

Question 3: Is the income as reported in the “no tax change” year and the adjusted net business loss as shown on the audit report of another year considered to be final and conclusive under s. 71.12 or any other statute?

Answer 3: The Wisconsin Board of Tax Appeals ruled in the *Superior Water, Light and Power Company* case that the “no tax letter” is not provided for in the statutes nor does it operate with the same legal finality as does an additional assessment. Thus, the income reported in the “no tax change” year and the net business loss as determined by the department in the audit report may be adjusted at a later date by both the taxpayer and the department as indicated above.

Question 4: If both the taxpayer and the department may adjust the business loss as shown in the “no tax change” audit report, may adjustments be made to items shown in the audit report or only to items not included in the audit report?

Answer 4: Because there are no appeal remedies available to a taxpayer in a year that a net business loss is adjusted and because such a year does not become final and conclusive as a result of a field audit, adjustments may be made by both the taxpayer and the department to items shown in the audit report as well as to other items.

Question 5: If the department conducted a field audit of a taxpayer and the department made an assessment for one or more years audited but the final year of the audit was a loss year both before and after adjustments, may the department or the taxpayer further adjust the loss year in a subsequent year in which the loss is carried forward?

Answer 5: Yes. Under the principles set forth in *Amber, Inc.*, a net business loss may be adjusted for a year beyond the statute of limitations as long as the income year against which it is used is open to adjustment.

Claim for Refund

Question 6: If the department conducted a field audit of a taxpayer and the department made no adjustment in one or more years audited, may the taxpayer file a claim for refund for the “no tax change” year(s) after the field audit has been concluded and department notification has been received?

Answer 6: Yes. In the *Superior Water, Light and Power Company* case, the Board of Tax Appeals ruled that a “no tax letter” sent by the department to the taxpayer at the conclusion of a field audit did not have the effect of barring the taxpayer’s claim for refund of taxes within s. 71.10(10), Wis. Stats., since the letter was not a notice of an additional assessment within Chapter 71 of the Wisconsin Statutes.

Question 7: If the department conducted a field audit of a taxpayer for income or franchise taxes and made adjustments for all but the last year audited, may the taxpayer at some later date file a claim for refund (or the department make an assessment) for the last (“no tax change”) year of the audit even though the field audit assessment has become final and conclusive?

Answer 7: Yes. If no timely petition for redetermination was filed, the years assessed would have become final and conclusive. However, the last year audited resulted in a “no tax change” and would not operate with the same legal finality as a year assessed (*Superior Water, Light and Power Company*).

Manufacturer’s Sales Tax Credit

Question 8: Is a notice sent to a taxpayer pursuant to a franchise or income tax field audit indicating no change in tax in the years audited but reducing the manufacturer’s sales tax credit carryforward to unaudited future years considered an additional assessment or correction of assessment under s. 71.11(21)(a), Wis. Stats.?

Answer 8: No. Pursuant to the *Superior Water, Light and Power Company* and *Amber, Inc.* cases, an “additional assessment” requires an assessment of tax liability greater than that reported.

Question 9: Is the reduction in the manufacturer’s sales tax credit carryforward with no change in tax liability in the years field audited considered appealable under s. 71.12, Wis. Stats., or any other statute?

Answer 9: No. A taxpayer would have no reason to seek the appeal remedies specified in s. 71.12 because the relief provided therein is available only to those who are aggrieved by an assessment, refund or notice of denial of refund.

Question 10: Is the adjusted manufacturer’s sales tax credit carryforward in Question 8 considered to be final and conclusive under s. 71.12, s. 71.10(10)(d), or any other statute?

Answer 10: No. In the *Superior Water, Light and Power Company* case, the Board of Tax Appeals ruled that “the no tax letter is not provided for nor does it operate with the same legal finality as does an additional assessment.” Similarly, an adjustment to the manufacturer’s sales tax credit carryforward, which is not considered an additional assessment, is not considered to be final and conclusive. The manufacturer’s sales tax credit as determined by the department in the audit report may be adjusted at a later date within the statute of limitations by both the department and the taxpayer.

