

The Court of Appeals concluded that because the taxpayer did not raise the equal protection issue before the Wisconsin Tax Appeals Commission,

it failed to exhaust its administrative remedies and cannot attack the additional franchise tax on constitutional grounds in this action.

The taxpayer has appealed this decision to the Wisconsin Supreme 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:

Individual Income Taxes

1. Wisconsin Historic Rehabilitation Credits for Property Used for Both Business and Personal Purposes (p. 22)

4. Mobile Mixing Units (p. 26)
5. Motor Vehicle Warranty Transfer Fees (p. 26)
6. Sale and Lease of Modular Office Units (p. 26)

Sales and Use Taxes

2. Fireworks Displays (p. 23)
3. Lights Used at Outdoor Sporting Facilities (p. 25)

Corporation Franchise and Income Taxes

7. Wisconsin Treatment of Tax-Option (S) Corporations' Officer's Life Insurance (p. 28)

Under section 47(c)(2) of the Internal Revenue Code (IRC), "qualified rehabilitation expenditure" means any amount chargeable to capital account for property for which depreciation is allowable under IRC section 168 and which is nonresidential real property, residential rental property, real property with a class life of more than 12.5 years, or an addition or improvement to such property in connection with the rehabilitation of a qualified rehabilitated building.

A qualified rehabilitated building is one which has been "substantially rehabilitated." This means that the qualified rehabilitation expenditures within a 24-month (or, in certain cases, 60-month) period must be more than the greater of \$5,000 or the adjusted basis of the building and its structural components. IRC section 47(c)(1).

INDIVIDUAL INCOME TAXES

1 Wisconsin Historic Rehabilitation Credits for Property Used for Both Business and Personal Purposes

Statutes: Section 71.07(9m) and (9r), Wis. Stats. (1991-92)

Note: This tax release applies for taxable years beginning on or after January 1, 1991.

Background: Wisconsin law provides two historic rehabilitation credits for

preserving or rehabilitating historic property located in Wisconsin:

- (1) *Supplement to the federal historic rehabilitation tax credit.* This credit equals 5% of the "qualified rehabilitation expenditures" for certified historic structures used for business purposes. To qualify for the credit, the rehabilitation project must be begun after December 31, 1988, and the rehabilitated property must be placed in service after June 30, 1989.
- (2) *State historic rehabilitation credit.* For taxable years beginning on or after January 1, 1991, an individual may claim a credit equal to 25% of the costs of preservation or rehabilitation of an owner-occupied personal residence. The residence cannot actively be used in a trade or business, held for the production of income, or held for sale or other disposition in the ordinary course of the claimant's business.

To be eligible for the credit, qualified preservation or rehabilitation costs must be more than \$10,000.

Eligible costs are those relating to the exterior of the historic property, the interior of a window sash if work is done to the exterior of the window sash, structural elements of the property, the heating or ventilating systems, and electrical or plumbing systems, but not electrical or plumbing fixtures. Section 71.07(9r)(b), Wis. Stats. (1991-92).

Facts and Question 1: Taxpayer A acquires a 2-story historic structure for \$50,000 and spends \$15,000 rehabilitating it. He operates a business on the first floor of the structure and uses the second floor as his personal residence. He allocates one-half of the basis of the building to business use and the remainder to personal use. He rehabilitates the exterior and the heating system of the historic structure. The expenditures benefit the building as a whole; therefore, one-half of the amount is allocated to the business portion and the remainder to the personal portion.

Taxpayer A does not qualify for the federal historic rehabilitation tax credit because the \$15,000 of qualified rehabilitation expenditures do not exceed the \$50,000 adjusted basis of the entire building. In *Alexander v. Comr.*, 97 T.C. 244 (1991), the Tax Court held that an entire building must be "substantially rehabilitated," as defined in the Internal Revenue Code, for a taxpayer to be entitled to the federal rehabilitation tax credit.

Does Taxpayer A qualify for either of the Wisconsin historic rehabilitation credits and, if so, how are the credits computed?

Answer 1: No, Taxpayer A does not qualify for either of the Wisconsin

historic rehabilitation credits. Taxpayer A may not claim the supplement to the federal historic rehabilitation tax credit since he does not qualify for the federal credit. The qualified rehabilitation expenditures for the entire property are taken into account when determining whether the threshold for the state supplement to the federal historic rehabilitation tax credit is exceeded.

Taxpayer A does not qualify for the state historic rehabilitation credit because the \$7,500 of rehabilitation expenditures for the personal residence do not exceed \$10,000. Only the qualified rehabilitation expenditures attributable to the personal residence portion of the structure are taken into account when determining whether the threshold for the state historic rehabilitation credit is exceeded.

Facts and Question 2: Taxpayer B acquires an historic structure for \$40,000 and spends \$45,000 rehabilitating it. She uses one-half of the building for business purposes and the other half as her personal residence; therefore, she allocates one-half of the basis of the structure to each use. Of the expenditures for rehabilitating the property, \$30,000 are attributable to the personal residence and \$15,000 are attributable to the business portion.

Does Taxpayer B qualify for either of the Wisconsin historic rehabilitation credits and, if so, how are the credits computed?

