an assessment for sales and use taxes allegedly due on two of the taxpayer's Lor-Al Air Flow Filter machines for the years 1981, 1982, and 1983. This assessment was overturned by the Tax Appeals Commission on October 16, 1986. The Commission found the machines to be instruments of manufacture, exempt from the sales and use taxes under s. 77.51(27), Wis. Stats.

Pavelski Enterprises, Inc. (Pavelski) manufactures agricultural fertilizer compounds at three different locations in Wisconsin. Pavelski's business format is to perform soil analysis for farmers and after being informed of what crop the farmer intends to plant, Pavelski then custom mixes a fertilizer product to meet the specific needs of the farmer's crop.

The fertilizer product which Pavelski manufactures at its plant consists of chemicals such as potash, nitrogen, zinc, boron, sulfur, phosphate, and also includes numerous pesticides. When these ingredients are blended at Pavelski's plant, the chemical configuration of their final product is different in chemical composition than the beginning ingredients.

Pavelski transports the customized fertilizer product to the farmer's field by truck. During this shipping process, the product segregates and is out of specification. To remedy this problem at the field site, Lor-Al Air Flow Filter machines are used. This machine remixes the fertilizer to the formula originally designated. The material is then funneled through a pneumatic air process to distribution nozzles and spread on the field through a process termed impregnation.

The Department of Revenue argues the field process using the Air Flow machine for mixing and spreading the fertilizer on the farmer's field does not make the Air Flow machine exempt as manufacturing under s. 77.54(6m), Wis. Stats.

The Circuit Court upheld the Tax Appeals Commission decision which determined the use of the Air Flow machine was a continuation of the manufacturing process which the Department of Revenue concedes at the plant is exempt manufacturing. The facts earlier cited by the court, referring to need for use of the Air Flow machines to remix the fertilizer compound which breaks down and segregates in shipping, are a sufficient factual base to support the Tax Appeals Commission decision.

The department has appealed this decision to the Court of Appeals.

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TAX RELEASES

("Tax Releases" are designed to provide answers to the specific tax questions covered, based on the facts indicated. However, the answer may not apply to all questions of a similar nature. In situations where the facts vary from those given herein, it is recommended that advice be sought from the department. Unless otherwise indicated, Tax Releases apply for all periods open to adjustment. All references to section numbers are to the Wisconsin Statutes unless otherwise noted.)

The following Tax Releases are included:

Individual Income Taxes

Individual and Corporation Franchise or Income Taxes

Corporation Franchise or Income Taxes

Farmland Preservation Credit

Sales/Use Taxes

County Sales/Use Taxes

INDIVIDUAL INCOME TAXES

1. Determining Required Estimated Tax Payments of Trusts

Statutes: Section 71.21(1) and (14), 1985 Wis. Stats., as amended by 1987 Wis. Act 27.

Note: This Tax Release applies for purposes of determining the estimated tax payments for taxable year 1988 of trusts that were required to change their taxable year to a calendar year as a result of the federal Tax Reform Act of 1986.

Background: Section 71.21(1), 1985 Wis. Stats., as amended by 1987 Wis. Act 27, requires trusts deriving taxable income to make estimated tax payments. With certain exceptions, the amount of each required payment is 25% of the lower of the following amounts:

a. Ninety percent of the tax for the taxable year.
b. The tax shown on the return for the preceding year.

Alternative b., the prior year alternative, does not apply if the preceding taxable year was less than 12 months, if the trust did not file a return for the preceding taxable year, or if the trust has taxable income of $20,000 or more.

Facts and Question: A trust had been reporting its income on the basis of a fiscal year ending October 31. As a result of the federal Tax Reform Act of 1986, the trust was required to change to a calendar year. The trust filed a Wisconsin return for the fiscal year beginning November 1, 1986, and ending October 31, 1987. In addition, the trust filed a short-period return for the short taxable year beginning November 1, 1987, and ending December 31, 1987.

If the trust, which was required to change its taxable year to a calendar year, has less than $20,000 of income for 1988, may the trust determine its required estimated tax payments for 1988 under the prior year alternative?

Answer: Yes. Since the short taxable year in 1987 was preceded by a taxable year of 12 months, the trust may use the prior year alternative. However, the tax shown on the return for the preceding short taxable year must be increased by dividing the tax by the number of months in the short taxable year and multiplying the result by 12.