Farmland Preservation and Homestead Credits

Question 11: A notice is sent to a taxpayer pursuant to field audit indicating no change in the tax liability for a particular tax year but recovering a portion of the farmland preservation credit or homestead credit. (A) Is the income reported in that tax year considered to be final and conclusive under s. 71.09(13)(a), s. 71.10(10)(d), or any other statute? (B) Is the farmland preservation credit or homestead credit as determined by the department considered to be final and conclusive if there was no timely appeal of the determination for the recovery of the farmland preservation credit or homestead credit?

Answer 11: (A) In accordance with the *Superior Water, Light and Power Company* case, there is no finality to the income because there was no “additional income or franchise tax assessment” under Chapter 71 of the statutes. (B) If no timely petition for redetermination of the farmland preservation credit or homestead

credit is filed, the department's determination of the credit is final and conclusive under s. 71.90(13)(a), Wis. Stats.

Sales and Use Tax

Question 12: What is the effect of a "no change" sales/use tax field audit?

Answer 12: For sales and use tax purposes, unless appealed, a field audit "no change" letter issued prior to April 30, 1986, does finalize those years for which there is no change, and no adjustments (claims for refund, amended return, etc.) may be made to such years by the taxpayer or the department (*Moebius Printing Co*). Effective for "no change" letters issued on or after April 30, 1986, and under s. 77.59(8m), Wis. Stats., created by 1985 Wisconsin Act 261, a claim for refund may be filed within 4 years after the due date of the taxpayer's Wisconsin income or franchise tax return, or if exempt from filing a Wisconsin income or franchise tax return, within 4 years of the 15th day of the 4th month of the year following the close of the calendar year or fiscal year even though a field audit "no change" letter was issued if (a) the taxpayer's customers have filed valid claims for refund with the taxpayer and (b) the refund is passed along by the taxpayer to the customers.

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2. The Effect of a Corporation's Interest in a Partnership on the Apportionment Formula

Statutes: Sections 71.07(1m)(b)14 and 15 and 71.07 (2)(a), (b), (cm)8 and (cr)15, 1985 Wis. Stats.

Wis. Adm. Code: Section Tax 2.39, September 1983 Register

Background Information: A partnership is defined as an association of two or more persons to carry on as co-owners a business for profit. Partnerships are not regarded under the Uniform Partnership Act as separate entities, but only as associations or contracts between the general partners. Partnerships are not taxed as separate entities either in Wisconsin or federally. General partners have liability for all of the debts incurred by the partnership, have equal rights in the management of the partnership, and rights in specific partnership property.

Limited partners in a limited partnership are not liable beyond the limited partner's contribution to the limited partnership and the limited partner's interest has been held to constitute intangible property analogous to a share in a corporation.

Some income from intangibles is included in apportionable income only if the operations of the payer are unitary with the payee or if derived from a unitary investment activity not involving an affiliate or a subsidiary. A partnership is not a legal or taxable entity apart from its general partners. In addition, a general partner's interest in a partnership is more than an interest in an intangible, because of the general partner's unlimited liability, control over the management of the partnership, and property interest in the partnership. Therefore, a general partner is deemed to always be involved in both a unitary relationship with the

partnership and the partnership is deemed to always be the product of unitary investment activity. A corporate general partner's share of the income of a partnership is always apportionable income.

A limited partner's share of the income of a limited partnership is included in apportionable income if it is a product of the limited partner's unitary investment activity, i.e., its investment activities are an integral part of the other business activities.

Corporations doing business within and without Wisconsin, whose Wisconsin operations are an integral part of a unitary business, must apportion a part of their income to Wisconsin based on the three-factor apportionment formula of property, payroll, and sales. If the corporation is a general partner of a partnership, its share of the partnership's property, payroll, and sales are included in the various factors since they are deemed those of the corporate general partner. The same is **not** true if the corporation is a limited partner, with one exception. The exception is that the corporate limited partner may include income from a limited partnership it has included in apportionable income in its sales factor for years up through 1985.

Part I - Property Factor

Question 1: How will a corporation's interest in a general partnership affect the property factor of the apportionment formula?

