

tax assessed for the first two audit years. No penalty will be imposed on the additional \$400 use tax liability for the last two audit years or on the additional sales tax assessed for all audit years because this additional liability is not due to neglect.

Example 2: A multistate corporation headquartered in Wisconsin with an Ohio division is field audited for franchise tax purposes. A number of adjustments are made to deductions claimed on the corporate returns. Adjustments are also made to the sales factor of the apportionment formula to include both Wisconsin destination and throwback sales in the numerator of this factor. The Department concludes that the adjustments to income as well as the throwback sales adjustments are not due to neglect. However, the Department concludes that failure to include sales shipped from the taxpayer's Ohio plant directly to Wisconsin customers in the sales factor numerator in accordance with s. 71.07(2)(c)2, 1983 Wis. Stats., is due to neglect. Accordingly, the 25% negligence penalty pursuant to s. 71.11(47), Wis. Stats., will be imposed on the portion of the additional tax directly attributable to this adjustment.

Question 2: Is the 100% or 50% penalty under s. 71.11(6)(b) or s. 77.60(5), Wis. Stats., imposed on the entire additional tax finally determined or can it be applied to specific amounts only?

Answer: The 100% or 50% penalty is imposed on the entire underpayment of tax for any year there is evidence of intent to defeat or evade the tax assessment required by law.

Question 3: How is the 25% negligence penalty computed when it is imposed on part of the additional tax assessed and the additional income is subject to graduated tax rates?

Answer: When only part of the adjustments are subject to penalty and the amount of the additional income is subject to graduated tax rates, the amount of the penalty is determined by considering that the adjustments penalized are at the top of the particular tax bracket.

Example: An individual taxpayer reported 1984 Wisconsin net taxable income of \$10,000. Upon audit various adjustments which total to \$20,000 are made increasing the Wisconsin net taxable income to \$30,000. Only \$10,000 of the adjustments are deemed subject to penalty, however. Thus the adjusted 1984 Wisconsin net taxable income not subject to penalty is \$20,000 (\$30,000 adjusted 1984 net taxable income minus \$10,000 additional income due to negligence). The gross tax on \$30,000 is \$2,245 and on \$20,000 is \$1,318, resulting in a difference of \$927. The 25% negligence penalty to be imposed is therefore \$232 (\$927 times 25%).

Question 4: Can the 25% negligence penalty under s. 71.11(47), Wis. Stats., or the 100% penalty under s. 71.11(6)(b), Wis. Stats., be imposed even though a refund is due the taxpayer?

Answer: Yes, the negligence penalty under s. 71.11(47), Wis. Stats., or the 100% penalty under s. 71.11(6)(b), Wis. Stats., may be imposed even though a refund is due the

taxpayer. The penalty would apply when a franchise or income tax return showing a refund due the taxpayer as filed is audited before the refund is issued, and the audit discloses adjustments due to negligence or intent to defeat or evade the law on the part of the taxpayer. The penalty is computed on the excess of the tax based on the corrected income over the liability reported on the return, without regard to the amount of tax withheld or paid by declaration of estimated tax.

Example: A taxpayer files a 1984 Wisconsin return showing a refund due of \$559 based on net taxable income of \$10,000, estimated tax credits and payments of \$1,000 and a net tax after personal exemptions and other credits of \$441. Before the refund is issued the taxpayer's return is audited and additional taxable income of \$5,000 is determined. Additional tax of \$428 is computed on the adjusted net taxable income of \$15,000 (\$10,000 per return plus \$5,000 per audit). A 25% negligence penalty is also imposed on the additional tax of \$428 resulting in a \$107 penalty. The tax and penalty totaling \$535 (\$428 plus \$107) is offset against the \$559 refund requested, resulting in a net refund of \$24 issued to the taxpayer.

Question 5: Section 71.11(21)(g)1, Wis. Stats., provides that if a taxpayer reports on its Wisconsin return less than 75% of the net taxable income properly assessable, an additional assessment may be made within six years of the date on which the return is filed, provided that the additional tax is in excess of \$100. May the 25% negligence penalty imposed under s. 71.11(47), Wis. Stats., be used in arriving at the \$100 amount?