If the short taxable year in 1987 had not been preceded by a taxable year of 12 months, the trust could not use the prior year alternative to determine its 1988 estimated tax payments.

Example: The tax shown on the trust's Wisconsin return for the short taxable year beginning November 1, 1987, and ending December 31, 1987, is $150. For purposes of determining the trust's required estimated tax payments for 1988, the tax shown on the return for the preceding year is $900 ($150 tax shown on the short-period return divided by 2 months; the result multiplied by 12 months).

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2. Educational Assistance Program Benefits - Wisconsin Tax Treatment

Statutes: Section 71.02(2)(d)12, 1985 Wis. Stats., and s. 71.02(2)(d)13, Wis. Stats., as created by 1987 Wis. Act 27 and amended by 1987 Wis. Act 399.

Background: Section 127 of the Internal Revenue Code (IRC), provides that gross income of an employe does not include amounts paid or expenses incurred by an employer for educational assistance to the employe if the assistance is furnished pursuant to a qualified educational assistance program. An educational assistance program is a separate written plan of an employer to provide educational assistance to employes. Educational assistance includes payments for tuition, fees and similar payments, books, supplies, and equipment. It does not include payments for meals, lodging, transportation, or tools and supplies that the employe may keep after completing the course.

Prior to the Tax Reform Act of 1986 (Act), the maximum annual exclusion for educational assistance program benefits was $5,000. The exclusion was to expire for taxable years beginning after December 31, 1985, however, the Act extended the exclusion for two years (that is, the exclusion is not effective for taxable years beginning after December 31, 1987). The Act also increased the maximum annual exclusion to $5,250.

Generally, the Wisconsin statutes require that Wisconsin individual income taxpayers use the IRC as amended to December 31 of the prior year to determine Wisconsin net income. For example, for the 1986 taxable year, the IRC as amended to December 31, 1985, is used to determine Wisconsin net income. For the 1987 taxable year, the IRC as amended to December 31, 1986 (which includes the changes made by the Act), is used to determine Wisconsin net income.

Facts and Question 1: Joe Brown, a calendar year taxpayer, received $3,000 from his employer during 1986 pursuant to a qualified educational assistance program. Is the $3,000 excludable from Joe Brown's 1986 Wisconsin gross income?

Answer 1: No. For the 1986 taxable year, Wisconsin follows the IRC as amended to December 31, 1985, and because IRC section 127, as amended to December 31, 1985, provides that the exclusion did not apply to taxable years beginning after December 31, 1985, the exclusion is not available for Wisconsin.

Question 2: Mary Smith, a calendar year taxpayer, received $6,000 from her employer during 1987 pursuant to a qualified educational assistance program. Is any of the $6,000 excludable from Mary Smith's 1987 Wisconsin gross income?

Answer 2: Yes. For the 1987 taxable year, Wisconsin follows the IRC as amended to December 31, 1986. Therefore, Mary Smith may exclude $5,250 of the $6,000 of educational assistance program benefits received.

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3. Effect of Transitional Adjustments on Married Couple Credit Computation

Statutes: Section 71.09(7m), 1985 Wis. Stats., as amended by 1987 Wis. Act 27.

Background: Section 71.09(7m), 1985 Wis. Stats., as amended by 1987 Wis. Act 27, provides that qualified earned income, for purposes of computing the Wisconsin married couple credit, is the same as defined in section 221(b) of the Internal Revenue Code as amended to December 31, 1985, plus employe business expenses under section 62(2)(b), (c), or (d) of that Code, allocable to Wisconsin under s. 71.07, 1985 Wis. Stats., minus the amount of disability income excluded under s. 71.05(1)(b)8m, 1985 Wis. Stats., and minus any other amount not subject to tax under Chapter 71 of the Wisconsin Statutes.

Question: Are transitional adjustments, reported on Wisconsin Schedule T, amounts not subject to taxation under Chapter 71 of the Wisconsin Statutes and, therefore, subtracted to determine Wisconsin qualified earned income for purposes of computing the Wisconsin married couple credit?

Answer: No. A Schedule T transitional adjustment should not be used to reduce earned income for purposes of computing the Wisconsin married couple credit.