Answer 1: A corporation's share of the partnership's tangible personal property or rental property is included in the denominator of the property factor. If the partnership has property in Wisconsin, the value of such property would be included in the numerator of the factor to the extent of the corporation's partnership ratio. For example, a corporation holding a 50% interest in a partnership will include 50% of the Wisconsin property in the numerator of its property factor.

Question 2: How will a corporation's interest in a limited partnership affect the property factor of the apportionment formula?

Answer 2: The investment in a limited partnership is intangible property; therefore, as an investor the corporation does not own any tangible partnership property. Therefore, the value of the property is not included in the numerator or denominator of the property factor.

Example: A multistate corporation has the following information in regard to its property factor:

Total company property of the corporation	\$500,000
Wisconsin property of the corporation	\$300,000
Total property of limited partnership in which the corporation holds a 50% interest	\$100,000
Wisconsin property of the limited partnership	\$ 10,000
Total property of general partnership in which the corporation holds a 50% interest	\$ 50,000
Wisconsin property of the general partnership	\$ 20,000

The numerator of the property factor would be \$310,000, which is Wisconsin corporation property (\$300,000) and 50% of the

Wisconsin general partnership property (\$10,000). The denominator of the property factor would be \$525,000, which is total company corporation property (\$500,000) and 50% of the total general partnership property (\$25,000). The amounts from the limited partnership would not be included in the factor.

Part II - Payroll Factor

Question 3: How will the Wisconsin payroll factor be affected for a corporation which is a general partner in a partnership that is paying wages to the partnership's employees and management fees to the partners?

Answer 3: Payment of wages to a general partnership's employees is included in the denominator of the corporation's payroll factor to the extent of the corporation's partnership ratio. For example, if a corporation holds a 30% interest in the partnership, 30% of the partnership payroll will be included in the denominator of the payroll factor. Payment of wages to a general partnership's Wisconsin employees is included in the numerator of the corporation's payroll factor to the extent of the corporation's partnership ratio. Payments to corporate partners for management services performed in Wisconsin are included in the numerator of the payroll factor to the extent of the partnership ratio. The denominator of the payroll factor includes all management fees paid to corporate partners.

Question 4: How will the payroll factor be affected for a corporation which is a limited partner in a partnership that is paying wages to the partnership's employees?

Answer 4: The limited partnership interest is an intangible investment interest and the compensation paid by the limited partnership is not compensation paid by the corporation; therefore, such compensation is not included in the numerator or denominator of the payroll factor.

Example: A corporation has the following information in regard to its payroll factor:

Total company payroll of the corporation	\$1,000,000
Wisconsin payroll of the corporation	\$ 500,000
Total payroll of a limited partnership in which the corporation holds a 50% interest	\$ 50,000
Wisconsin payroll of the limited partnership	\$ 20,000
Total payroll of a general partnership in which the corporation holds a 50% interest	\$ 100,000
Wisconsin payroll of the general partnership	\$ 40,000
Management fees paid by the general partnership to the partners for services performed in Wisconsin	\$ 20,000

The numerator of the payroll factor would be \$530,000, which is the corporation's Wisconsin payroll (\$500,000) and 50% of the general partnership Wisconsin payroll and management fees paid (\$30,000). The denominator of the payroll factor would be \$1,060,000, which is the corporation's total company payroll (\$1,000,000), 50% of the general partnership's total payroll (\$50,000) and 50% of the management fees paid (\$10,000).

Part III - Sales Factor

Question 5: How will a corporation's interest in a general partnership affect the sales factor?

Answer 5: The corporation's share of partnership gross receipts is included in the numerator and denominator of the sales factor under the same conditions as the corporation would handle its own gross receipts. For example, sales are treated on a destination basis and all rules regarding throwback sales will apply. Sales made by the partnership to the corporate partner are not included in the numerator or denominator of the sales factor because they are considered intercompany transfers. The third party gross receipts of the partnership will only be included in the numerator or denominator to the extent of the corporate partner's interest in the partnership. For example, if a corporation holds a 60% interest in the partnership, 60% of the Wisconsin and total company gross receipts will be included in the corporation's numerator and denominator of the sales factor.