Answer: No. The 25% negligence penalty imposed under s. 71.11(47), Wis. Stats., may not be used to reach the \$100 amount and thereby open to additional assessment an otherwise closed year. However, under the provisions of s. 71.11(21)(c) or 77.59(8), Wis. Stats., filing a return with intent to defeat or evade the tax opens any year for assessment of the additional tax and penalty.

Example: A taxpayer filed a timely 1979 Wisconsin individual income tax return and reported a Wisconsin net taxable income of \$2,975. Upon audit in 1985 a net Wisconsin taxable income of \$4,750 is determined for the 1979 tax year. On this income there is a gross tax of \$190 and, after personal exemptions of \$100, additional net Wisconsin tax of \$90 is computed. The reported net income (\$2,975) is less than 75% of the amount properly assessable (75% of \$4,750 = \$3,563). A 25% negligence penalty of \$23 (\$90 net Wisconsin tax times 25%) when added to the \$90 tax would increase the liability to \$113, which is more than the amount required to open the 1979 tax year under s. 71.11(21)(g)1, 1983 Wis. Stats. However, since only the additional net Wisconsin tax of \$90 may be used to compute whether the tax on the additional income is in excess of \$100 as the statutes require, the tax may not be assessed even though all of the other requirements of the statute have been fulfilled.

Question 6: Is the failure of a person's tax practitioner to complete and file the required returns on time reasonable cause to avoid the imposition of the graduated negligence penalties under s. 71.11(46) or 77.60(4), Wis. Stats.?

Answer: No. The duty to file returns is personal and may not be delegated. For example, in the case of *Ruhl Enterprises, Inc. vs. Wis. Dept. of Revenue* (WTAC, Docket No. I-8075) a second accounting service engaged to bring the books up to date and file the returns failed to do so before the filing deadline after the first accountant had delayed for six months. The taxpayer's failure to act sooner was found to demonstrate lack of "ordinary business care and prudence" in conducting the corporate affairs and thus was not reasonable cause for the late filing. The negligence penalty under s. 71.11(46), Wis. Stats., was deemed appropriate under the circumstances. In another case financial inability to pay and disruption of the bookkeeping system because of moving were found not reasonable causes for late filing. (*Witt, Farr, and Frost, Inc. vs. Wis. Dept. of Revenue*, 6 WBTA 112).

CORPORATION FRANCHISE/INCOME TAXES

1. Deduction of Taxes By Corporations

Statutes: sections 71.01(4)(a)6 and 71.04(3), 1983 Wis. Stats.

Wis. Adm. Code: section Tax 3.24, March 1966 Register

Background: Section 71.04(3), 1983 Wis. Stats. provides in part that certain taxes paid during the taxable year upon the business or property from which the income to be taxed is derived are deductible. This section further provides that certain other taxes are not deductible.

The following is a listing and brief discussion of some of the taxes which are either deductible or nondeductible for Wisconsin corporate franchise/income tax purposes pursuant to s. 71.04(3), 1983 Wis. Stats. (or other Wisconsin law as noted):

DEDUCTIBLE TAXES (this list is not all-inclusive)

A. Real estate and personal property taxes

Real estate and personal property taxes that relate to a definite period of time may be accrued ratably over that period by accrual basis taxpayers.

B. Gross receipts taxes assessed as license fees

These taxes include telephone license fees assessed in lieu of property taxes under s. 76.38(8), 1983 Wis. Stats., and light, heat and power company license fees assessed under s. 76.28, 1983 Wis. Stats.

C. Ad Valorem taxes assessed under s. 76.07, 1983 Wis. Stats.

These taxes are assessed in lieu of local property taxes on such property.

D. Net proceeds occupation tax on mining of metallic minerals under s. 70.375, 1983 Wis. Stats.

Although this tax is based on net mining proceeds, its deductibility is specifically provided for under s. 71.04(3), 1983 Wis. Stats.

E. Other occupational taxes imposed under Chapter 70, 1983 Wis. Stats., on the following:

1. Iron ore concentrates (s. 70.40).
2. Scrap iron, scrap steel and all other steel (s. 70.415).
3. Coal (s. 70.42).
4. Petroleum and petroleum products refined in Wisconsin (s. 70.421).
5. Owners of domestic mink farms (s. 70.425).