Example: A taxpayer reports $10,000 of income on federal Schedule C and on federal Schedule SE. In computing the income on Schedule C, the taxpayer claimed depreciation on a business asset which has a federal basis of $8,000 and a Wisconsin basis of $10,000. He or she determined on Wisconsin Schedule T that he or she must make a subtraction adjustment of $400 for the difference in basis of the changing basis asset. The $400 does not reduce earned income for purposes of computing the married couple credit.

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4. Exclusion for Retirement Benefits

Statutes: Section 71.03(2)(d), 1983 and 1985 Wis. Stats.

Background: Section 71.03(2)(d), 1983 Wis. Stats., provided for an exclusion from taxable income of "All payments received from the employe's retirement system of the City of Milwaukee, Milwaukee county employes' retirement system, sheriff's annuity and benefit fund of Milwaukee County, police officer's annuity and benefit fund of Milwaukee, fire fighter's annuity and benefit fund of Milwaukee, or the public employe trust fund as successor to the Milwaukee public school teachers' annuity and retirement fund and to the Wisconsin state teachers retirement system, which are paid on the account of any person who was a member of the paying or predecessor system or fund as of December 31, 1963, or was retired from any of the systems or funds as of December 31, 1963."

During the 1970s, the Milwaukee Board of School Directors established the Early Retirement Supplement and Benefit Improvement Plan for administrators. The employe does not contribute to this plan. Benefits under this plan are not payments from the retirement funds, but are funded by the City of Milwaukee general funds.

Facts and Question: A taxpayer began employment with the Milwaukee school system in 1951. Upon retirement in 1984, the taxpayer received benefits from the Early Retirement Supplement and Benefit Improvement Plan.

Does the income from this supplemental plan qualify for exclusion from Wisconsin taxable income?

Answer: No. Income from the Milwaukee Board of School Directors' Early Retirement Supplement and Benefit Improvement Plan does not qualify for exclusion from Wisconsin taxable income. Section 71.03(2)(d), 1983 Wis. Stats., grants exemption from taxation for all payments received from the various Milwaukee based funds and systems which are specified. The supplemental benefits, even though they may be dispensed by one of the retirement systems, are not payments from one of the specified retirement funds or systems, but are payments provided by the City of Milwaukee. Thus the supplemental benefits do not qualify for exclusion under s. 71.03(2)(d), 1983 Wis. Stats. This position was upheld in the Circuit Court case of *Wisconsin Department of Revenue vs. Andre Le Veque* and further clarified through amend-

ment of s. 71.03(2)(d), by 1985 Wisconsin Act 29, which added that the exemption for certain retirement benefits provided shall not exclude tax sheltered annuity benefits from gross income tax.

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5. Married Couple Credit When Spouse Is Reporting Income of a Deceased Spouse

Statutes: Section 71.09(7m), 1985 Wis. Stats., as amended by 1987 Wis. Act 27.

Background: Section 61(a)(14) of the Internal Revenue Code provides that gross income shall include income in respect of a decedent. Therefore, under s. 71.02(2)(d), 1985 Wis. Stats., such income is also includable in Wisconsin gross income. Income in respect of a decedent is items of gross income not properly includable on the deceased's final return but attributable to him or her personally. Such income must be reported for the tax year received by:

a. The decedent's estate, if it acquired the right to receive the item of income from the decedent

b. The person who, by reason of the decedent's death, acquires the right to income whenever the right is not acquired by the decedent's estate from the decedent, or

c. Any person to whom the estate properly distributes the right to receive the amount.

Question: If a widowed spouse is required to include in his or her gross income, in a year subsequent to the year of death of the spouse, income in respect of a decedent (deceased spouse), may the taxpayer claim the Wisconsin married couple credit?

Answer: No. Section 71.09(7m), 1985 Wis. Stats., as amended by 1987 Wis. Act 27, provides that the Wisconsin married couple credit may be claimed only by married persons filing a Wisconsin joint return. Even though the widowed spouse must report income of his or her deceased spouse, the widowed spouse may not file a Wisconsin joint return with the deceased spouse for any year subsequent to the year of death of the spouse.

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6. Standard Deduction of Dependent Receiving Taxable Scholarship or Fellowship Income

Statutes: Section 71.02(2)(km)6, 1985 Wis. Stats., as amended by 1987 Wis. Act 92.