Question 6: How will a corporation's interest in a limited partnership affect the sales factor?

Answer 6: 1986 taxable year and thereafter - Neither the corporation's share of the gross receipts or of the income or loss of a limited partnership are included in the numerator or denominator of the sales factor by the corporate partner. (s. 71.07(2)(cr), 1985 Wis. Stats.)

1985 taxable year and prior - Corporations have an option in computing the sales factor for taxable years prior to 1986 that are open for assessment or refund. Corporations may or may not include all income from intangibles, included in apportionable income, in the numerator and denominator of the sales factor. If intangible income is included, only the distributive share of the limited partnership income — not loss — is to be included. If the option is exercised, all income from intangibles, included in apportionable income, would be excluded from the sales factor. (For additional information, see the tax release titled "Sales Factor: Items of Income Includable" in Wisconsin Tax Bulletin 46.)

Example 1: A corporate partner in a limited partnership has the following information in regard to its sales factor for the 1985 taxable year.

Total company sales by the corporation	\$200,000,000
Wisconsin sales by the corporation	\$ 10,000,000
Total sales by the limited partnership in which the corporation has a 50% interest (to third parties)	\$ 1,000,000
Wisconsin sales by the limited partnership (to third parties)	\$ 500,000
Sales by the limited partnership to the corporation	\$ 100,000

If the option mentioned above is not exercised, the numerator would be \$10,250,000 which is Wisconsin sales by the corporation (\$10,000,000) and 50% of Wisconsin sales by the limited partnership to third parties (\$250,000). The denominator would

be \$200,500,000, which is total company sales by the corporation (\$200,000,000) and 50% of total sales by the limited partnership to third parties (\$500,000).

If the option is exercised, the numerator would be \$10,000,000 and the denominator would be \$200,000,000.

Sales by the limited partnership to the corporation are not included in the sales factor under either option.

Example 2: Assuming the same facts as in Example 1, except that the information relates to the 1986 taxable year, the numerator would be \$10,000,000 (Wisconsin sales by the corporation) and the denominator would be \$200,000,000 (total company sales by the corporation). The corporation does not have an option in computing the Wisconsin sales factor for 1986. The sales factor will not include sales from a limited partnership. (s. 71.07(2)(c), 1985 Wis. Stats.)

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SALES/USE TAXES

1. Food Service Charges (Costs and Management Fee Reimbursed)

Statutes: Section 77.51(14)(f), 1985 Wis. Stats.

Wis. Adm. Code: Section Tax 11.87, September 1984 Register

Facts and Question: A food service provider ("P") provides food service to a manufacturer's ("M") guests at a motel-like facility. At this facility "M" provides lodging and food to guests at no cost to the guests. The only amount paid "P" for the food service comes from "M". The contract between "P" and "M" provides that "P" is an independent contractor.

"P" provides the personnel and purchases, stores, prepares and serves the food. Menu selections are made in advance and agreed upon between the parties. "M" provides the facilities and equipment, including dining room furniture and furnishings, kitchen equipment, china and silverware. "P" is responsible for cleaning this equipment. "M" pays "P" all the direct costs of this food service plus a management fee of 10% of the direct costs.

Is the payment by "M" to "P" subject to the sales tax?

Answer: Yes. The amounts paid by "M" to "P" are taxable gross receipts from the sale of meals under s. 77.51(14)(f), 1985 Wis. Stats., which provides that "sale" includes "the furnishing, preparing or serving for consideration of food, meals, confections or drinks."

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2. Industrial Waste Treatment Facility-Air Stripping System Doesn't Qualify For Exemption

Statutes: Sections 70.11(2) and (21)(a) and 77.54(26), 1985 Wis. Stats.

