, P.O. Box 8903, Madison, WI 53708-8903; or calling (608) 267-2025.

You should place your order as early as possible after receiving the order blank. Orders are expected to be filled in late December and early January.

Package WI-X will be mailed separately in late January. Most forms in Package WI-X may be reproduced. □

## Question and Answer

**Q** We sell gift certificates. Do we report sales tax when we sell a gift certificate or when it is used to purchase merchandise?

**A** Sales tax applies when a gift certificate is used to purchase tangible personal property or a taxable service. Sales tax does not apply to the original sale of the gift certificate.

For example, you operate a restaurant and sell a gift certificate for \$50 in May 1996. In June 1996, the recipient of the gift certificate uses it to pay for meals at your restaurant. Your taxable receipts from the gift certificate are as follows:

- May 1996, \$0
- June 1996, \$50

**Q** We hired our neighbor to remove snow from the sidewalks at our business. Is any sales tax due on his services?

**A** No. Snow removal is not a taxable service.

**Q** I received unemployment compensation during the year. Is this taxable for Wisconsin?

**A** Unemployment compensation may be taxable to Wisconsin when received by a

Wisconsin resident. The amount of unemployment compensation that is taxable is determined based on your filing status and income. For example, if you are single and your income (including the unemployment compensation) is \$12,000 or less, none of the unemployment compensation is taxable to Wisconsin. If your income is over \$12,000, all or a portion of the unemployment compensation is taxable to Wisconsin. See the instructions for Form 1A or Form 1 for worksheets to be used to compute taxable unemployment compensation.

**Q** May I file Wisconsin Form WI-Z if I received unemployment compensation during the year?

**A** No, individuals who have unemployment compensation may not file their Wisconsin income tax return on Form WI-Z. You must use either Form 1A (short form) or Form 1 (long form). Form WI-Z does not provide for any adjustment for the difference between the amount of unemployment compensation that is taxable for federal and Wisconsin tax purposes. Thus use of Form WI-Z by individuals who receive unemployment compensation could result in too much income being reported for Wisconsin.



## Do You Need a Speaker?

Are you planning a meeting or training program? The Department of Revenue's Speakers Bureau provides speakers to business, community, and educational organizations.

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

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

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

## Wisconsin Tax Bulletin Annual Index Available

Once each year the *Wisconsin Tax Bulletin* includes an index of materials that have appeared in past Bulletins. The latest index available appears in *Wisconsin Tax Bulletin* 96 (April 1996), pages 31 to 58, and includes information for issues 1 (October 1976) to 95 (January 1996). ☐

## Joint IRS/State Audit Targets Taverns

The Wisconsin Department of Revenue and the Internal Revenue Service (IRS) have merged audit efforts. An agreement between the agencies allows selected Department of Revenue and IRS auditors to conduct joint, cooperative audits. Under the IRS "Market Segment Specialization Program," the tavern industry has been selected, to determine compliance for this predominantly cash industry.

The audit team conducts the audit using one or more income reconstruction methods and reviews records that the taxpayer has available. The audit team discusses their findings with the taxpayer, expands the scope and depth of the audit as necessary, and attempts to reach a final agreement.

This audit method eliminates duplication of work for both agencies and results in less inconvenience to the taxpayer; the taxpayer receives both the state and federal adjustments at the conclusion of the audit.

In addition to auditing small taverns to improve compliance, both agencies are working to educate small tavern owners about the records they need to keep. ☐

## 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 (10/96)
104	Wisconsin Taxation of Military Personnel (8/96)
106	Wisconsin Tax Information for Retirees (8/96)
109	Tax Information for Married Persons Filing Separate Returns and Persons Divorced in 1996 (10/96)
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 (10/96)
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 (10/96)

118	Electronic Funds Transfer Guide (4/96)	214	Do You Owe Wisconsin Use Tax? (Businesses) (9/93)	509	Filing Wage Statements and Information Returns on Magnetic Media (3/94)
119	Limited Liability Companies (LLCs) (10/95)	216	Filing Claims for Refund of Sales or Use Tax (9/95)	600	Wisconsin Taxation of Lottery Winnings (11/93)
120	Net Operating Losses for Individuals, Estates, and Trusts (11/95)	217	Auctioneers — How Do Wisconsin Sales and Use Taxes Affect Your Operations? (3/96)	601	Wisconsin Taxation of Pari-Mutuel Wager Winnings (3/94)
121	Reciprocity (10/95)	219	Hotels, Motels, and Other Lodging Providers — How Do Wisconsin Sales and Use Taxes Affect Your Operations? (6/96)	700	Speakers Bureau presenting ... (2/93)
122	Tax Information for Part-Year Residents and Non-residents of Wisconsin (10/96)	220	Grocers — How Do Wisconsin Sales and Use Taxes Affect Your Operations? (8/96)	W-166	Wisconsin Employer's Withholding Tax Guide (9/90) <input type="checkbox"/>
123	Business Tax Credits for 1996 (9/96)	400	Wisconsin's Temporary Recycling Surcharge (12/95)		
200	Sales and Use Tax Information for Electrical Contractors (10/95)	410	Local Exposition Taxes (11/94)		
201	Wisconsin State and County Sales and Use Tax Information (8/96)	500	Tax Guide for Wisconsin Political Organizations and Candidates (9/95)		
202	Sales and Use Tax Information for Motor Vehicle Sales, Leases, and Repairs (6/96)	501	Field Audit of Wisconsin Tax Returns (2/96)		
203	Sales and Use Tax Information for Manufacturers (12/94)	502	Do You Have Wisconsin Tax Questions? (10/95)		
205	Do You Owe Wisconsin Use Tax? (Individuals) (9/95)	503	Wisconsin Farmland Preservation Credit (12/95)		
206	Sales Tax Exemption for Nonprofit Organizations (9/90)	504	Directory for Wisconsin Department of Revenue (10/95)		
207	Sales and Use Tax Information for Contractors (2/96)	505	Taxpayers' Appeal Rights of Office Audit Adjustments (6/96)		
210	Sales and Use Tax Treatment of Landscaping (5/94)	506	Taxpayers' Appeal Rights of Field Audit Adjustments (2/96)		
211	Sales and Use Tax Information for Cemetery Monument Dealers (10/91)	507	How to Appeal to the Tax Appeals Commission (4/96)		
212	Businesses: Don't Forget About Use Tax (7/94)	508	Wisconsin Tax Requirements Relating to Nonresident Entertainers (8/94)		
213	Travelers: Don't Forget About Use Tax (3/93)				

## Manufacturing Property Assessment

(Note: This article was prepared by the Bureau of Manufacturing Assessment, Division of State and Local Finance of the Wisconsin Department of Revenue.)

**Cost Approach Upgrade** The Bureau of Manufacturing Assessment has acquired a new cost approach system. The Bureau now subscribes to the Marshall and Swift cost system. This new personal computer system will replace the Bureau's in-house mainframe system. This will provide more accurate appraisals using more up-to-date costs. It will make us uniform with other assessing agencies and appraisers, and save Wisconsin taxpayers money.

**M-P Form on Diskette** Last year over 150 manufacturers and accountants used the M-P diskette to complete the Manufacturing Personal Property Return (M-P). The diskette is available in a Lotus for Windows format. It eliminates the need to reenter the same data every year. A signed copy of the printed output from this program is considered an acceptable facsimile of the M-P form. A diskette is not acceptable for filing purposes. The diskette costs \$6.00 plus tax. To request an

order form, contact the following address or telephone number.

Bureau of Manufacturing Assessment  
Wisconsin Department of Revenue  
P.O. Box 8933  
Madison, WI 53708  
Phone (608) 266-8662  
FAX (608) 264-6897

### Telephone Company Assessment

A law change provides a three-year phase-in period to change the state tax on telephone companies from a gross receipts basis to a property tax basis. Beginning in 1998, the Manufacturing Assessment Bureau will provide telephone company assessments to the Bureau of Utility and Special Taxes.

For additional information on manufacturing or telephone company assessment, please contact the Manufacturing Assessment Office serving your area. ☐

## How to Obtain Copies of Your Tax Returns

### What is Available

Upon request, the Department of Revenue will provide taxpayers with copies of their previously filed tax returns. Copies of returns are generally mailed within 10 days after a request is received.

The chart at the end of this article lists which returns are available, and the number of prior years for which the returns are available.

When a copy is requested, a copy of the federal return will also be provided if it is a part of the Wisconsin return. Wage statement copies are not always available with Forms 1A and WI-Z.

Copies of tax returns are generally available within four months after the returns are filed.

### Who May Request Copies

Taxpayers, partners in a partnership, or corporation officers may request copies of their own tax returns. Other persons may also request copies, if they provide a power of attorney form or other written authorization, signed by the taxpayer, partner, or corporation officer, and specifying the type of tax return and periods requested. A photocopy or fax copy of an authorization is not acceptable unless the authorization specifically states that copies have the same force as the original.

Requests for copies of a deceased taxpayer's tax returns must include a certified domiciliary letter and be signed by the personal representative of the estate. If there is no estate, a certified copy of the death certificate and a statement of the reason for the request is required.

### Fees

Effective January 1, 1997, the fee is \$5.00 for each return requested. There is an additional fee of \$1.00 per return for a certified copy. **Payment must be sent with the request.**

### How to Request

All requests for copies of returns must be made in writing or in person. Requests by telephone or fax machine will not be accepted.

Requests must include the following:

1. Name on the requested tax return.
2. Social security number (including spouse's social security number, if applicable), or other identification number of the taxpayer.

3. Type of return and year(s) or period(s) of the tax return being requested.
4. Name and address to which the copies are to be mailed.
5. Signature of the taxpayer, partner, or corporation officer.
6. Payment of appropriate fees for requested information.

### Where to Direct Requests

**Written Requests:** Mail your request to Wisconsin Department of Revenue, Central Files Section, P.O. Box 8903, Madison, WI 53708-8903.

**In-Person Requests:** Make your request at the Department of Revenue, Audit Bureau, 4638 University Avenue, Room 132, Madison, Wisconsin. Office hours are 7:45 a.m. to 4:30 p.m. Proper identification (for example, a driver's license) is required.

### Questions

If you have questions, you may call the Department of Revenue in Madison, at (608) 267-1266.

Type of Returns Available	# of Years
corporation or insurance tax returns	6
gift tax reports	5
homestead credit claims	4
(microfilmed homestead credit claims)	10
individual income tax returns	4
(electronically filed individual returns)	10
(microfilmed individual returns)	10
partnership tax returns	4
sales/use tax returns	10
trust fiduciary returns	4
withholding statements	5
(microfilmed withholding tax returns)	10

## Embezzler Guilty of Million Dollar Tax Theft

A Milwaukee area man was convicted in September 1996, of cheating the state out of over a million dollars in motor fuel tax money during 1990 and 1991. Paul C. Kramer, 55, East Troy, was found guilty of fifteen felony counts of theft of motor fuel taxes, after a four day trial.

In October 1994, Kramer and another man, Patrick S. Gedig, 49, of Franklin, were charged with participating in an invoicing scheme during 1990, when Gedig was president of United Petroleum Corporation. United has wholesale and retail operations in the Milwaukee area. At the time of the thefts, Kramer ran Ohio Fuel & Supply Co., Inc., of Big Bend, Wisconsin, with wholesale fuel operations throughout southeastern Wisconsin.

In February 1990, Gedig owed Kramer close to \$700,000 for past fuel purchases, and Kramer refused to supply Gedig with more fuel unless part of the bill was paid down. Kramer then devised a scheme to have Gedig issue phony invoices from United Petroleum Corporation to three companies owned by Kramer, to collect additional fuel taxes that were not paid over to the state. Kramer misappropriated \$935,297, operating the scheme from February 1990 to May 1990, when the state revoked United's motor fuel tax license. Gedig pled guilty to his involvement in the scheme on December 2, 1994, and later testified against Kramer during the trial. Gedig is awaiting sentencing.