Background: Section 71.02(2)(km)6, 1985 Wis. Stats., as amended by 1987 Wis. Act 92, provides that for taxable year 1979 or thereafter, the Wisconsin standard deduction for a taxpayer claimed as a dependent under s. 71.09(6p), 1985 Wis. Stats., shall not exceed the taxpayer's earned income, as defined under section 911(b) of the Internal Revenue Code as of December 31, 1976. Section 911(b) of the Internal Revenue Code as of December 31, 1976, defines earned income to include compensation for personal services such as wages, salaries, and professional fees included in gross income. Therefore, the taxable portion of any scholarship or fellowship grant that represents payment for teaching, research, or other services is earned income for Wisconsin standard deduction purposes.

The conference agreements of the Tax Reform Act of 1986 further provide that earned income for purposes of the federal standard deduction used by a student who is claimed as a dependent, includes any amount of a noncompensatory scholarship or fellowship grant that is includable in gross income. This provision, however, is not included in the Internal Revenue Code.

Question: Is taxable noncompensatory scholarship and fellowship income earned income for purposes of the Wisconsin standard deduction used by a student who is claimed as a dependent?

Answer: No. The basic concept of "earned income" is that it is compensation for personal services. By its very name, noncompensatory scholarship or fellowship income is not compensation for services performed. The fact that the conference agreement of the Tax Reform Act of 1986 provides a special provision for scholarship or fellowship income received by a student who is claimed as a dependent has no effect on the definition of earned income that Wisconsin uses for standard deduction purposes. Therefore, taxable noncompensatory scholarship or fellowship income is not earned income for purposes of the Wisconsin standard deduction used by a student who is claimed as a dependent. Only the taxable portion of any scholarship or fellowship grant that represents payment for teaching, research, or other services is earned income for Wisconsin standard deduction purposes.

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7. Taxability of Interest from Veterans Administration Life Insurance Policy

Statutes: Section 71.05(1)(b)1, 1985 Wis. Stats., as amended by 1987 Wis. Acts 27 and 399.

Question: Is interest received from the Veterans Administration on a life insurance policy taxable by Wisconsin?

Answer: Yes. The interest from a veteran's life insurance policy does not qualify for exemption under 31 U.S.C. §3124, which provides that stocks and obligations of the United States Govern-

ment are exempt from taxation by a state, as life insurance policies are not of the same nature as treasury bills and other items exempted by 31 U.S.C. §3124. Therefore, no subtraction modification is allowed under s. 71.05(1)(b)1, 1985 Wis. Stats., as amended by 1987 Wis. Acts 27 and 399, for interest received from a life insurance policy issued by the Veterans Administration.

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INDIVIDUAL AND CORPORATION FRANCHISE OR INCOME TAXES

1. Statute of Limitations for Adjustments Resulting from Internal Revenue Service Adjustments and Amended Federal Returns

Statutes: Section 71.11(21)(g)2 and (21m), 1985 Wis. Stats., and 71.11(21)(g)2, 1985 Wis. Stats., as amended by 1987 Wis. Act 27

Wis.Adm.Code: Section Tax 2.105, July 1987 Register

Background: Section 71.11(21m), 1985 Wis. Stats., provides that if the amount of taxable income for any year of any taxpayer as reported to the Internal Revenue Service is changed or corrected by the Internal Revenue Service or other officer of the United States, the taxpayer must report such changes or corrected income to the department within 90 days after its final determination and shall concede the accuracy of such determination or state how the determination is erroneous. Such changes or corrections need not be reported unless they affect the amount of Wisconsin net income reportable or franchise or income tax payable. Any taxpayer filing an amended return with the Internal Revenue Service, or with another state if there has been allowed a credit against Wisconsin taxes for taxes paid to that state, shall file, within 90 days of such filing date, an amended federal or other state return with the department if any information contained on the amended return affects the amount of Wisconsin income reportable or franchise or income tax payable.

Section 71.11(21)(g)2, 1985 Wis. Stats., as amended by 1987 Wis. Act 27, provides that if a taxpayer reports such adjustments or amended returns to the department within the required 90 days, the department may make an assessment or refund within 90 days of the date on which the department receives a report from the taxpayer under s. 71.11(21m), 1985 Wis. Stats., or within such other period specified in a written agreement entered into by the taxpayer and the department prior to the expiration of 90 days. If the taxpayer does not report to the department as required under s. 71.11(21m), 1985 Wis. Stats., the department may make an assessment against the taxpayer or refund to the taxpayer within 4 years after discovery by the department.