Wis. Adm. Code: Sections Tax 6.40 and 12.40 (both March 1980 Register) and Section Tax 11.11, September 1984 Register

Facts and Question: A construction company has been awarded a contract by the U.S. Army Corps of Engineers to build an air stripping system on the municipal well field owned by a city in Wisconsin. The project encompasses the construction of water treatment facilities to remove volatile organic contaminants (VOC) from the ground water obtained from the municipal well field. The contractor is installing an air stripping system which consists of pumps, motors, treatment equipment, instrumentation and controls, piping and packed stripping towers in a pre-fabricated metal building.

The air stripping system upon its completion will be transferred to the city. The property is exempt from real estate tax under s. 70.11(2), 1985 Wis. Stats., because it is owned by the city. However, the contractor needs a determination if this facility is a waste treatment facility in order to decide if it is entitled to a sales tax exemption under s. 77.54(26), 1985 Wis. Stats., on its purchases of tangible personal property for construction of the project. The taxpayer suggested that the project qualifies as an industrial waste treatment facility because it will treat VOC which are in the well field and that such VOC's are a liquid waste resulting from a process of industry years ago.

Does this entire facility, equipment and building, qualify for the sales/use tax exemption as a waste treatment facility under s. 77.54(26), 1985 Wis. Stats.?

Answer: No. This air stripping system is not a waste treatment facility qualifying for a sales/use tax exemption under s. 77.54(26), 1985 Wis. Stats. The exemption applies to waste treatment facilities, not to drinking water purification plants, whether operated by a city or some other person.

However, the contractor may purchase the items of tangible personal property without tax for resale, which are resold to the U.S. Army Corps of Engineers as tangible personal property. This would include all the processing equipment used to purify the water, but it does not include the materials used to construct the building which houses the equipment, because these materials are consumed by the contractor in constructing a building which is a realty improvement.

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3. Reseller's Purchases of Equipment and Access Services

Statutes: Section 76.38(1)(c), 77.51(13)(p) and (14)(m) and 77.54(24), 1985 Wis. Stats.

Wis. Adm. Code: Section Tax 11.66(2), January 1983 Register

Facts and Question: A reseller of long-distance telecommunication services purchases telephone services from carriers. It also purchases access services from local telephone companies which permit it to reach its customers to originate and terminate telephone messages.

Section 77.51(13)(p), 1985 Wis. Stats., provides that a "retailer" includes "A telephone company which provides to an interexchange carrier services which permit the origination or termination of telephone messages between a customer in this state and one or more points in another telephone exchange."

To utilize the reseller's service a customer must call a central number, give an access code and then dial the desired number. The company utilizes a central switching service to connect the customer with the desired number. The calls coming through the reseller's system utilize the nearby local telephone company's switch.

Statute 77.54(24), 1985 Wis. Stats., provides a sales/use tax exemption for central office equipment of telephone companies used in transmitting traffic and operating signals. This reseller's equipment consists of switching equipment and computer equipment. The company also has computer terminals and equipment in their corporate headquarters used to record call detail and check the routing of calls. This computer is also used in its accounting system.

Section 76.38(1)(c), 1985 Wis. Stats., effective January 1, 1986, provides that a "telephone company" means "any person operating a telecommunications facility or providing telecommunications services to another person, including the resale of those services provided by another telephone company. ...". Because of the change, resellers became subject to the telephone license fee under Chap. 76 in 1986, based on 1985 revenues. Resellers were not considered telephone companies under Chap. 76 prior to January 1, 1986.

Section 76.38(1)(bkm), 1985 Wis. Stats., provides in part "qualifying telecommunications reseller" means a company that provides local or rural exchange service and does not own, operate, manage or control transmission facilities for toll business outside the exchanges in which the public service commission has authorized them to provide local or rural services or a telephone company that fulfills all the following requirements:

1. Resells message telecommunications service, wide-area telecommunications services or other telecommunications services which have been approved for reselling by the public service commission or by the federal communications commission.
2. Does not own, operate, manage or control transmission facilities that have the technological capability to provide telecommunications service within this state."

Is a telecommunications reseller required to pay sales or use tax on its purchases of switching equipment and access services?