In addition to the \$935,297, Kramer also stole \$197,097 in fuel tax monies between December 1990 and March 1991. These were taxes that

Ohio Fuel & Supply Co. collected from sales to retailers, but never remitted to the state. Ohio's fuel tax license was revoked by the state in March 1991.

The case was prosecuted by the State Attorney General's office after an investigation by the Fraud Unit of the Wisconsin Department of Revenue. Dane County Circuit Court Judge Robert A. DeChambeau presided. Kramer faces a maximum sentence of 75 years in prison and \$150,000 in fines.

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A Mequon businessman was found guilty in August 1996, of one count of tax evasion related to the purchase of a motorcycle. According to the charge, George S. Zabrycki, 53, purchased a 1992 motorcycle for \$15,000. However, he listed the purchase price as \$5,000 when he registered it with the Department of Transportation, evading \$550 in state sales taxes.

Milwaukee County Circuit Court Reserve Judge Raymond Gieringer fined Zabrycki \$500 and further ordered that he pay the fine within 60 days or face 20 days in the House of Corrections.

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A self employed Menomonee Falls bookkeeper was charged in August 1996, in Waukesha County Circuit Court, with one felony count of state income tax evasion. According to the criminal complaint, Donna L. Blaeske, 42, filed a fraudulent 1993 income tax return, reporting only \$15,750 as her wages for the year. However, she failed to report an additional \$17,058 that she received for work done at the North Hills Athletic Club. For that year, Blaeske was in charge of issuing the company's tax forms and omitted

issuing herself a W-2, to conceal the amount that she had received.

The complaint also noted that Blaeske had a history of filing late state tax returns and had not filed either her 1993 or 1994 return until April 1996. The complaint further noted that when Blaeske filed her 1993 and 1994 returns she told state investigators that she had actually prepared them timely, but had forgotten to mail them in. Investigators noted that in an attempt to conceal the late filings, Blaeske inadvertently had dated the 1993 return as April 15, 1993, and the 1994 return as April 10, 1994, each a full year before they were actually due.

If convicted, Blaeske could face up to five years in prison and a fine of up to \$10,000.

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Also in August, accountant and tax preparer Samuel J. Palzkill, 44, Mineral Point, was charged by the Iowa County District Attorney's office with two counts of failure to file Wisconsin income tax returns. The criminal complaint alleges that Palzkill failed to file Wisconsin income tax returns for 1992 and 1993, that for 1992 he had income of \$26,413 and owes Wisconsin income tax of \$1,766, and that for 1993 he owes tax of \$1,339 based on income of \$24,716. The State contends that Palzkill has not filed any income tax returns for seven consecutive years.

If convicted on both counts, Palzkill faces a maximum penalty of up to 18 months in jail and up to \$20,000 in fines. 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. □

## Endangered Resources Contributions

**Total \$621,000**



The 1995 Wisconsin income tax returns, Forms WI-Z, 1A, 1, and 1NPR, included a line for taxpayers to designate a contribution to the Wisconsin Endangered Resources Fund. These donations either reduce a taxpayer's income tax refund or increase the amount of income tax owed. Amounts contributed go to the Wisconsin Department of Natural Resources to help protect and care for Wisconsin's endangered species, nongame wildlife, and rare plant and animal habitats.

Donations to the Endangered Resources Fund can be made on both paper filed tax returns and electronically filed returns.

During July 1995 through June 1996 (primarily 1995 returns), 49,669 taxpayers contributed \$621,270 to the Endangered Resources Fund. This compares with 1994 income tax returns, where 50,585 taxpayers contributed \$599,760. ☐

## Taxpayers Designate \$306,955 to State Election Campaign Fund

Wisconsin income tax returns, Forms WI-Z, 1A, 1, and 1NPR, include a box for taxpayers to designate \$1 to the State Election Campaign Fund. Checking the election box does not increase the tax liability or reduce a taxpayer's refund.

During July 1995 to June 1996 (primarily 1995 tax returns), taxpayers designated \$306,955 to the election campaign fund on their Wisconsin tax returns. This compares to \$315,133 for the prior year. ☐



## Over 1.8 Million Refunds Issued

Taxpayers were issued more than 1.8 million income tax refunds during January through July 1996 (primarily 1995 returns), for an average refund of \$342. The average refund for 1994 returns was \$327.

There were 2,692,000 Wisconsin individual income tax returns filed during the twelve months ending June 30, 1996. This compares to 2,608,000 returns for the prior year. The 2,692,000 returns, which included joint tax returns, were filed by 3,830,000 individuals.

An itemized deduction credit was claimed by 27% of the taxpayers on their 1995 returns. The average credit was \$377, compared to \$360 on 1994 returns.

There were 213,000 homestead credit claims filed during the year, and the average credit was \$452. This compares to 222,000 homestead credit claims averaging \$456 for the prior year. About 49% of the claimants were age 65 or older, 49% were renters, and 51% were homeowners.

About 23,200 farmland preservation credit claims, averaging \$1,226 per claim, were filed during the year ending June 30, 1996. During the prior year 25,500 farmland preservation credit claims were filed, and the average payment was \$1,288. ☐

## Administrative Rules in Process

Listed below are proposed new administrative rules and changes to existing rules that are currently in the rule adoption process. The rules are shown at their stage in the process as of October 1, 1996, or at

the stage in which action occurred during the period from July 2 to October 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).

### Proposed Rules Being Drafted

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

### Rules Sent to Revisor for Publication of Notice

- 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 for Legislative Committee Review

- 11.28 Gifts, advertising specialties, coupons, premiums and trading stamps-A

11.46	Summer camps-A	9.31	Sales out of Wisconsin-A
11.51	Grocers' guidelist-A	9.36	Displaying of cigarettes-A
11.69	Financial institutions-A	9.41	Vending machines-A
11.87	Meals, food, food products and beverages-A	9.46	Purchases by the retailer-A
11.95	Retailer's discount-R&R	9.47	Invoicing of sales, including exchanges of cigarettes-A

#### Rules Adopted But Not Yet Effective

2.47	Apportionment of net business income of interstate motor carriers of property-R&R (anticipated effective date 1/1/97)	9.51	Samples-A
		9.61	Warehousing of cigarettes-A
11.69	Financial institutions-A (anticipated effective date 11/1/96)	9.68	Ownership and name changes-A

#### Rules Repealed (September 1, 1996)

9.12	Refunds — military
9.16	Meter machines

#### Rule on Hold Pending Court Decision

11.04	Constructing buildings for exempt entities-A	<input type="checkbox"/>
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#### Recently Adopted Rules Summarized

Most of the administrative rules in Chapter Tax 9, relating to cigarette tax, have been revised or repealed, effective September 1, 1996. These changes are summarized below. In addition, the text of some of the amended rules is reproduced. In the amendments, material lined through (~~lined through~~) represents deleted text, and underscored (underscored) material represents new text.

To order up-to-date administrative rules of the Department of Revenue, you can use the order blank on page 55 of this Bulletin to obtain the Revenue section of the Wisconsin Administrative Code.

**Tax 9.01(5)** is amended to reflect proper punctuation and to reflect the name change from "Winnebago Indian Communities" to "Ho-Chunk Nation Communities."

**Tax 9.01(6) and (7)** are amended to delete "or meter imprints" and **Tax 9.06(2), 9.16, and 9.17** are repealed, to reflect the discontinuance of the use of cigarette meter machines.

**Tax 9.08(2)** is amended to correct quoted statutory language and to reflect correct style.

**Tax 9.08(3) and (4)(d)1** are amended to reflect that distributors (rather than permittees) are to perform various functions.

**Tax 9.09(6)** is amended to reflect correct recordkeeping requirements for retailers. The text of Tax 9.09(6) is as follows:

9.09(6) **Records for Sales by Indians.** The Indian retailer shall keep detailed records of both taxable and nontaxable transactions and shall record the number and dollar ~~volume~~ amounts of taxable sales to nonmembers of the tribe. With respect to nontaxable sales, the retailer shall record and retain for state inspection the names of all Indian purchasers, their tribal affiliations, the Indian reservation within which sales are made, and the number, dollar amounts and dates of sales. In addition, unless the Indian purchaser is personally known to the retailer, he or she shall present a tribal identification card.

#### Rules Adopted and in Effect (September 1, 1996)

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
9.19	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

**Tax 9.11(1)** is amended to reflect current department practice. The text of Tax 9.11(1) is as follows:

9.11(1) A refund shall be granted to any cigarette distributor for stamps which were applied to packages of cigarettes when the distributor supplies documentation to the department that the packages of cigarettes to which stamps have been affixed were damaged or otherwise unsalable and have been returned to the manufacturer ~~thereof~~. A distributor who has ~~possession of unsalable cigarettes in his or her possession must file a written notice to the department of intent to return such cigarettes to the manufacturer thereof at least 10 days prior to shipping such cigarettes. If the department, upon receipt of this notice of intent, desires to exercise its right to inspect such cigarettes prior to shipment, it must so notify the distributor prior to the expiration of the 10 day period. If the department does not notify the distributor of its intent to inspect before the end of the 10 day period, the distributor may ship the cigarettes to the manufacturer and make application for refund. The distributor shall make application for such refund on a form to be furnished by the department. The application for refund must shall be accompanied by a copy of the signed bill of lading for said the shipment. A copy of the credit memo for each shipment from the manufacturer must shall be forwarded to this the department prior to processing the refund. The department may also require requires an affidavit from the manufacturer attesting to the number of cigarettes received in each shipment.~~

**Tax 9.11(3)**, relating to deducting processing costs from refunds, is repealed because it is not current department practice.

**Tax 9.12**, relating to refunds to the military, is repealed because it is obsolete.

**Tax 9.19(4)** is amended to reflect proper style and to more properly describe methods of stamping cigarette packages. The text of Tax 9.19(4) is as follows:

9.19(4) To be considered properly stamped an identifying code number ~~must~~ shall also be clearly affixed to the cigarette package by the distributor or in a method approved by the secretary of revenue.

**Tax 9.22(4)**, relating to distributors servicing drop shipments, is repealed because it describes an incorrect procedure.

**Tax 9.31** is amended to change "occupational" to "excise" tax, to properly identify the cigarette tax.

**Tax 9.36** is amended to reflect the discontinuance of the use of cigarette meter machines and to revise the procedure regarding verification of tax stamps. The text of Tax 9.36 is as follows:

**9.36 DISPLAYING OF CIGARETTES.** (ss. 139.32(1) and 139.39, Stats.) All cigarette retail outlets in the state of Wisconsin shall display all cigarettes, offered for sale at retail, in ~~such a manner that the tax stamp or meter imprint is clearly and conveniently visible permitting verification that they are stamped cigarettes.~~

**Tax 9.47(3)** is amended to give a revised procedure regarding verification that cigarettes are stamped. The text of Tax 9.47(3) is as follows:

9.47(3) When a seller, acting as a representative of a cigarette manufacturer, or when a permittee ~~exchanges returns~~ dried or damaged cigarettes to a distributor for return to the manufacturer and receives fresh cigarettes in exchange ~~therefor, he or she, the seller or permittee~~ shall prepare a true and correct invoice as set forth in sub. (1). Each carton of ~~such~~ dried or damaged cigarettes shall contain only cigarettes of one brand and pack. ~~Such cartons shall be packed so that the tax stamps on the dried or damaged cigarettes are exposed for inspection and the distributor shall refuse to receive or accept any cigarettes not so packed. The distributor shall verify that all of the cigarettes are stamped cigarettes.~~

In addition, the following rules are amended to reflect proper language, grammar, punctuation, and style: Tax 9.01(1); 9.06(1) (renumbered 9.06); 9.08(4)(a), (4)(c), and (4)(i); 9.09(2)(b) and (7); 9.11(2); 9.19(1), (2), and (3); 9.21; 9.22(1), (2), and (3); 9.26; 9.41; 9.46; 9.47(1)(intro.), (1)(d), and (1)(e), and (4); 9.51; 9.61; and 9.68(2)(title), (2)(b), and (3)(b). □





## Report on Litigation

Summarized below are recent significant Wisconsin Tax Appeals Commission (WTAC) and Wisconsin Court decisions. The last paragraph of each

decision indicates whether the case has been appealed to a higher Court.