Note: Prior to being amended by 1987 Wisconsin Act 27, s. 71.11(21)(g)2, 1985 Wis. Stats., provided that if the taxpayer did not report to the department as required under s. 71.11(21m), 1985 Wis. Stats., the department could make an assessment against the taxpayer, after discovery by the department of the requirement of such reports within 10 years after the date on which the affected return was filed or within 2 years after the date when the federal determination of tax became final, whichever is later.

Question: What is the effective date of the change made by 1987 Wisconsin Act 27 to s. 71.11(21)(g)2, 1985 Wis. Stats.?

Answer: The change to s. 71.11(21)(g)2, 1985 Wis. Stats., by 1987 Wisconsin Act 27, which allows the department to make an assessment against or refund to a taxpayer within 4 years after discovery by the department if the taxpayer did not comply with the reporting requirement of s. 71.11(21m), 1985 Wis. Stats., is effective for the 1987 tax year and thereafter (that is, taxable years which end after June 30, 1986). This means that the 4 year time period in s. 71.11(21)(g)2, 1985 Wis. Stats., as amended by 1987 Wis. Act 27, is effective for amended returns or Internal Revenue Service adjustments which affect a 1987 or later tax year.

Section 71.11(21)(g)2, 1985 Wis. Stats., which allows the department to make an assessment against the taxpayer within 10 years after the date on which the affected return was filed or within 2 years after the date when the federal determination of tax becomes final, whichever is later, if the taxpayer did not comply with the reporting requirement of s. 71.11(21m), 1985 Wis. Stats., is still effective for amended returns or Internal Revenue Service adjustments which affect a 1986 and prior tax year.

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CORPORATION FRANCHISE OR INCOME TAXES

1. Applicability of Federal Regulations, Rules, and Court Cases to Wisconsin Corporate Franchise or Income Tax Law

Statutes: Section 71.02(1)(bg), Wis. Stats., as created by 1987 Wis. Act 27

Note: This Tax Release applies only with respect to taxable year 1987 and thereafter.

Background: Beginning with the 1987 taxable year, Wisconsin corporate franchise and income tax law uses the federal Internal Revenue Code in the determination of Wisconsin net income. For the 1987 taxable year, Wisconsin follows, with certain exceptions, the Internal Revenue Code as amended to December 31, 1986, as it applies to the 1987 taxable year.

Question: Will federal regulations, rules, and court cases apply when determining the proper treatment of an item of income,

expense, etc., for Wisconsin corporate franchise or income tax purposes?

Answer: Yes. The department will apply federal regulations, rules, and court cases that apply to the Internal Revenue Code as defined in the Wisconsin Statutes. Thus, if a deduction is allowable for federal purposes, it generally would be allowable for Wisconsin tax purposes, unless Wisconsin has not adopted that particular section of the Internal Revenue Code.

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2. Federal Transitional Rules for Depreciation

Statutes: Section 71.02(1)(bg)27, Wis. Stats., as created by 1987 Wis. Act 27 and ss. 3047 and 3203(47)(za), 1987 Wisconsin Act 27

Background: As part of the Tax Reform Act of 1986 (P.L. 99-514), the federal Accelerated Cost Recovery System (ACRS) was replaced with the Modified Accelerated Cost Recovery System (MACRS). MACRS is generally effective for assets first placed in service on or after January 1, 1987. However, sections 203 and 204 of the Tax Reform Act of 1986 provide transitional rules which allow ACRS to be utilized for certain property first placed in service on or after January 1, 1987.

For property first placed in service on or after January 1, 1987, Wisconsin allows the deduction for depreciation to be determined under the Internal Revenue Code (IRC) as amended to December 31, 1986, or the IRC in effect for Wisconsin purposes for the taxable year for which the return is filed. Therefore, for Wisconsin purposes, MACRS is available for all assets (regardless of location) first placed in service on or after January 1, 1987 (s. 71.02(1)(bg)27, Wis. Stats., as created by 1987 Wis. Act 27 and section 3203(47)(za), 1987 Wisconsin Act 27).

Facts and Question: On June 12, 1987, Corporation A, a calendar year taxpayer, placed property in service which was eligible to be depreciated under ACRS for federal purposes. Can Corporation A claim the ACRS deduction on its 1987 Wisconsin corporate franchise or income tax return?