Note: Refer to Item E under Nondeductible Taxes for the treatment of occupational tax on grain storage (s. 70.41).

The laws imposing the taxes on Items 1 through 4 above specifically provide that the tax is deductible under s. 71.04(3), 1983 Wis. Stats., and are in lieu of other property taxes.

The tax imposed on Item 5 is a tax on the owner or operator of a domestic mink farm. This tax is in addition to all other property taxes.

F. Sales and use taxes (including room taxes and wheel taxes)

These taxes include taxes imposed by Wisconsin, any other state and the District of Columbia, and any political subdivisions thereof. However, sales and use taxes used in computing the manufacturing sales tax credit are not deductible. (Refer to Item G under Nondeductible Taxes.)

G. Taxes imposed by cities, municipalities or other political subdivisions on or measured by net income, gross income, gross receipts or capital stock

Section 71.04(3), 1983 Wis. Stats., specifically prohibits the deduction of such taxes imposed by Wisconsin or any other state including the District of Columbia. However, this section does not prohibit a deduction of such taxes when imposed by political subdivisions thereof.

H. Payroll taxes

Payroll taxes include FICA (social security tax), FUTA (federal unemployment compensation tax), and any state unemployment tax.

I. Excise and other taxes

These taxes include taxes paid to the federal government or to any political subdivision thereof. Examples are motor fuel, tobacco, alcohol and beverage, and manufacturer's excise, privilege, license and business taxes. Import or tariff duties are also deductible if incurred in connection with the operation of a corporation's trade or business.

J. Fire department dues paid by insurance companies under s. 601.93, 1983 Wis. Stats.

NONDEDUCTIBLE TAXES (this list is not all-inclusive)

A. Income, excess profit, war profits and capital stock taxes imposed by the federal government

- B. Windfall profits tax under Section 4986 of the Internal Revenue Code
- C. Taxes imposed by Wisconsin or any other state or the District of Columbia on or measured by net income, gross income, gross receipts or capital stock pursuant to ss. 71.04(3) and 71.01(4)(a)6, 1983 Wis. Stats.

Included in these taxes are the net worth taxes paid to the States of Texas and Georgia and the single business tax paid to the State of Michigan. The Texas and Georgia taxes are referred to as a franchise tax and are imposed on or measured by the value of a corporation's capital stock and surplus. The Michigan single business tax is measured by net income, gross income, and gross receipts.

Premium taxes paid by insurance companies to Wisconsin or any other state including the District of Columbia are also not deductible. These include taxes based on gross premiums under ss. 76.60 and 76.63, 1983 Wis. Stats.; taxes based on gross income or gross premiums under s. 76.65, 1983 Wis. Stats.; and taxes paid to other states under similar laws.

D. Special improvement taxes

These taxes (e.g., water, sewer or sidewalk) represent an increase in basis of the property assessed.

- E. Occupational tax on grain storage (s. 70.41, 1983 Wis. Stats.)

This tax is allowed as an offset against the net franchise/income tax liability of the corporation at the time the original corporate franchise/income tax return is filed for the year of payment.

- F. Addition to the tax imposed under s. 71.22, 1983 Wis. Stats. (s. 71.23, 1983 Wis. Stats.)

This addition to the tax is an underpayment penalty for failing to file required declarations of estimated tax in a timely manner.

- G. Sales and use taxes paid during the taxable year which under s. 71.043(2) and (3), 1983 Wis. Stats., are used in computing the manufacturing sales tax credit

These taxes are not deductible even if a benefit is not received from the credit.

OTHER

A. Assessments by Wisconsin Public Service Commission

The Wisconsin Public Service Commission (PSC) is supported by all the utilities operating within Wisconsin which they regulate. It bills each utility directly for the cost of an audit or investigation of the utility. At the end of the year the PSC assesses all utilities under s. 196.85(2), 1983 Wis. Stats., for the costs not directly related to any corporation. This assessment is called a remainder assessment and is based on the gross receipts of each utility. Although

based on gross receipts, it is not a tax. Rather, this is an ordinary expense of doing business for a regulated utility corporation and is deductible under s. 71.04(2), 1983 Wis. Stats.

SALES/USE TAXES

1. Nexus for State and County Sales/Use Taxes

Statutes: sections 77.51(7g), 77.72 and 77.73, 1985 Wis. Stats.