The following decisions are included:

### Individual Income Taxes

Basis of assets — gifts — basis for gain or loss

*Patrick J. and Jo Ann Murphy, Jr., and Patrick and Carrie Murphy, III* (p. 17)

Marital property

*Werner Brandt, and Werner and Elizabeth Brandt* (p. 17)

### Corporation Franchise and Income Taxes

Apportionment — factors

Dividends — deductible dividends

Foreign source income

*NCR Corporation* (p. 18)

### Sales and Use Taxes

Claims for refund — time limitation for filing

*D & S Dental Laboratory, Inc.* (p. 19)

Computer software — tangible vs. intangible

*Manpower International, Inc.* (p. 19)

Construction contractors — highway construction

*Hanz Contractors, Inc.* (p. 20)

Estoppel

*Spickler Enterprises, Ltd.* (p. 21)

Exemptions — commercial vessels and barges

*LaCrosse Queen, Inc.* (p. 22)

Exemptions — common or contract carriers — constitutionality

*Wisconsin Steel Industries, Inc.* (p. 23)

Service enterprises — bathtub refinishing

*Ark Corporation* (p. 23)

Service enterprises — horseshoeing/farrier

*Mark Espersen* (p. 23)

Statute of limitations — nonfilers

Manufacturing — exemption of property consumed or destroyed

Occasional sales  
*Zignego Company, Inc.* (p. 24)

### Sales Taxes and Withholding Taxes

Personal liability

*William Drilias* (p. 25)

### INDIVIDUAL INCOME TAXES

— **Basis of assets — gifts — basis for gain or loss.** *Patrick J. and Jo Ann Murphy, Jr., and Patrick and Carrie Murphy, III vs. Wisconsin Department of Revenue* (Circuit Court for Waukesha County, March 7, 1996).

The taxpayers appealed the September 14, 1995, Wisconsin Tax Appeals Commission decision to the Circuit Court. The Commission had upheld the department's assessment of taxes and interest on the gain from the sale of real property. See *Wisconsin Tax Bulletin* 95 (January 1996), page 22, for a summary of the Commission decision.

The taxpayers withdrew their petition for review, and the Circuit Court dismissed the case. The case is final. □

— **Marital property.** *Werner Brandt, and Werner and Elizabeth Brandt vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, May 23, 1996). The issue in this case is whether shares of Continental Gummiwerke ("Continental") stock sold during the years 1969 through 1974 were property held for the joint benefit of Werner and Melitta Brandt, thereby entitling taxpayers Werner and Elizabeth Brandt to a capital loss carryforward during the years 1979 through 1987, or whether the shares were the individual property of Melitta Brandt.

Melitta and Werner Brandt were married in West Germany, in 1952.

They entered into a post-nuptial agreement whereby they agreed to maintain their separate estates, declaring that their particular individual interests in property would remain individual in character.

In 1963, Melitta's mother died, leaving a will which provided that her bequests should forever remain the separate property of the beneficiaries, and that the inheritances were never to become marital property. Melitta inherited a large estate. Melitta's inheritance remained in Germany for a period of time following her mother's death. In 1966, Melitta and Werner moved to Wisconsin.

Nearly all of Melitta's assets from her inheritance were invested in Continental stock in Germany. In 1969, Melitta and Werner decided to transfer the bulk of Melitta's inheritance to the United States. When the Continental stock arrived from Germany, an investment account for Melitta was created. The account was initially established in both spouses' names. When this error was discovered by Melitta, the account was changed to Melitta's name at her and Werner's direction.

Eventually, the Continental stock was sold during various periods from 1969 through 1975. The vast majority of the sales of the Continental stock were made from the account in the individual name of Melitta Brandt.

Melitta filed for divorce in 1980, and in 1982 the trial court granted the divorce. Property division issues were taken under advisement. Ultimately, the proceeds of the Continental stock, among other assets, were deemed to be unidentifiably commingled at the time of the filing of the divorce petition, and were accordingly included in the marital estate subject to division upon dissolution of the marriage.

Werner Brandt filed income tax returns during the years 1979 and afterward in which, for some years, he claimed capital losses associated with the earlier sales of Continental stock. The department assessed the taxpayers for additional income taxes and interest for the years 1979 through 1987, on the basis that they were not entitled to capital losses associated with sales of the Continental stock during 1969 through 1974. The department deemed the Continental stock to be the individual property of Melitta Brandt at the time of the sales and therefore not subject to capital loss carryforwards claimed on the taxpayers' income tax returns.

The Commission concluded that the taxpayers were not entitled to capital loss carryforwards during the years 1979 through 1987 for losses associated with the sales of Continental stock during the years 1969 through 1974, because the shares sold at a loss were the individual property of Melitta Brandt, precluding the subsequent utilization of capital loss carryforwards on the part of the taxpayers.

The taxpayers have appealed this decision to the Circuit Court. ☐

## CORPORATION FRANCHISE AND INCOME TAXES

**— Apportionment — factors; Dividends — deductible dividends; Foreign source income.** *Wisconsin Department of Revenue vs. NCR Corporation* (Court of Appeals, District IV, July 31, 1996). Both NCR Corporation and the department appealed an April 30, 1993, decision of the Circuit Court for Dane County. See *Wisconsin Tax Bulletin* 82 (July 1993), page 21, for a summary of the Circuit Court's decision. The issues in this case are as follows:

- A. Do the Foreign Commerce and Due Process Clauses of the United States Constitution force Wisconsin to exclude from a corporate taxpayer's Wisconsin apportionable income under the state corporate franchise and income tax all interest, royalties, and dividends paid the corporate taxpayer by its overseas unitary subsidiaries?
- B. In the alternative, do the Foreign Commerce and Due Process Clauses force Wisconsin to adjust the corporate taxpayer's three-factor apportionment formula in order to provide the corporate taxpayer relief against allegedly impermissible multiple taxation of interest, royalties, and dividends paid the corporate taxpayer by its unitary subsidiaries?
- C. Do the Interstate Commerce and Equal Protection Clauses bar Wisconsin from granting corporate taxpayers a dividend-received deduction for dividends paid the corporate taxpayer by qualifying Wisconsin-based payor corporations, without also granting a dividend-received deduction for dividends paid the corporate taxpayer by out-of-state payor corporations?

The Court of Appeals stated that since the questions raised have both constitutional and international taxation implications, they deserve definitive resolution by the Wisconsin Supreme Court. Therefore, the Court of Appeals certified the case to the Wisconsin Supreme Court.

The taxpayer and the State agreed to a resolution of the case, and on September 24, 1996, the Wisconsin Supreme Court dismissed the case. ☐

## SALES AND USE TAXES

**— Claims for refund — time limitation for filing.** *D & S Dental Laboratory, Inc. vs. Wisconsin Department of Revenue* (Circuit Court for Dane County, May 13, 1996). This is a review of the June 14, 1995 decision of the Wisconsin Tax Appeals Commission (Commission). For a summary of that decision, see *Wisconsin Tax Bulletin* 94 (October 1995), page 17. The issue in this case is whether the department's interpretation of the starting date for the two year time period to file a refund claim under sec. 77.59(4)(a), Wis. Stats., is correct.

The department issued a field audit assessment of sales tax to the taxpayer on August 1, 1991. The taxpayer paid the assessment on August 6, 1991. On August 6, 1993, the taxpayer filed a refund claim with the department for the amount paid pursuant to the assessment. The taxpayer received a letter from the department dated September 13, 1993, stating that the refund claim had not been timely filed under sec. 77.59(4)(a), Wis. Stats.

The taxpayer filed a petition for review with the Commission and the department filed a motion to dismiss. On June 14, 1995, the Commission ruled that the two year period to file a claim for refund under sec. 77.59(4)(a), Wis. Stats., began on August 1, 1991, and ended on August 1, 1993, thereby causing the Commission to lack jurisdiction to hear the taxpayer's petition for review.

The Circuit Court concluded that the refund claim was not timely filed and the Commission properly granted the department's motion to dismiss for lack of jurisdiction.

Once a determination of tax liability is made by the department in a field audit, and the appeal period expires, that determination is final unless one of three exceptions applies. One of the three exceptions is sec. 77.59(4)(a), Wis. Stats., which states: "A claim for refund ... may be made within 2 years of the determination of a tax assessed by ... field audit and paid if the tax was not protested by the filing of a petition for redetermination."

The "and paid" language in sec. 77.59(4)(a), Wis. Stats., indicates to the Circuit Court that what is being discussed is how a tax liability will be allowed to be adjusted. The Circuit Court therefore found that the "and paid" language does not relate to the original payment of an assessment.

The taxpayer has not appealed this decision. □

**— Computer software — tangible vs. intangible.** *Wisconsin Department of Revenue vs. Manpower International, Inc.* (Court of Appeals, District IV, August 22, 1996). This is a review of the June 15, 1995 decision of the Circuit Court for Dane County. For a summary of that decision, see *Wisconsin Tax Bulletin* 94 (October 1995), page 17. The issue in this case is whether the Wisconsin Tax Appeals Commission properly determined that the taxpayer did not owe sales tax on its sale of pre-written computer software from 1987 through 1990.

Section 77.52(1), Wis. Stats., imposes a sales tax on the sale or lease of tangible personal property, "including accessories, components, attachments, parts, supplies and materials."

Section 77.52(2)(a)10, Wis. Stats., imposes a sales tax on the "repair, service, alteration ..., inspection and maintenance of all items of tangible personal property ..."

Section 77.52(2)(a)11, Wis. Stats., imposes the tax on "the producing, fabricating, processing, printing or imprinting of tangible personal property" for consumers who furnish the materials used in the process.

For the period 1987 through 1990, sec. 77.51(20), Wis. Stats. (1989-90), defined tangible personal property as "all tangible personal property of every kind and description ..." Section 77.51(20), Wis. Stats., has since been amended to expressly define computer programs, except custom computer programs, as tangible personal property.

Pre-written or "canned" software is defined as that which "is produced in quantity, available for sale to the public, selected by the customer to meet the customer's hardware requirements, is generally usable by the customer as written, and is 'loaded' into the computer memory by the customer." The taxpayer usually delivered the canned software on magnetic tapes or diskettes that the taxpayer placed into a computer's magnetic tape or disc drive for copying into the computer's memory unit. The memory units are physically altered and rearranged at the molecular level when new programs are copied into it. The cost of the magnetic tapes or diskettes was a minimal part of the taxpayer's charge for the software. In some cases, the taxpayer delivered the software by telephone.

The Court of Appeals affirmed the Circuit Court's decision, concluding that the taxpayer did not owe sales

tax on its sale of pre-written computer software from 1987 through 1990.

Before the legislature amended sec. 77.51(20), Wis. Stats., canned computer software was not "tangible personal property." In *Janesville Data Center, Inc. vs. Wisconsin Department of Revenue* (June 30, 1978), the Wisconsin Supreme Court held that the sale of keypunch cards, magnetic tapes and computer printouts was not taxable because the essence of the transaction was the intangible data embodied in these products. Here, the technology may have advanced, but the principle remained the same; the essence of the transaction was the sale of information offered by the taxpayer. Under *Janesville Data Center*, information is intangible property not subject to a sales tax.

The department argues, alternatively, that the transactions were taxable because canned software is an accessory, component, attachment or part for the computer because the computer is useless without software. However, sec. 77.52, Wis. Stats., imposes a sales tax only upon the retail sales of tangible goods, not the sales of intangibles. Under *Janesville Data Center*, software is an intangible and is not taxable as such, even if computers are useless without it.