Answer: No. For Wisconsin purposes, Corporation A must claim depreciation on the property placed in service on June 12, 1987, under MACRS. Since sections 203 and 204 of the Tax Reform Act of 1986 are not part of the IRC, the federal transitional rules provided in these sections do not apply for Wisconsin corporate franchise or income tax purposes.

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3. How Are "Dock Sales" Assigned to Various States for Purposes of the Sales Factor in the Apportionment Formula

Statute: Section 71.07(2)(c)2, 1985 Wis. Stats.

Wis.Adm.Code: Section Tax 2.39(5)(c), Wis. Adm. Code, January 1978 Register

Background: Generally, the apportionment formula to be used by corporate taxpayers engaged in business in Wisconsin and elsewhere contains, as one of its elements, a sales factor. Special apportionment formulas, lacking a sales factor as such, apply to financial institutions, air and motor carriers, and pipeline companies. The sales factor is a fraction, the numerator of which is the taxpayer's total sales in Wisconsin and the denominator of which is the taxpayer's total sales everywhere.

Sales of tangible personal property are in Wisconsin if the property is delivered or shipped to a purchaser in Wisconsin. Similarly, if products are delivered or shipped to a purchaser in another state, the sale is assigned to that other state, assuming that the taxpayer, besides being subject to Wisconsin franchise tax, was also within the taxing jurisdiction of the other state. This test for assigning sales of tangible personal property to one state or another is commonly called the "destination test." It is contained in both s. 71.07(2)(c)2, 1985 Wis. Stats., and Section 16 of the Uniform Division of Income for Tax Purposes Act (UDITPA). Such provisions also provide that the f.o.b. point or other conditions of the sale do not affect the assignment of the sale to one state or the other under the destination test.

Another recognized principle in the administration of formula apportionment is that if the purchaser directs the taxpayer to deliver or ship the tangible personal property to a designated recipient, then the sale shall be assigned to the state of the recipient. See section Tax 2.39(5)(c)4, Wis. Adm. Code.

In summary, under the destination test, the sale is assigned to the state where tangible personal property is shipped or delivered to a purchaser or, if it is not shipped or delivered to the purchaser, then to the purchaser's designee, regardless of the conditions of the sale.

This tax release relates to the application of these general principles to "dock sales." "Dock sales" are those sales where a purchaser uses its owned or rented vehicles or a common carrier it has made arrangements with to take delivery of the product at the seller-taxpayer's shipping dock.

In *Pabst Brewing Co. v. Wisconsin Department of Revenue* (Ct. App. Dist. IV, 1986), 130 Wis. 2d 291, the taxpayer sold beer to an Illinois distributor who picked it up in its own truck at the taxpayer's Wisconsin shipping dock and hauled it to Illinois. The Court held that the sales were not Wisconsin sales, since the location of the purchaser, rather than the location of the pickup of the product, controlled the determination of where the sale was as-

signed for purposes of the sales factor. The Court noted that if the sales were assigned to Wisconsin, the method of delivery, a condition of the sale, would be the determinative, which is contrary to statute.

The department will apply the destination test to dock sales in the same manner it is applied to other sales. If a taxpayer makes dock sales to a purchaser that has a Wisconsin location to which it returns with the product, the sale will be assigned to Wisconsin. If a taxpayer makes dock sales to a purchaser that returns with the product to its out-of-state location, the sale will be assigned to the state of the purchaser's location. If the purchaser, after picking up the goods at the dock, delivers them to another recipient, then the recipient's business location is substituted for the purchaser's as the state to which the sale is assigned and that state becomes the destination state. Accordingly, whether, in the dock sales situation, a purchaser delivers the product to its customer or, in the more usual situation, the purchaser directs that the taxpayer ship it to the customer by common carrier, the state where the customer receives delivery is the destination state to which the sale is assigned for purposes of the seller-taxpayer's sales factor.