Wis. Adm. Code: section Tax 11.97, August 1985 Register

A. NEXUS FOR STATE SALES/USE TAX

Facts and Question: A seller located in Minnesota uses a common carrier to transport taxable tangible personal property to a buyer located in Wisconsin. The seller contacted the common carrier in Minnesota and made all the arrangements to have the goods delivered into Wisconsin. The only activity of this seller in Wisconsin is that the seller used a common carrier to deliver the goods into Wisconsin. Does the use of the common carrier to deliver goods into Wisconsin create "nexus" for the seller and therefore require the seller to collect and report the Wisconsin sales/use tax on the transaction?

Answer: No, arranging with a common carrier and having that common carrier deliver taxable goods into Wisconsin does not create "nexus" for Wisconsin sales/use tax purposes. The seller also would not have nexus if the seller had used the postal service (rather than a common carrier) to make deliveries into Wisconsin. However, there would be nexus (jurisdiction to tax) if the seller used company-operated vehicles to deliver taxable tangible personal property to purchasers in Wisconsin.

B. NEXUS FOR COUNTY SALES/USE TAX

Facts and Question 1: A seller located in a Wisconsin county which has no county tax (County B) uses a common carrier to transport taxable tangible personal property to a buyer located in County A, a Wisconsin county which has adopted the county 1/2% sales/use tax. The seller contacted the common carrier and made all the arrangements to have the goods delivered into County A. The only activity of this seller in County A is the fact that the seller used a common carrier to deliver the goods into County A.

Does the use of the common carrier to deliver goods into County A create "nexus" for the seller in County A and therefore require the seller to collect and report the county tax on the transaction?

Answer: No, arranging with the common carrier and having that common carrier deliver taxable goods into County A does not create "nexus" for county sales tax purposes. The same answer would apply if the seller had used the postal service to make deliveries into County A. (Note: The seller would be liable for the 5% Wisconsin state sales tax on this sale because the seller has "nexus" in the state.)

However, nexus would be created (jurisdiction to tax) for county sales tax purposes in County A if the seller had used company-operated vehicles to deliver tangible personal property to purchasers in County A.

Facts and Question 2: A seller located in Minnesota uses a common carrier to transport taxable tangible personal property to a buyer located in County A, a Wisconsin county which has adopted the county 1/2% sales/use tax. The seller contacted the common carrier and made all the arrangements to have the goods delivered into County A. The only activity of this seller in County A is that the seller used the common carrier to deliver the goods into County A. However, this seller does have nexus in County B, which has no county tax, because it makes regular deliveries into County B with its own delivery trucks.

Does the use of the common carrier to deliver goods into County A create "nexus" for the seller in County A and therefore require the seller to collect and report the 1/2% county use tax on the transaction?

Answer: No, arranging with a common carrier and having that common carrier deliver taxable goods into County A does not create "nexus" in County A for county sales tax purposes. The same answer would apply if the seller had used the postal service to make deliveries into County A. (Note: The seller would be liable for the 5% Wisconsin state tax on this sale because the seller has nexus in the state, that is, in County B which has no county tax.)

However, nexus would be created (jurisdiction of tax) in County A for county sales tax purposes if the seller had used company-operated vehicles to deliver tangible personal property to purchasers in County A.

FARMLAND PRESERVATION CREDIT

1. Proration of Property Taxes Between Buyer and Seller

Statutes: s. 71.09(11)(a)7, 1983 Wis. Stats.

Facts and Question: Taxpayer X purchased farmland during the year. Although the sale was not closed until March 30, Taxpayer X had made an offer to purchase on January 1 that was accepted. In the closing agreement pertaining to the sale it was agreed that Taxpayer X would be liable for 100% of the property taxes for the year.

Can Taxpayer X claim 100% of the property taxes levied on the farmland for the year for purposes of farmland preservation credit, or must the property taxes be prorated in proportion to the number of months of actual ownership during the year?

Answer: Pursuant to s. 71.09(11)(a)7, 1983 Wis. Stats., Taxpayer X can claim 100% of the property taxes levied on the farmland because 100% of the property taxes were prorated to Taxpayer X in the closing agreement pertaining to the sale.