The department also argues in the alternative that the lease of canned software is taxable as a service under sec. 77.52(2)(a)10 and 11, Wis. Stats., because loading it into the computer physically alters the computer's memory core. While that may be true, it is not the essence of the transaction, which remains the transfer of intangible data. Such transactions therefore remained nontaxable events until the legislature amended sec. 77.51(20), Wis. Stats.

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

**Construction contractors — highway construction.** *Hanz Contractors, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, May 30, 1996). The issue in this case is whether the taxpayer's transfers of sand and aggregate to Vinton Construction (Vinton) and Trierweiler Construction (Trierweiler) are subject to Wisconsin sales and use tax and penalty.

The taxpayer is a Wisconsin corporation, with its principal place of business located in Wausau, Wisconsin. The taxpayer is a manufacturer and retailer of construction materials, as well as a contractor engaged in various road construction activities. The taxpayer is involved in gravel crushing and base aggregate preparation for roadbed construction as well as the actual road construction itself. The taxpayer has held a Wisconsin seller's permit since 1977, and filed regular sales tax returns since that time.

Vinton is a Wisconsin corporation, with its principal place of business located in Manitowoc, Wisconsin. Vinton is also a contractor that is engaged in the road construction business. Vinton and the taxpayer have worked on the same highway construction projects many times over the years.

The taxpayer was the prime contractor in two highway construction projects. The taxpayer hired Vinton to batch and lay concrete for both projects.

The taxpayer provided sand and aggregate to Vinton to make the concrete. The taxpayer obtained the

sand and aggregate from its own gravel pit without the payment of any sales or use tax. Vinton manufactured the concrete at its batch plant by adding water and cement mix to the sand and aggregate in proper proportions and mixing it all together. Vinton then transported the concrete in its cement mixing trucks to the highway construction site, where Vinton then used its slip-form paver to pour, form, puddle, float, and trowel the concrete into the roadbed of the highway construction project.

The taxpayer "back charged" the dollar amount of sand and aggregate it supplied to Vinton, deducting this amount from the amount the taxpayer owed Vinton under the subcontract agreement. No sales or use tax was collected or paid to the State of Wisconsin on this sand and aggregate provided to Vinton.

Trierweiler is a Wisconsin corporation, with its principal place of business located in Marshfield, Wisconsin. Trierweiler is also a contractor engaged in the road construction business. Trierweiler and the taxpayer have worked on the same highway projects many times over the years.

The taxpayer was a subcontractor and Trierweiler was the prime contractor on two highway construction projects. Both of these highway construction projects involved the laying of base course upon which to pour the concrete highway as part of the road construction process. The taxpayer delivered base course to the job sites pursuant to its subcontract agreements. The taxpayer obtained the aggregate from its own gravel pit without the payment of any sales or use tax. The taxpayer did not, however, "place" this base course onto or into the roadbed itself. The actual spreading, packing, and forming into

place was provided by Trierweiler. No sales or use tax was paid to the State of Wisconsin on these items.

Trierweiler transported part of the base course material from its place of business to the road construction site and provided for the placement of the base course by spreading, grading, packing, and forming it into the proper place to support the pouring of the concrete roadbed.

The taxpayer provided other base course that it did not deliver to the construction site. Trierweiler picked up this base course at the taxpayer's place of business and hauled it directly to the construction site itself. Trierweiler did not provide the taxpayer with an exemption certificate for these transactions. No sales or use tax was paid on these items.

The Commission concluded that the department properly determined that the transfers of sand and aggregate to Vinton and the transfers of aggregate to Trierweiler were "sales" within the meaning of sec. 77.51(14), Wis. Stats., and therefore subject to the imposition of sales tax. The department properly imposed the penalty provided in sec. 77.60(3), Wis. Stats., because the taxpayer did not show that its incorrect return was not due to neglect.

The taxpayer has not appealed this decision. ☐

**■ Estoppel.** *Spickler Enterprises, Ltd. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, December 21, 1995). The issue in this case is whether the Department of Revenue should be estopped from collecting sales tax from the taxpayer on its sales of nonmotorized trailers to non-Wisconsin residents and on its sales of related items of tangible personal property and services per-

formed at the same time and in conjunction with the sales of the trailers.

The taxpayer was organized under the laws of Wisconsin in 1972 and has done business in Wisconsin as a registered motor vehicle dealer since that date. During the period under review, the taxpayer had its principal place of business in Chippewa Falls, Wisconsin, and was primarily engaged in the business of selling both motorized recreational vehicles as well as nonmotorized trailers, such as recreational vehicles, 5th wheel trailers, tent campers, and pickup truck toppers.

The taxpayer has held a Wisconsin seller's permit since July 1976, except for a short period in 1982 when the permit had been inactivated.

In July 1992, the Department of Revenue issued a sales tax assessment against the taxpayer. The only sales at issue from the assessment are those involving nonmotorized trailers and related items of tangible personal property and services for which the taxpayer did not charge or pay over any Wisconsin sales tax.

In deciding not to collect Wisconsin sales tax on its sales of nonmotorized recreational campers, trailers and /or toppers to out-of-state residents, the taxpayer relied on an oral statement or statements from the Wisconsin Department of Transportation.

During the period under review, the taxpayer never contacted the Department of Revenue or any of its employees to inquire whether its various sales at issue herein were subject to Wisconsin sales tax. The taxpayer did not pay any sales tax to any states other than Wisconsin and Minnesota during the audit period.

The Department of Revenue's *Sales and Use Tax Report* dated June 1977 was mailed to all those who held Wisconsin seller's permits and who were sent a return for the month or quarter of June 1977, which included the taxpayer. *Sale and Use Tax Information: Motor Vehicle Sales, Leases and Repairs*, Publication 202 (12/87), was also sent to the taxpayer.

The Department of Revenue has consistently taken the position that sales of nonmotorized trailers and pickup toppers, such as those in question in this case, are taxable.

Two employees of the taxpayer testified they relied on oral statements of clerical employees of the Department of Transportation. Both performed clerical functions for the taxpayer in connection with vehicle registrations. Neither had tax return preparation or filing responsibilities, and neither read the tax publications sent to the taxpayer by the Department of Revenue which contained the proper tax payment information pertaining to the transactions under review.

The Department of Transportation and the Department of Revenue are separate state agencies, and there was no agency-principal relationship between them, either express or implied, with respect to determining sales tax liability or providing specific tax information to the public, including vehicle dealers such as the taxpayer.

The Commission concluded that the taxpayer is not entitled to estoppel against the Department of Revenue to defeat the Department of Revenue's assessment. The taxpayer has not clearly shown that it reasonably relied on an action by the Department of Revenue in failing to pay the taxes assessed.

The elements of estoppel are (1) action or non-action, (2) on the part of one against whom estoppel is asserted, (3) which induces reasonable reliance thereon by the other, either in action or non-action, and (4) which is to his detriment.

There was no convincing proof of the date or dates of oral statements from the Wisconsin Department of Transportation or of the contents of the statements. The record contains only uncorroborated testimony which lacked specifics.

In order to succeed in its estoppel claim, the taxpayer must also show that the statement relied on was made by the one against whom estoppel is sought. But the statement or statements here were made by an employe or employes of the Department of Transportation, not the Department of Revenue whom the taxpayer seeks to estop. Under these circumstances, there can be no estoppel.

The Commission also rejected the taxpayer's assertion that the Department of Transportation was acting as an agent of the Department of Revenue in disseminating tax advice during the period under review. If the alleged tax advice was in fact provided by Department of Transportation clerical employes, they were acting outside the scope of their authority.

The Commission found it is not reasonable for the taxpayer, an experienced and sizeable business which has an established tax filing relationship with the Department of Revenue, to rely for its tax advice on oral statements to its clerical employes by clerical employes of the Department of Transportation, where thousands of dollars in potential sales tax liability are implicated.

The evidence is not clear as to detriment to the taxpayer resulting from its reliance on statements of Department of Transportation employes.

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

— **Exemptions — commercial vessels and barges.** *La Crosse Queen, Inc. vs. Wisconsin Department of Revenue* (Court of Appeals, District IV, April 4, 1996). This is an appeal from the August 10, 1995 decision of the Circuit Court for Dane County. The Circuit Court affirmed the decision of the Wisconsin Tax Appeals Commission, that the gross receipts of the taxpayer are subject to sales tax. For a summary of the Circuit Court decision, see *Wisconsin Tax Bulletin* 95 (January 1996), page 28.

The issue is whether the taxpayer's receipts from the lease of an excursion vessel are exempt from sales tax as a commercial vessel of fifty-ton burden or over primarily engaged in interstate commerce.

During the years 1989 through 1991 the taxpayer was the owner of an excursion vessel named the La Crosse Queen IV and leased it to Riverboats America, Inc. The vessel carries passengers on sightseeing and dinner cruises and operates exclusively on the Mississippi River. The western boundary of the State of Wisconsin is the center of the main channel of the Mississippi River. All passengers embark and disembark at La Crosse, Wisconsin. Approximately seventy-five percent of the passengers carried by the vessel are from states other than Wisconsin.

On the one and one-half hour cruise, the vessel goes upstream, crosses over the Wisconsin boundary into Minnesota territorial waters, travels

to the lock and dam at Dresbach, Minnesota, then turns around and returns to La Crosse. There is a longer four-hour cruise that serves a meal and includes this same route. On this cruise and on charter cruises, the vessel typically "locks through" the lock at Dresbach before it turns around. There is also a two-hour dinner cruise that goes south on the river and then turns around to return to La Crosse. A guide provides information about the river and its history during the cruises. No passengers disembark at any point during the cruises.

The vessel operates under Interstate Commerce Commission (ICC) authority. Until the time of deregulation, the vessel was required to file tariff reports with the ICC. Because the Mississippi River is considered an interstate waterway, the vessel must be, and is, certified by the United States Coast Guard, and must report annually to the Army Corps of Engineers. The vessel exceeds a fifty-ton burden.

The Court of Appeals concluded that the vessel was engaged in interstate commerce during the years in question, but was unable to decide, based on the record, whether it was "primarily" engaged in interstate commerce. The vessel is engaged in interstate commerce when it crosses into Minnesota territorial waters on its excursion routes.

The Court of Appeals reversed the judgement of the Circuit Court and directed the Circuit Court to remand to the Wisconsin Tax Appeals Commission for a determination of whether the vessel was "primarily" engaged in interstate commerce.

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

**Exemptions — common or contract carriers — constitutionality.** *Wisconsin Steel Industries, Inc., vs. Wisconsin Department of Revenue* (Circuit Court for Milwaukee County, June 7, 1996).

This is an appeal from the January 23, 1996 decision of the Wisconsin Tax Appeals Commission. For a summary of that decision, see *Wisconsin Tax Bulletin* 96 (April 1996), page 19.

The taxpayer and the department have stipulated as follows:

1. The taxpayer agrees that it is liable for the full amount of tax due pursuant to the January 23, 1996 decision of the Wisconsin Tax Appeals Commission.
2. The department agrees that it will reduce the interest on the tax due from 18 % to 12 %, provided the taxpayer makes the required monthly payments until the full amount of tax and interest due is paid in full.

The Circuit Court dismissed this case pursuant to the stipulation. □

**Service enterprises — bathtub refinishing.** *Ark Corporation vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 12, 1996, and May 28, 1996). The issues in this case are:

- A. Whether the term “bathroom fixtures,” as used in sec. 77.52(2)(a)10, Wis. Stats., includes bathtubs.
- B. Whether the taxpayer’s re-enameling of bathtubs is a service subject to the sales tax pursuant to sec. 77.52(2)(a)10, Wis. Stats.

The taxpayer is an Illinois corporation whose business activities in Wisconsin were limited to the re-enameling of bathtubs. The taxpayer describes this process as thermal-fusion, and it involves the application of finishing compounds to existing bathtub enamel to create a new surface.