Answer: A reseller is required to pay sales or use tax on its purchases of switching equipment. The exemption in s. 77.54(24), 1985 Wis. Stats., does not apply to a reseller's switching equipment because a reseller does not own, operate, manage or control transmission facilities. Section 77.54(24), 1985 Wis. Stats., only provides an exemption for central office equipment used in "transmitting traffic and operating signals." A reseller also is required to pay sales tax on its purchases of access services from the local telephone company because it is a telecommunication interexchange carrier as defined in s. 77.51(13)(p), 1985 Wis. Stats.

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COUNTY SALES/USE TAXES

1. County Tax: "Similar Local Tax in Another State"

Statutes: Section 77.71(2), 1985 Wis. Stats.

Facts and Question: Section 77.71(2), 1985 Wis. Stats., provides that "An excise tax is imposed at the rate of 0.5% of the sales price upon every person storing, using or otherwise consuming in the county tangible personal property or services if the property or service is subject to the state use tax under s. 77.53 ... except that if the buyer has paid a similar local tax in another state on a purchase of the same property or services that tax shall be credited against the tax under this subsection."

What does "similar local tax in another state" mean?

Answer: The reference to a "similar local tax in another state" means either a local sales tax or local use tax measured by a percentage of gross receipts or sales price. It would not refer to all local excise taxes but only to local excise taxes imposed as sales or use taxes. "Local taxes" would include both city and township sales or use taxes of other states.

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2. Definition of "Contractor" in County Sales/Use Tax Law

Statutes: Section 77.71(3), 1985 Wis. Stats.

Facts and Question: Section 77.71(3) 1985 Wis. Stats., imposes a county excise (use) tax upon a "contractor who is engaged in construction activities within the county" on property that is used in constructing, altering, etc. real property that becomes a component part of the real property in that county.

Question: Does "contractor" as used in s. 77.71(3) 1985 Wis. Stats., include persons who are not generally in the construction business but may on occasion or very infrequently engage in construction activities such as building their own home. For example, a person works for the government full time as a wage earner during the week, but decides to build a home and act as his

own contractor during "nonwork" hours. He purchases building materials, etc. for the purpose of constructing the home.

Answer: Yes, such persons are considered contractors. Section 77.71(3), 1985 Wis. Stats., imposes a county excise (use) tax upon a contractor engaged in construction activities within a county which has adopted the tax.

The key to the tax imposition is that the materials are used in construction activities, no matter who purchases the building materials. Anyone engaged in construction activities is considered a contractor even though that is a minor part of the person's activities. For example, if a large retailer sells and then has carpeting installed in a household, it is a contractor who must pay tax on its cost of materials.

Therefore, s. 77.71(3), 1985 Wis. Stats., imposes a tax on any person using building materials in construction activities within a county which has adopted the tax, whether that person is in the construction business or not. A person who remodels or repairs his or her own residence is liable for tax under s. 77.71(3), 1985 Wis. Stats., just as a business person is subject to this 1/2% county tax on building materials which become a component part of real property.

3. **Manufacturer's Franchise/Income Tax Credit For County Sales Tax Paid on Fuel and Electricity Purchased**

Statutes: Sections 71.043 and 77.79, 1985 Wis. Stats.

Wis. Adm. Code: Section Tax 2.11, September 1983 Register

Facts and Question: Section 71.043(2), 1985 Wis. Stats., provides: "The tax imposed upon or measured by corporation net income of the taxable year 1973 and subsequent taxable years pursuant to s. 71.01(1) or (2) may be reduced by an amount equal to the sales and use tax under ch. 77 paid by the corporation in such taxable year on fuel and electricity consumed in manufacturing tangible personal property in this state."

The county sales and use tax is imposed under Subchapter 5 of Chapter 77.

Does s. 71.043(2), 1985 Wis. Stats., provide a manufacturer with a Wisconsin franchise or income tax credit for county sales and use taxes paid on fuel and electricity purchased which is consumed in manufacturing?

Answer: Yes. The county sales and use taxes paid on fuel and electricity consumed in manufacturing may be used to offset Wisconsin corporation franchise or income tax computed on Form 4 or 5, the Corporation Franchise or Income Tax Return, as provided under s. 71.043, 1985 Wis. Stats.