Dock sales will also be governed by the "throwback" rule. This rule is contained in the same statutory provisions cited previously. The rule is that a sale shall be assigned to Wisconsin if the taxpayer ships the product from Wisconsin to a purchaser or designated recipient in a state without jurisdiction to impose an income or franchise tax on the taxpayer. The throwback rule is an exception to the destination test. Therefore, if a purchaser delivers goods it picked up at a Wisconsin taxpayer's dock to an out-of-state customer in a state that cannot tax the taxpayer, the dock sale is a Wisconsin sale under the throwback rule. The throwback rule applies equally to a taxpayer's sales shipped to a purchaser or a purchaser's customer in a nontaxing state and to dock sales delivered by the purchaser itself in a nontaxing state. The reason is that dock sales and other sales differ only with respect to how delivery occurs, which is a condition of the sale that under the statute is to be disregarded in assigning the sale to the destination state. The throwback rule, as it appears in s. 71.07(2)(c)2, 1985 Wis. Stats., contains broad language of general applicability and applies to all cases where the destination state, as determined under the destination test, is a nontaxing state.

Facts and Question 1: The taxpayer is a Wisconsin brewer that sells beer to an Illinois purchaser to be picked up at the brewer's shipping dock in Wisconsin. The purchaser is a beer distributor which used its own vehicle to pick up the beer and haul it back to Illinois. The taxpayer is subject to tax by the State of Illinois. Are these dock sales assigned to Wisconsin in the taxpayer's sales factor in its apportionment formula for Wisconsin tax purposes?

Answer 1: No. The sales are assigned to Illinois, since the purchaser's location is in Illinois and the product is shipped to Illinois. Therefore, the taxpayer, for Wisconsin franchise tax purposes, will not include the amount of this dock sale in the numerator of its sales factor, but will include it in the denominator of the sales factor.

Facts and Question 2: The taxpayer is a Minnesota brewer that sells beer to a Wisconsin purchaser to be picked up at the brewer's shipping dock in Minnesota. The purchaser is a beer distributor which used its own vehicle to pick up the beer and haul it back to Wisconsin. The taxpayer is subject to the tax by the State of Wisconsin. Are these dock sales assigned to Wisconsin in the taxpayer's sales factor in its apportionment formula for Wisconsin tax purposes?

Answer 2: Yes. Since the purchaser's location is in Wisconsin and the product is shipped to Wisconsin, the dock sales are assigned to Wisconsin. Therefore, the taxpayer, for Wisconsin franchise tax purposes, will include the amount of this dock sale in both the numerator and the denominator of the sales factor.

Facts and Question 3: The taxpayer is a Wisconsin manufacturer that sells plumbing ware to an Illinois wholesaler and retailer to be picked up at the manufacturer's shipping dock in Wisconsin. The purchaser has its corporate headquarters in Illinois and a number of retail stores throughout the Midwest. The purchaser uses its own vehicle to pick up the plumbing ware and hauls it to the purchaser's retail store in Iowa. The taxpayer is subject to tax by the State of Iowa. Are these dock sales assigned to Wisconsin in the taxpayer's sales factor in its apportionment formula for Wisconsin tax purposes?

Answer 3: No. The sales are assigned to Iowa, since one of the purchaser's business locations is in Iowa and the product is shipped to Iowa. If the taxpayer was not subject to tax by the State of Iowa, the sales would be thrown back to Wisconsin. Therefore, under the facts set forth, the taxpayer, for Wisconsin franchise tax purposes, will not include the amount of this dock sale in the numerator of the sales factor, but will include it in the denominator of the sales factor. If Iowa lacked jurisdiction to tax, this dock sale would be included in both the numerator and the denominator of the sales factor.

Facts and Question 4: The taxpayer is a Wisconsin manufacturer that sells plumbing ware to an Illinois wholesaler and retailer to be picked up at the manufacturer's shipping dock in Wisconsin. The purchaser has its corporate headquarters in Illinois. The purchaser uses its own vehicle to pick up plumbing ware and haul it to the job site of the purchaser's customer. The customer is a plumbing contractor that is working on a new motel being constructed in Madison, Wisconsin. Are these dock sales assigned to Wisconsin in the taxpayer's sales factor in its apportionment formula for Wisconsin tax purposes?

Answer 4: Yes. Since the purchaser's customer's location is in Wisconsin and the product is shipped to Wisconsin, the dock sales are assigned to Wisconsin. The delivery to the plumbing contractor was at the designation of the purchaser and that is where the product was delivered. Therefore, the taxpayer, for Wisconsin franchise tax purposes, will include the amount of this dock sale in both the numerator and the denominator of the sales factor.

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