The Commission concluded that:

- A. The term “bathroom fixtures” as used in sec. 77.52(2)(a)10, Wis. Stats., includes bathtubs.
- B. The taxpayer’s re-enameling of bathtubs is a service subject to the sales tax pursuant to sec. 77.52(2)(a)10, Wis. Stats.

Section 77.52(2)(a)10, Wis. Stats., applies the sales tax to certain services performed with regard to tangible personal property. This statute provides that certain items retain their character as tangible personal property regardless of the manner in which they are affixed to real property. Thus, a taxable service performed on one of these specially designated items of tangible personal property would continue to be taxable, even though the items might otherwise be considered real property fixtures.

One category of these specially designated items of tangible personal property is “bathroom fixtures.” When installed, a bathtub is clearly a fixture because it is physically annexed to real property, it is normally adapted to the purpose to which the realty is devoted, and it is typically intended to become a permanent part of the real property.

By looking to its common and approved usage, the Commission determined that the meaning of “bathroom” is a room equipped for taking a bath or a shower. Therefore, any room containing an in-

stalled bathtub is a “bathroom” and the term “bathroom fixtures” used in sec. 77.52(2)(a)10, Wis. Stats., clearly includes installed bathtubs. The re-enameling process falls within the meaning of one or more of the services listed in sec. 77.52(2)(a)10, Wis. Stats.

The taxpayer has not appealed this decision. □

**Service enterprises — horseshoeing/farrier.** *Mark Espersen vs. Wisconsin Department of Revenue* (Circuit Court for Waushara County, January 3, 1996). This is an appeal from the January 24, 1994 decision of the Wisconsin Tax Appeals Commission. For a summary of that decision, see *Wisconsin Tax Bulletin* 86 (April 1994), page 20.

The issue in this case is whether a farrier’s services are subject to sales tax under sec. 77.52(2)(a)10, Wis. Stats. An exception exists in that section for “services performed by veterinarians.” The issue, then, is whether farriers are veterinarians as the term is commonly understood.

The taxpayer is a farrier, and as such he shoes horses and trims hooves. Some of his work is remedial, some preventative, most to regain or ensure the soundness of the animal. In equine usage “sound” means “not lame.”

The Circuit Court concluded that the taxpayer’s evidence and authority is insufficient to establish that he is exempt from taxation. No definitions of veterinarians are supplied which show that the term is commonly understood to include a farrier.

Section 97.42(1)(n), Wis. Stats., states, in part, that “veterinarian” means a graduate veterinarian of an accredited school of veterinary medi-

cine qualified on the basis of training and experience. Section 453.02(7), Wis. Stats., states "veterinarian means a practitioner of veterinary medicine who is duly licensed by the examining board". The taxpayer does not fall within this class.

The taxpayer has not appealed this decision. The case is pending at the Commission to decide other issues not ruled on in its January 24, 1994 decision. Those issues include possible farming exemptions and the penalties and interest assessed. □

**— Statute of limitations — nonfilers; Manufacturing — exemption of property consumed or destroyed; Occasional sales.** *Zignego Company, Inc., vs. Wisconsin Department of Revenue* (Circuit Court for Dane County, April 9, 1996). This is a review of the May 2, 1995 decision of the Wisconsin Tax Appeals Commission, which affirmed the Department of Revenue's assessment against the taxpayer for unpaid sales and use taxes plus interest and penalties. For a summary of that decision, see *Wisconsin Tax Bulletin* 92 (July 1995), page 17.

The issues are:

- A. Whether the Commission incorrectly ruled that a four year statute of limitations had not run on the taxpayer's non-payment of the sales and use taxes in question for the fiscal years running from April 1, 1984 through March 31, 1988.
- B. Whether the Commission incorrectly ruled that the taxpayer was not entitled to a sales tax exemption for its purchase of the ingredients of manufactured concrete.
- C. Whether the Commission incorrectly ruled that the taxpayer is not entitled to the sales tax ex-

emption for its occasional sales and rentals.

The taxpayer is a Wisconsin corporation engaged in the business of road construction, primarily for public entities. The taxpayer manufactures ready-mixed concrete for use in its road paving projects. The taxpayer's construction activity is a real property construction activity, and it is a contractor under sec. 77.51(2), Wis. Stats.

The concrete is manufactured by mixing together cement, aggregate (crushed stone or gravel), water, and other ingredients in a batch plant or in trucks. The final product is ready-mixed concrete which is in a semi-liquid state and constitutes tangible personal property. The taxpayer manufactured only the concrete it needed to fulfill its real property construction contracts.

During the period under review, all of the taxpayer's construction contracts were with government entities which are exempt from sales and use taxes.

The taxpayer purchased the ingredients for its concrete. These ingredients became component parts of or lost their identity in the manufacture of the concrete. The taxpayer did not pay any Wisconsin sales or use tax on these ingredients. However, it did pay sales tax on other materials used in its projects, such as cement, hardware, and piping.

The taxpayer also engaged in a number of sales or rentals of equipment or services for the fiscal years 1984-85 through 1991-92. The taxpayer did not hold a seller's permit, and did not charge or pay any sales tax on these transactions. The taxpayer concedes that two of the transactions, involving the rental of trucks, were not eligible for the occasional sale exemption.

The Circuit Court concluded as follows:

- A. The Commission's decision on this issue is reversed. The four year statute of limitations had run on the taxpayer's non-payment of the sales and use taxes in question for the fiscal years running from April 1, 1984 through March 31, 1988. The legislature has expressly provided extensions to the four year statute of limitations in cases where sales and use tax returns were not filed, but should have been, only where the failure to file was with the intent of evading or defeating the tax. No such intent has been demonstrated here.
  - B. The Commission's decision on this issue is affirmed. The taxpayer was not entitled to a sales tax exemption on its purchase of the ingredients of manufactured concrete. The purpose of the sales and use tax system is to make everything taxable at the retail level unless specifically exempted. Contractors and subcontractors are consumers of tangible personal property used by them in construction activities.
- Whether contractors purchase raw materials and use them, as is, in their construction projects or whether raw materials are purchased for "manufacture" into other materials which are, in turn, used in construction projects, is not relevant to the determination of whether the tax applies.
- C. The Court remanded this issue to the Commission for further consideration. If the Commission determines that the taxpayer was required to have a seller's permit and lost exemptions as a result,



it must adequately explain the basis for this position in law and fact.

The taxpayer has appealed the decision to the Court of Appeals, relative to Issue B. The department has appealed the decision to the Court of Appeals, relative to Issue A. ☐

## SALES TAXES AND WITHHOLDING TAXES

**— Personal liability.** *William Drilias vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, May 31, 1996). The matter is before the Wisconsin Tax Appeals Commission (Commission) on remand by the Dane County Circuit Court (Circuit Court). For a summary of the Circuit Court's remand decision, see *Wisconsin Tax Bulletin* 94 (October 1995), page 18.

The Circuit Court found no support in the record for the Commission's conclusion that the taxpayer did not voluntarily and intentionally act to prefer other creditors over the government. The Commission was instructed on remand to:

- A. Make explicit what evidence supports its factual findings that the taxpayer complied with the entire installment agreement until he lost control and authority of the corporation.
- B. Decide whether the installment agreement changed the corporation's obligation to prefer the department to other creditors and, if so, whether the department is estopped from asserting liability against the taxpayer.

C. Decide what legal conclusion results from the department's collection efforts as regards the taxpayer's duty to pay (1) the withholding taxes covered by the installment agreement, (2) the withholding taxes not covered by the installment agreement, and (3) the sales taxes.

D. Make explicit which party must bear the burden of proof and by which standard the evidence is to be judged.

On remand, the Commission concluded as follows:

A. The taxpayer "intentionally" and "wilfully" failed to pay over taxes within the meaning of sec. 71.20(5)(a), Wis. Stats. (withholding tax) and sec. 77.60(9), Wis. Stats. (sales tax).

The record shows that the taxpayer, as president of the corporation, paid other creditors while not paying to the department the taxes which were due before he lost control due to the corporation's bankruptcy. The corporation breached the express language of the installment agreement with the department, which required the corporation to file current returns and pay the tax as it became due.

B. The department is not estopped from asserting liability against the taxpayer.

When the taxpayer failed to make current tax payments, the corporation defaulted and its rights (and the taxpayer's, if he had any) under the installment agreement were forfeited. The

taxpayer has shown no action or inaction by the department which reasonably induced reliance by the taxpayer to the taxpayer's detriment.

C. The department's collection efforts or lack thereof are immaterial to the taxpayer's personal liability for withholding taxes under sec. 71.20(5)(a), Wis. Stats., which contains no requirement that the department pursue collection against the delinquent corporation as a condition of the imposition of personal liability.

The department acted reasonably and properly within the meaning of sec. 77.60(9), Wis. Stats., by filing an amended bankruptcy claim with respect to the corporation's sales taxes due November 20, 1984 and January 20, 1985.

D. The "burden of proof" is placed on the department; the evidence is judged according to that standard.

If the department presents clear and satisfactory evidence that the individual was indeed a "responsible person" and preferred other creditors over the department, then the burden appropriately shifts, and the assessed individual must show otherwise by clear and satisfactory evidence.

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



## Tax Releases

*"Tax releases" are designed to provide answers to the specific tax questions covered, based on the facts indicated. In situations where the facts vary from those given herein, the answers may not apply. Unless otherwise indicated, tax releases apply for all periods open to adjustment. All references to section numbers are to the Wisconsin Statutes unless otherwise noted.*

The following tax releases are included:

### Corporation Franchise and Income Taxes

1. Deductibility of State and Local Taxes for Wisconsin Corporation Franchise and Income Tax Purposes (p. 26)
2. Dividends Received Deduction — Ownership of Stock During Entire Taxable Year (p. 27)

### Individual Income and Corporation Franchise and Income Taxes

3. Expired Tax Credits Not Deductible (p. 28)

### Sales and Use Taxes

4. Federal Preemption of Collection and Remittance of Local Taxes by Direct-to-Home Satellite Service Providers (p. 29)

### CORPORATION FRANCHISE AND INCOME TAXES

#### 1 Deductibility of State and Local Taxes for Wisconsin Corporation Franchise and Income Tax Purposes

**Statutes:** Sections 71.26(3)(g), 71.34(1)(ag), and 71.45(2)(a)5, Wis. Stats. (1993-94)

**Background:** A corporation computes its Wisconsin net income under the Internal Revenue Code, with certain modifications prescribed in sec. 71.26(3), Wis. Stats. (1993-94). Sec. 71.26(2)(a), Wis. Stats. (1993-94). One of those modifications is sec. 71.26(3)(g), which modifies sec. 164(a)(3) of the Internal Revenue Code (IRC) so that state taxes and taxes of the District of Columbia that are value-added taxes, single business taxes, or taxes on or measured by all or a portion of net income, gross income, gross receipts, or capital stock are not deductible. Similar provisions are included in secs. 71.34(1)(ag) and 71.45(2)(a)5, Wis. Stats. (1993-94), relating to tax-option (S) corporations and insurance companies, respectively.

In addition to the taxes described in IRC sec. 164(a)(1) through (5), IRC sec. 164(a) provides for the deduction of other state and local taxes that are paid or accrued in carrying on a trade or business or an activity for the production of income under IRC sec. 212. However, any tax paid or accrued in connection with the acquisition or disposition of

property must be capitalized and treated as part of the cost of the property. State and local sales and use taxes are deductible under this provision. Since sec. 71.26(3), Wis. Stats. (1993-94), does not modify this provision of IRC sec. 164(a), taxes such as state and local sales and use taxes and other local taxes incurred in carrying on a trade or business may be deductible for Wisconsin franchise and income tax purposes.

**Facts and Question 1:** Hawaii imposes a general excise or privilege tax on all business and other activities conducted within the state. The tax applies not only to sales of goods and services but to virtually every economic activity not otherwise exempt. The tax is imposed on gross income, gross proceeds, or values of products in the distribution chain at varying rates. Hawaii's complementary use tax is imposed on tangible personal property imported for use in the state or purchased from unlicensed sellers in the state. The incidence of the general excise tax is on the seller, service provider, or person conducting business and activities in the state, and any visible pass on of the tax to the consumer or purchaser is a matter of contractual agreement. Chapters 237 and 238, Hawaii Revised Statutes.

May a corporation deduct the Hawaii general excise and use taxes paid under chapters 237 and 238 of the Hawaii Revised Statutes for Wisconsin franchise and income tax purposes?

**Answer 1:** Yes, the Hawaii general excise and use taxes are deductible as sales and use taxes for Wisconsin franchise and income tax purposes. However, when the expenditure must be capitalized for federal income tax purposes, it must be capitalized for Wisconsin purposes.

**Facts and Question 2:** New Mexico imposes a gross receipts tax on persons engaged in business in New Mexico for the privilege of doing business in the state. The tax is imposed on the gross receipts of persons who sell property in New Mexico, perform services in New Mexico, lease property employed in New Mexico, or sell research and development services performed outside New Mexico, the product of which is initially used in New Mexico. The compensating (use) tax is imposed on persons for the privilege of using tangible personal property in New Mexico. Chapter 7, Article 9, New Mexico Statutes Annotated 1978, the Gross Receipts and Compensating Tax Act.

May a corporation deduct the gross receipts and compensating taxes imposed under the New Mexico Gross Receipts and Compensating Tax Act for Wisconsin franchise and income tax purposes?

**Answer 2:** Yes, the New Mexico gross receipts and compensating taxes are deductible as sales and use taxes for Wisconsin franchise and income tax purposes. However, when the expenditure must be capitalized for federal income tax purposes, it must be capitalized for Wisconsin purposes.

**Facts and Question 3:** Washington imposes a business and occupation tax for the act or privilege of engaging in business activities in Washington. The tax is based on the value of the products involved for

extracting and manufacturing industries, gross proceeds of sales for retail businesses, and gross income for other business activities such as personal service businesses. The incidence of the tax is upon the business rather than upon the customer or consumer. Different rates apply to various classifications of business activities. Firms are taxable according to the activities they engage in and, therefore, may be subject to more than one tax rate. Chapter 82.04, Revised Code of Washington.

May a corporation deduct the Washington business and occupation taxes paid under chapter 82.04, Revised Code of Washington, for Wisconsin franchise or income tax purposes?

**Answer 3:** Yes, the Washington business and occupation taxes are deductible for Wisconsin franchise and income tax purposes.

**Facts and Question 4:** The city of Everett, Washington, imposes business and occupation taxes patterned after the state business and occupation taxes. Chapter 3.24, Everett Municipal Code.

The city of Santa Ana, California, imposes business license taxes, which are gross receipts taxes on all business activities. Chapter 21, Santa Ana Municipal Code.

Arlington County, Virginia, imposes a business license tax and the city of Arlington, Virginia, imposes a city business tax certificate fee for the privilege of doing business in the county and municipality, respectively. Both of these taxes are based on gross receipts.

May a corporation deduct the Everett, Washington, business and occupation taxes, the Santa Ana,

California, business license taxes, the Arlington County, Virginia, business license taxes, and the Arlington, Virginia, city business tax certificate fees for Wisconsin franchise and income tax purposes?

**Answer 4:** Yes, the Everett, Washington, business and occupation taxes, the Santa Ana, California, business license taxes, the Arlington County, Virginia, business license taxes, and the Arlington, Virginia, city business tax certificate fees are deductible for Wisconsin franchise and income tax purposes. All of these local taxes are incurred in carrying on a trade or business within the meaning of IRC sec. 164(a). Since the modification to IRC sec. 164(a)(3) by sec. 71.26(3)(g), Wis. Stats. (1993-94), relates only to state-imposed taxes, local business taxes paid by a corporation are deductible. □

## 2 Dividends Received Deduction — Ownership of Stock During Entire Taxable Year

**Statutes:** Sections 71.22(10) and 71.26(3)(j), Wis. Stats. (1993-94)

**Wis. Adm. Code:** Section Tax 3.03, December 1995 Register

**Background:** Under sec. 71.26(3)(j), Wis. Stats. (1993-94), a corporation may deduct from income dividends received from a corporation with respect to its common stock if the corporation receiving the dividends owns, directly or indirectly, during the entire taxable year at least 70% of the total combined voting stock of the payor corporation. For taxable years beginning before January 1, 1993, the corporation receiving the dividends was required to own at least 80%, rather than 70%, of the total combined

voting stock of the payor corporation.

**Facts:** The Taxpayer is an affiliated group of corporations in a regulated industry. The corporate structure includes a multistate holding company based outside Wisconsin (Grandparent), a Wisconsin-based holding company (Parent), and a number of second tier wholly owned subsidiaries. The Taxpayer files its federal income tax returns on a calendar-year basis.

In order to operate more efficiently, the Taxpayer has applied for and received approval to combine virtually all of its separate second tier wholly owned subsidiaries together with Parent (Combining Event). Due to regulatory issues, Parent will not be the surviving entity. The combination of the various corporate entities of the Taxpayer will be income tax-free pursuant to the provisions of sec. 368, Internal Revenue Code (IRC).

The Combining Event will be effective on the same business day; however, a specific ordering of events is needed to satisfy the requirements of the regulatory authority:

1. All second tier subsidiaries slated for termination (Combining Entities) will be merged with a single second tier subsidiary (Survivor).
2. By operation of law, the Combining Entities will cease to exist and all operations will vest in Survivor.
3. Immediately following the completion of the second step, Parent will merge with Survivor, and Parent will cease to exist.

Although these steps will occur within seconds of each other on the same day, under corporate law each

step is separate and deemed to occur in the designated order. Pursuant to federal Treasury Regulation sections 1.441-1T(b) and 1.443-1(a), the taxable year of Parent and the Combining Entities will run from January 1, 1996, through the date of the Combining Event.

During 1996, all of the second tier subsidiaries have paid dividends on their common stock to Parent. Parent has owned continuously from January 1, 1996, until the date of the Combining Event at least 70% of the total combined voting stock of each second tier subsidiary which has paid dividends. There is no preferred stock outstanding at the second tier subsidiary level.

**Question:** Is Parent considered to own at least 70% of the stock of the second tier subsidiaries during Parent's entire taxable year so that Parent will qualify for the deduction for dividends received from the second tier subsidiaries during 1996?

**Answer:** Yes, Parent is considered to own at least 70% of the stock of the second tier subsidiaries during Parent's entire taxable year. Therefore, Parent will qualify for the dividends received deduction.

For Wisconsin franchise tax purposes, the taxable year is the taxable period upon the basis of which the taxable income of the taxpayer is computed for federal income tax purposes. Sec. 71.22(10), Wis. Stats. (1993-94). For federal income tax purposes, in the case of a return made for a fractional part of a year, "taxable year" means the period for which such return is made. Sec. 7701(a)(23), IRC. In this case, short period returns will be filed for both the Parent and the second tier subsidiaries for the period from January 1, 1996, through the date of the Combining Event. □

## INDIVIDUAL INCOME AND CORPORATION FRANCHISE AND INCOME TAXES

### 3 Expired Tax Credits Not Deductible

**Statutes:** Sections 71.01(13), 71.21, 71.26(2)(a), 71.34(1), and 71.45(2), Wis. Stats. (1993-94), and as affected by 1995 Wisconsin Acts 27 and 209

**Background:** In computing their Wisconsin net income, individuals, estates, and trusts must add to their federal adjusted gross income the development zones credits computed for the taxable year, even though the full amount of a credit cannot be used to offset tax for the current taxable year but must be carried forward to future taxable years. Sections 71.01(13) and 71.05(6)(a)15, Wis. Stats. (1993-94), as affected by 1995 Wisconsin Acts 27 and 209.

Partnerships, including limited liability companies treated as partnerships, must add to their federal net income the development zones credits computed for the taxable year and passed through to their partners or members. Section 71.21(4), Wis. Stats. (1993-94), as affected by 1995 Wisconsin Act 27.

Tax-option (S) corporations are required to add to their federal net income the development zones credits computed for the taxable year and passed through to shareholders. Section 71.34(1)(g), Wis. Stats. (1993-94), as affected by 1995 Wisconsin Act 27. In addition, tax-option (S) corporations must add back the amount of manufacturer's sales tax credit used by the corporation to offset tax for the current taxable year. Section 71.34(1)(e), Wis. Stats. (1993-94).

Corporations and insurance companies must add back to their federal taxable income the community development finance credit, manufacturer's sales tax credit, research credits, and development zone credits computed for the taxable year, even though the full amount of a credit cannot be used to offset tax for the current taxable year but must be carried forward to future taxable years. Sections 71.26(2)(a) and 71.45(2)(a)10, Wis. Stats. (1993-94), as affected by 1995 Wisconsin Act 27. For 1986 and prior taxable years, rather than requiring an addition for the manufacturer's sales tax credit computed, sec. 71.04(3), Wis. Stats. (1981-82), prohibited corporations from deducting sales and use taxes paid during the taxable year which could be used in computing the manufacturer's sales tax credit under sec. 71.043, Wis. Stats. (1981-82).

**Facts and Question:** A Wisconsin corporation, which files its franchise tax returns on a calendar-year basis, has manufacturer's sales tax credit carryovers dating back to the 1981 taxable year. The corporation will not have Wisconsin franchise taxes due for 1996. Since unused credits may be carried forward for up to 15 taxable years under sec. 71.28(3)(c), Wis. Stats. (1993-94), the 1981 credit will expire at the end of the corporation's 1996 taxable year. Pursuant to sec. 71.04(3), Wis. Stats. (1981-82), the corporation had not deducted the Wisconsin sales and use taxes paid on fuel and electricity consumed in manufacturing on its 1981 Wisconsin franchise tax return.

May the corporation claim a deduction on its 1996 Wisconsin franchise tax return for the unused 1981 manufacturer's sales tax credit that expires at the end of the corporation's 1996 taxable year?

**Answer:** No. The corporation may not claim a deduction on its 1996 Wisconsin franchise tax return for the expired 1981 manufacturer's sales tax credit since the Wisconsin Statutes do not provide for such a deduction. □

## SALES AND USE TAXES

**Note:** The following tax release interprets the Wisconsin sales and use tax law as it applies to the 5% state sales and use tax. The 0.5% county and 0.1% stadium sales and use taxes may also apply. For information on sales or purchases that are subject to the county sales and use tax, refer to Wisconsin Publication 201, *Wisconsin State and County Sales and Use Tax Information*. For information on stadium sales and use tax, refer to the December 1995 issue of the *Sales and Use Tax Report*. A copy can be found in *Wisconsin Tax Bulletin* 95 (January 1996), pages 41 to 47.

### 4 Federal Preemption of Collection and Remittance of Local Taxes by Direct-to-Home Satellite Service Providers

**Statutes:** Section 77.52(2)(a)12 and (2)(am), Wis. Stats. (1993-94), and sec. 77.71(2), Wis. Stats., as amended by 1995 Wisconsin Act 56, effective October 27, 1995

**Federal Law:** Section 602 of Federal Public Law 104-104, effective February 8, 1996

**Introduction:** This tax release explains how sec. 602 of Federal Public Law 104-104 (Telecommunications Act of 1996), which exempts direct-to-home satellite service providers from the collection and remittance of local taxes, affects direct-to-home satellite service providers and purchasers of direct-to-

home satellite service in Wisconsin. Federal Public Law 104-104 exempts the **provider** of the direct-to-home satellite service from the requirement to collect and remit local taxes. However, it does not exempt the consumer (customer) of the direct-to-home satellite service from liability for any applicable local use taxes. Even though direct-to-home satellite service providers are **not required** to collect and remit local taxes on direct-to-home satellite services, the providers may voluntarily collect and remit the local taxes for the convenience of their customers.

**Background:** *Federal Public Law* — Section 602(a) of Federal Public Law 104-104, states that "A provider of direct-to-home satellite services shall be exempt from the collection or remittance, or both, of any tax or fee imposed by any local taxing jurisdiction on direct-to-home satellite service."

"Direct-to-home satellite service" is defined in sec. 602(b)(1), Federal Public Law 104-104, to mean "...programming transmitted or broadcast by satellite directly to the subscribers' premises without the use of ground receiving or distribution equipment, except at the subscribers' premises or in the uplink process to the satellite."

"Provider of direct-to-home satellite service" is defined in sec. 602(b)(2), Federal Public Law 104-104, to mean "...a person who transmits, broadcasts, sells, or distributes direct-to-home satellite service."

"Local taxing jurisdiction" is defined in sec. 602(b)(3), Federal Public Law 104-104, to mean "...any municipality, city, county, township, parish, transportation district, or assessment jurisdiction, or any other local jurisdiction in the

territorial jurisdiction of the United States with the authority to impose a tax or fee, but does not include a State.”

#### *Wisconsin Law*

Section 77.52(2)(a)12, Wis. Stats. (1993-94), imposes a sales tax on “The sale of cable television system services including installation charges.”

Section 77.51(2)(am), Wis. Stats. (1993-94), defines “cable television system” to mean “...any facility which, for a fee, regularly amplifies and transmits by wire, coaxial cable, lightwave or microwave, simultaneously to 50 or more subscribers, programs broadcast by television or radio stations or originated by themselves or any other party...”

Section 77.71(2), Wis. Stats., as amended by 1995 Wisconsin Act 56, effective October 27, 1995, provides that “An excise tax is imposed at the rate of 0.5% in the case of a county tax or at the rate under s. 77.705 in the case of a special district tax of the sales price upon every person storing, using or otherwise consuming in the county or special district tangible personal property or services if the property or service is subject to the state use tax under s. 77.53...”

#### **Facts and Question 1:**

- Company A, a direct-to-home satellite service provider, provides direct-to-home satellite service to Customer B, located in LaCrosse, Wisconsin.
- Company A charges Customer B the 5% Wisconsin state sales or use tax, but does not charge Customer B the 0.5% LaCrosse County sales or use tax.

What is the proper Wisconsin sales and use tax treatment of this transaction?

#### **Answer 1:**

##### *Wisconsin Sales and Use Tax Treatment for Company A*

Company A is required to collect and remit the 5% Wisconsin state sales or use tax on the charge to Customer B for the direct-to-home satellite service.

Company A is **not** required to collect the 0.5% LaCrosse County tax on the charge to Customer B, because the county tax is a “local tax” which, under sec. 602 of Federal Public Law 104-104, Company A is exempt from the requirement of collecting and remitting.

##### *Wisconsin Sales and Use Tax Treatment for Customer B*

Customer B is required to remit the 0.5% county use tax imposed under sec. 77.71(2), Wis. Stats., as amended by 1995 Wisconsin Act 56, to the Department of Revenue. Section 602 of Federal Public Law 104-104 only exempts the direct-to-home satellite service provider from the requirement to collect and remit local taxes on the direct-to-home satellite service. It does not exempt the purchaser (Customer B) from being required to remit the local use taxes on the direct-to-home satellite service.

If Customer B holds a Wisconsin seller’s permit, use tax registration certificate, or consumer use tax registration certificate, Customer B should report the LaCrosse County use tax due on its sales and use tax return.

If Customer B is not registered to collect and remit Wisconsin sales

and use tax, Customer B should report the LaCrosse County use tax due as follows:

- If Customer B is a corporation, partnership, limited liability company, or legal entity other than an individual, Customer B should report the LaCrosse County use tax due on the direct-to-home satellite service on Form UT-5, Consumer Use Tax Return.
- If Customer B is an individual and is required to file a Wisconsin income tax return, Customer B should report the LaCrosse County use tax due on the direct-to-home satellite service on Customer B’s individual income tax return on the line titled “Sales and use tax due on out-of-state purchases.”
- If Customer B is an individual and is **not** required to file a Wisconsin income tax return, Customer B should report the LaCrosse County use tax due on the direct-to-home satellite service on Form UT-5, Consumer Use Tax Return.

Since Company A collected the 5% Wisconsin state sales or use tax on the charges to Customer B, no additional **state** sales or use tax is owed by Customer B.

#### **Facts and Question 2:**

- Company C, a direct-to-home satellite service provider, provides direct-to-home satellite service to Customer D, located in Waukesha, Wisconsin.
- Company C charges Customer D the 5% Wisconsin state sales or use tax, but does not charge Customer D the 0.1% special district (stadium) sales or use tax.

What is the proper Wisconsin sales and use tax treatment of this transaction?

### Answer 2:

#### *Wisconsin Sales and Use Tax Treatment for Company C*

Company C is required to collect and remit the 5% Wisconsin state sales or use tax on the charge to Customer D for the direct-to-home satellite service.

Company C is not required to collect the 0.1% stadium tax on the charge to Customer D, because the stadium tax is a "local tax" which, under sec. 602 of Federal Public Law 104-104, Company C is exempt from the requirement of collecting and remitting.

#### *Wisconsin Sales and Use Tax Treatment for Customer D*

Customer D is required to remit the 0.1% stadium use tax imposed under sec. 77.71(2), Wis. Stats., as amended by 1995 Wisconsin Act 56, to the Department of Revenue. Section 602 of Federal Public Law 104-104 only exempts the direct-to-home satellite service provider from the requirement to collect and remit local taxes on the direct-to-home satellite service. It does not exempt

the purchaser (Customer D) from being required to remit the local use taxes on the direct-to-home satellite service.

Customer D should report the stadium use tax due in the same manner as explained for Customer B in Answer 1.

### Facts and Question 3:

- Company E, a direct-to-home satellite service provider, provides direct-to-home satellite service to Customer F, located in Milwaukee, Wisconsin.
- Company E charges Customer F the 5% Wisconsin state sales or use tax, but does not charge Customer F the 0.5% Milwaukee County sales or use tax or the 0.1% special district (stadium) sales or use tax.

What is the proper Wisconsin sales and use tax treatment of this transaction?

### Answer 3:

#### *Wisconsin Sales and Use Tax Treatment for Company E*

Company E is required to collect and remit the 5% Wisconsin state sales or use tax on the charge to

Customer F for the direct-to-home satellite service.

Company E is not required to collect the 0.5% county tax or the 0.1% stadium tax on the charge to Customer F, because the county tax and the stadium tax are "local taxes" which, under sec. 602 of Federal Public Law 104-104, Company E is exempt from the requirement of collecting and remitting.

#### *Wisconsin Sales and Use Tax Treatment for Customer F*

Customer F is required to remit the 0.5% county use tax and the 0.1% stadium use tax imposed under sec. 77.71(2), Wis. Stats., as amended by 1995 Wisconsin Act 56, to the Department of Revenue. Section 602 of Federal Public Law 104-104 only exempts the direct-to-home satellite service provider from the requirement to collect and remit local taxes on the direct-to-home satellite service. It does not exempt the purchaser (Customer F) from being required to remit the local use taxes on the direct-to-home satellite service.

Customer F should report both the county use tax and the stadium use tax due in the same manner as explained for Customers B and D in Answers 1 and 2. □



## 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:

### Corporation Franchise and Income Taxes

Reorganizations — recapitalization

W9634004 (p. 32)

### Sales and Use Taxes

Prizes

W9630003 (p. 35)



**W9634004**, June 4, 1996

**Type Tax:** Corporation Franchise and Income

**Issue:** Reorganizations — recapitalization

**Statutes:** Sections 71.42(2) and 71.45(2), Wis. Stats. (1993-94)

This letter is in response to your request for a private letter ruling as to the Wisconsin franchise or income tax consequences of a proposed recapitalization of XYZ Company (the "Company") under sec. 368(a)(1)(E) of the Internal Revenue Code (IRC).

### Facts

The Company, which was incorporated under the laws of Wisconsin, is engaged in the insurance business.

The Company is not listed on any public exchange, nor is its stock publicly traded in the over-the-counter market. The authorized capital stock of the Company consists of 10X shares, \$Y par value, voting Common Stock, of which 2X are issued and outstanding, and 250X shares of \$Z par value nonvoting Preferred Stock, of which 20X Series A shares are issued and outstanding and 1.2X Series B shares are issued and outstanding. None of the outstanding shares of Series A or Series B Preferred Stock are "section 306" within the meaning of IRC sec. 306(c).

The issued and outstanding shares of Common Stock, Series A Preferred Stock, and Series B Preferred Stock

are owned by the sole shareholder of the Company, UVW, Inc. (the "Shareholder"). The rights and privileges appurtenant to the shares of each class of stock are described below.

### a. Common Stock

The holders of the Common Stock are entitled to one vote per share on all matters with respect to which shareholders of the Company are entitled to vote. The holders of the Common Stock are entitled to such dividends as shall be declared by the Board of Directors for any year after the cumulative dividends on the Series A Preferred Stock and the cumulative dividends on the Series B Preferred Stock have been paid in full. In the event of liquidation, the net assets of the Company shall be distributed ratably to the holders of the Common Stock, subject, however, to the liquidation preference of the Series A Preferred Stock and the Series B Preferred Stock. The holders of the Common Stock are not entitled to have the Common Stock redeemed by the Company.

### b. Series A Preferred Stock

The Series A Preferred Stock has a stated value of \$10Z per share and was issued at \$50Z per share. The Series A Preferred Stock has no voting rights. The Series A Preferred Stock is not convertible into Common Stock of the Company. The holders of Series A Pre-



ferred Stock are entitled to an annual cumulative dividend preference. The Series A Preferred Stock is redeemable upon a majority vote of the Company. The Series A Preferred Stock was redeemable at \$51Z in 1990 and thereafter the redemption price decreases annually. This amount does not exceed 110% of the issue price of the stock. Upon redemption of the Series A Preferred Stock or upon liquidation of the Company, the holders of the Series A Preferred Stock will be entitled to receive an amount equal to the redemption price plus accrued but unpaid cumulative dividends. The accumulated dividend arrearage on the Series A Preferred Stock as of December 31, 1995, is \$A. In no event will the holders of Series A Preferred Stock be entitled either to receive dividends in excess of the dividend preference or to receive more than the specified redemption or liquidation preference upon redemption or liquidation of the Company. The holders of the Series A Preferred Stock are not entitled to have the Series A Preferred Stock redeemed by the Company.

c. *Series B Preferred Stock*

The Series B Preferred Stock has a stated value of \$145Y per share and was issued at \$2,500Y per share. The Series B Preferred Stock has no voting rights. The Series B Preferred Stock is not convertible into Common Stock of the Company. The holders of Series B Preferred Stock are entitled to an annual cumulative dividend preference. The Series B Preferred Stock is redeemable upon a majority vote of the directors of the Company. The Series B Preferred Stock was redeemable

at \$2,550Y per share during 1990 and thereafter the redemption price decreases annually. Upon redemption of the Series B Preferred Stock or upon liquidation of the Company, the holders of the Series B Preferred Stock will be entitled to receive an amount equal to the redemption price plus accrued but unpaid cumulative dividends. The accumulated dividend arrearage on the Series B Preferred Stock as of December 31, 1995, is \$B. In no event will the holders of the Series B Preferred Stock be entitled either to receive dividends in excess of the dividend preference or to receive more than the specified redemption or liquidation preference upon redemption or liquidation of the Company. The holders of the Series B Preferred Stock are not entitled to have the Series B Preferred Stock redeemed by the Company. The Company's books of account and tax returns are maintained and filed on a December 31 fiscal year accrued basis. As of December 31, 1995, the Company had a retained earnings surplus after a deduction of the investment in its insurance subsidiary, RST, Inc.

The Company has not redeemed or otherwise acquired any shares of Common Stock or Series A or Series B Preferred Stock during the last five years, and has no present intention of redeeming or otherwise acquiring any of the outstanding shares of the stock.

It is proposed that the Company be recapitalized in the following manner. The Company will execute a Plan of Recapitalization pursuant to which the Company will amend its Articles of Incorporation to eliminate both the Series A Preferred Stock and the Series B Preferred Stock.

Pursuant to the proposed Plan of Recapitalization and effective immediately upon the filing and recording of the Second Restated Articles of Incorporation of the Company, (a) all dividends that have accumulated but have not yet been declared on all existing shares of both Series A Preferred Stock and Series B Preferred Stock will be deemed canceled and eliminated and (b) since fractional shares of Common Stock will not be issued, shares of Series A Preferred Stock and Series B Preferred Stock will be exchanged for shares of Common Stock. No Common Stock to be exchanged pursuant to the proposed Plan of Recapitalization will be held in escrow or will be issued under a contingent stock arrangement.

These conversions of stock are based upon the following exchange ratios:

1. One share of Series A Preferred Stock will be exchanged for 0.04444 shares of Common Stock.
2. One share of Series B Preferred Stock will be exchanged for 0.64444 shares of Common Stock.

After the proposed recapitalization, the Shareholder's shareholdings, rights, and preferences will be changed from (1)(a) 20X shares of Series A Preferred Stock, and 1.2X shares of Series B Preferred Stock, with an aggregate liquidation value of \$C and (b) 2X shares of Common Stock, with a total par value of \$D to (2) 3.9X shares of Common Stock, with a total par value of \$E.

The estimated fair market value of the Common Stock to be received by the Shareholder in exchange for its Series A Preferred Stock pursuant to the proposed Plan of Recapitalization (determined immediately following the proposed recapitalization) is

substantially less than the issue price of the Series A Preferred Stock to be surrendered. The estimated fair market value of the Common Stock to be received by the Shareholder in exchange for its Series B Preferred Stock pursuant to the proposed Plan of Recapitalization (determined immediately following the proposed recapitalization) is substantially less than the issue price of the Series B Preferred Stock to be surrendered.

The Company has no present intention of making any further changes to its capital structure; nor does it have any present intention of redeeming or otherwise acquiring any shares of Common Stock. The sole shareholder has no present intention of selling or otherwise disposing of any Common Stock to be received pursuant to the proposed recapitalization. No property other than the Common Stock to be received pursuant to the proposed capitalization will be involved in the proposed recapitalization.

The operations of the Company will be continued on an unchanged basis after the proposed recapitalization. The Company and its shareholders will each pay their own expenses incurred in the proposed recapitalization.

The proposed Plan of Recapitalization is designed to accomplish two business objectives or purposes of both the Company and the Shareholder. The first business purpose is to simplify and change the capital structure of the Company to provide for the elimination of the existing Preferred Stock. Simplifying the capital structure of the Company will ease the Company's application for admission to be licensed in certain states. The second business purpose is to cancel or eliminate the accumulated preferred dividend arrearages and the requirement of payment of preferred dividends.

Cancelling the accumulated preferred dividend arrearages and the requirement of payment of preferred dividends will conserve working capital and strengthen the Company's capital structure. Strengthening the Company's capital structure will ease the Company's application for admission to be licensed in certain states, as well as meet regulatory guidelines in jurisdictions where the Company is currently licensed.

### Request

You have requested that the following rulings be issued:

1. If the exchanges of stock provided for in the proposed Plan of Recapitalization of the Company constitute a recapitalization, and therefore a reorganization within the meaning of IRC sec. 368(a)(1)(E), for federal income tax purposes, then IRC sec. 368(a)(1)(E) will also apply for Wisconsin franchise or income tax purposes.
2. If no gain or loss is recognized by the Company pursuant to IRC sec. 1032 for federal income tax purposes as a result of the exchanges of stock provided for in the proposed Plan of Recapitalization, then IRC sec. 1032 will also apply for Wisconsin franchise or income tax purposes.
3. If no gain or loss is recognized by the Shareholder pursuant to IRC sec. 354 for federal income tax purposes as a result of the exchanges of shares of stock provided for in the proposed Plan of Recapitalization, then IRC sec. 354 will also apply for Wisconsin franchise or income tax purposes.
4. If, pursuant to IRC sec. 358(a), the basis for the shares of stock

to be received by the Shareholder under the proposed Plan of Recapitalization is determined by reference to such shareholder's basis and the holding period for the stock exchanged therefor continues pursuant to IRC sec. 1223(l) for federal income tax purposes, then IRC secs. 358(a) and 1223(l) will also apply for Wisconsin franchise or income tax purposes.

5. If no stock to be received by the Shareholder pursuant to the proposed Plan of Recapitalization is treated under IRC sec. 305(b) and (c) as a distribution of property to which IRC sec. 301 applies for federal income tax purposes, then IRC secs. 305(b) and (c) and 301 will not apply to the stock to be received by the Shareholder pursuant to the proposed Plan of Recapitalization for Wisconsin franchise or income tax purposes.

### Ruling

1. If the exchanges of stock provided for in the proposed Plan of Recapitalization of the Company constitute a recapitalization, and therefore a reorganization within the meaning of IRC sec. 368(a)(1)(E), for federal income tax purposes, then IRC sec. 368(a)(1)(E) will also apply for Wisconsin franchise or income tax purposes.
2. If no gain or loss is recognized by the Company pursuant to IRC sec. 1032 for federal income tax purposes as a result of the exchanges of stock provided for in the proposed Plan of Recapitalization, then IRC sec. 1032 will also apply for Wisconsin franchise or income tax purposes.

3. If no gain or loss is recognized by the Shareholder pursuant to IRC sec. 354 for federal income tax purposes as a result of the exchanges of shares of stock provided for in the proposed Plan of Recapitalization, then IRC sec. 354 will also apply for Wisconsin franchise or income tax purposes.
4. If, pursuant to IRC sec. 358(a), the basis for the shares of stock to be received by the Shareholder under the proposed Plan of Recapitalization is determined by reference to such shareholder's basis and the holding period for the stock exchanged therefor continues pursuant to IRC sec. 1223(l) for federal income tax purposes, then IRC secs. 358(a) and 1223(l) will also apply for Wisconsin franchise or income tax purposes.
5. If no stock to be received by the Shareholder pursuant to the proposed Plan of Recapitalization is treated under IRC sec. 305(b) and (c) as a distribution of property to which IRC sec. 301 applies for federal income tax purposes, then IRC secs. 305(b) and (c) and 301 will not apply to the stock to be received by the Shareholder pursuant to the proposed Plan of Recapitalization for Wisconsin franchise or income tax purposes.

### Analysis

The Wisconsin net income of an insurance company is federal taxable income as determined under the Internal Revenue Code, with certain adjustments prescribed in sec. 71.45(2), Wis. Stats. (1993-94). Internal Revenue Code sections 301, 305(b) and (c), 354, 358(a), 368(a)(1)(E), 1032, and 1223(l) are not modified for Wisconsin purposes. □

✱ **W9630003**, May 7, 1996

**Type Tax:** Sales and Use

**Issue:** Prizes

**Statutes:** Section 77.51(14)(k), Wis. Stats. (1993-94)

**Wis. Adm. Code:** Section Tax 11.83(7)(b), (April 1993 Register)

This letter responds to your request for a private letter ruling regarding the Wisconsin sales and use tax implications on a transaction under which ABC Company ("ABC") sold a motor vehicle to the DEF Native American Tribe ("the Tribe"), who in turn gave the motor vehicle away as a prize.

### Facts

Per your written request and subsequent telephone conversations with Wisconsin Department of Revenue representatives, the facts are as follows:

- ABC received a telephone call from the Tribe asking if ABC could obtain a specific automobile for a promotion the Tribe was planning.
- ABC located the automobile at a second dealership, notified the Tribe that they had located the automobile, and then purchased it from the second dealership.
- ABC obtained possession of the automobile from the second dealership.
- ABC received a purchase order for the automobile from the Tribe.
- ABC then delivered the automobile to the Tribe on the Tribe's reservation.

- The Tribe displayed the vehicle throughout the promotion at the Tribe's bingo and casino hall.
- The Tribe paid for the automobile with a check; the amount did not include any Wisconsin sales or use tax.
- Subsequently, Individual X won the automobile at the Tribe's casino and took possession of the automobile at the Tribe's casino.
- Individual X, the winner of the automobile from the Tribe, went to ABC to complete the paperwork to obtain title to the automobile.
- The title was transferred directly from ABC to Individual X. The vehicle was not titled in the name of the Tribe.
- ABC required that Individual X, the winner of the automobile, pay the Wisconsin sales and use tax due on the automobile, before they could transfer title of the automobile to him.
- Individual X paid the Wisconsin sales and use tax due based on the purchase price of the automobile paid to ABC by the Tribe.
- Individual X then filed a complaint with the Department of Transportation claiming, among other things, that he had been incorrectly required to pay the Wisconsin sales and use tax on the automobile he had won from the Tribe.
- An Investigator with the Department of Transportation contacted ABC and requested that ABC refund the Wisconsin sales tax to Individual X.

## Request

You ask what the proper treatment of this transaction is for Wisconsin sales and use tax purposes.

## Ruling

The "retail sale" of the automobile is from ABC to the Native American Tribe as provided in sec. 77.51(14)(k), Wis. Stats. (1993-94). Therefore, if any Wisconsin sales or use tax is to be imposed on this sale, it would be imposed on the selling price of the automobile to the Tribe.

However, since possession of the automobile was transferred to the Tribe on the Tribe's reservation, the retail sale of the automobile to the Tribe is not subject to Wisconsin sales tax.

No Wisconsin sales tax may be imposed on the transfer of the title to Individual X, either. Section Tax 11.83(7)(b), Wis. Adm. Code, April 1993 Register, provides that "A motor vehicle transferred as a gift or as a prize in a contest or drawing is exempt when registered with the department of transportation by the recipient or prize winner. However, the sale of the vehicle to the donor of the gift or prize is taxable..."

## Analysis

Section 77.51(14)(intro.) and (k), Wis. Stats. (1993-94), provides that

*"'Sale', 'sale, lease or rental', 'retail sale', 'sale at retail', or equivalent terms include any one or all of the following: the transfer of the ownership of, title to, possession of, or enjoyment of tangible personal property or services for use or consumption but not for resale as tangible personal property or services and includes: Any sale of tangible personal property to a purchaser even though such property may be used or consumed by some other person to whom such purchaser transfers the tangible personal property without valuable consideration, such as gifts, and advertising specialties distributed gratis apart from the sale of other tangible personal property or service."*

Section 77.52(1), Wis. Stats. (1993-94), provides that *"For the privilege of selling, leasing or renting tangible personal property, including accessories, components, attachments, parts, supplies and materials, at retail a tax is imposed upon all retailers at the rate of 5% of the gross receipts from the sale, lease or rental of tangible personal property, including accessories, components, attachments, parts, supplies and materials, sold, leased or rented at retail in this state."*

Generally the sale of an automobile to a person (or entity) who is going to give it away or raffle it off is subject to Wisconsin sales tax. How-

ever, no Wisconsin sales tax may be imposed on this particular transaction because the State of Wisconsin is prohibited from imposing Wisconsin sales tax on sales of automobiles to the Tribe when possession of the automobile is transferred to the Tribe on the Tribe's reservation.

In addition, the transfer of ownership of the automobile to Individual X is not subject to Wisconsin sales or use tax since you have not sold the automobile to Individual X and therefore have not received any gross receipts from Individual X upon which to impose the Wisconsin sales tax. The gross receipts you received were from the Tribe and those receipts, as explained above, are not subject to Wisconsin sales tax.

Since you indicated in your telephone conversation with the Wisconsin Department of Revenue representative that you have already remitted the sales tax collected from Individual X to the Wisconsin Department of Revenue, you will need to file an amended sales tax return (Form ST-12X) for the period in which you remitted the sales tax to the department in order to obtain a refund of the sales tax you collected from Individual X. You will then be required to refund the tax and related interest to Individual X on this transaction. □