Answer 2: Yes, Taxpayer B qualifies for both of the Wisconsin historic rehabilitation credits. Taxpayer B qualifies for the supplement to the federal historic rehabilitation tax credit because the total qualified rehabilitation expenditures of \$45,000 exceed the \$40,000 adjusted basis of the entire property. She may claim a supplement to the federal historic

rehabilitation tax credit of \$750, which is 5% of the \$15,000 of qualified rehabilitation expenditures attributable to the business portion of the building.

Taxpayer B qualifies for the state historic rehabilitation credit because she spent more than \$10,000 rehabilitating the personal residence. She may claim a state historic rehabilitation credit of \$7,500 (\$30,000 x 25%). □

SALES AND USE TAXES

Note: The following tax releases interpret the Wisconsin sales and use tax law as it applies to the 5% state sales and use tax. The ½% county sales and use tax may also apply. For information on sales or purchases that are subject to the county sales and use tax, refer to the December 1993 issue of the *Sales and Use Tax Report*. A copy can be found in *Wisconsin Tax Bulletin* 85 (January 1994), pages 37 to 40.

2 Fireworks Displays

Statutes: Section 77.51(19), Wis. Stats. (1989-90), and secs. 77.51(18), 77.52(1) and (2m)(a) and (b), and 77.53(1), (2), and (12), Wis. Stats. (1991-92)

Wis. Adm. Code: Section Tax 11.67(1), (2), and (3)(j), November 1993 Register

Background: Section Tax 11.67(3)(j), Wis. Adm. Code, provides that detonating explosives is a nontaxable service. A person who performs such service and furnishes the explosives used in conjunction with the service is the consumer of the explosives.

Facts and Question 1: Company A is in the business of providing fire-

works display programs. Municipality B advertises for bids for the furnishing and firing of its Fourth of July fireworks display program. Specifications for bidding include:

- Bidder shall submit a proposal for furnishing and firing the fireworks display, including aerial shells, ground pieces, mortars, and any other materials needed to set up and successfully fire the display.
- Bidder shall submit proof of insurance to cover all workers, spectators, and vehicles.
- Bidder shall be responsible for the inspection of the display area and removal and disposal of any unfired fireworks devices immediately after the show.

Upon completion of the bidding process, Company A enters into a contract with Municipality B for the furnishing and firing of the municipality's Fourth of July fireworks display program. Terms of the contract include:

- The contractor (Company A) shall perform everything required to be performed and shall provide and furnish all labor and materials and all utility and transportation services required to be performed to complete the Fourth of July fireworks display program.

Is the charge by Company A to Municipality B for the Fourth of July fireworks display program subject to Wisconsin sales tax?

Answer 1: No. Company A is considered to be providing a nontaxable service (i.e., a fireworks display program). Municipality B is not purchasing tangible personal property (i.e., aerial shells, ground pieces, mortars, etc.).

Facts and Question 2: Assume the same facts as in Facts and Question 1. Are Company A's purchases of aerial shells, ground pieces, mortars, and miscellaneous supplies, which are used or consumed by Company A in providing the Fourth of July fireworks display program, subject to Wisconsin sales or use tax?

Answer 2: Yes. Company A contracted with Municipality B to provide a nontaxable service. Therefore, Company A is the consumer, not the retailer, of the aerial shells, ground pieces, mortars, and other tangible personal property which Company A used or consumed in providing the service. Tax applies to the purchase of such property by Company A.

Facts and Question 3: Company C entered into a contract with XYZ Yacht Club to furnish the yacht club with a predetermined assortment of aerial shells, ground pieces, mortars, and other miscellaneous supplies for the club's 25th anniversary party. The contract does not provide for Company C to furnish any services to XYZ Yacht Club.

Is the charge by Company C to XYZ Yacht Club subject to Wisconsin sales or use tax?

Answer 3: Yes. Company C is selling tangible personal property to XYZ Yacht Club, which is subject to Wisconsin sales tax pursuant to sec. 77.52(1), Wis. Stats. (1991-92). Company C may purchase without tax from its suppliers the aerial shells, etc., that it resells to XYZ Yacht Club, provided it gives a properly completed resale certificate to its supplier.

Facts and Question 4: Company D, a Wisconsin corporation, is in the business of providing services relating to fireworks display programs. Company D purchases aerial shells, ground pieces, mortars, and miscella-

neous supplies from a supplier located outside Wisconsin. The supplier does not have nexus in Wisconsin and is not registered to collect Wisconsin use tax.

The supplier has the aerial shells, ground pieces, mortars, and miscellaneous supplies shipped to Wisconsin by common carrier. The fireworks are stored in Wisconsin by Company D and subsequently shipped to Michigan for use in a fireworks display program. Company D has contracted to provide for City E in Michigan. Terms of the advertisement to bid and contract are the same as in Facts and Question 1.

Are Company D's purchases of aerial shells, ground pieces, mortars, and miscellaneous supplies from the out-of-state supplier, which are used or consumed in providing the fireworks display program for City E in Michigan, subject to Wisconsin use tax?

Answer 4: Effective October 1, 1991, tangible personal property (e.g. aerial shells, ground pieces, mortars, and miscellaneous supplies) which are stored in Wisconsin and subsequently used or consumed outside Wisconsin are subject to Wisconsin use tax.

Prior to October 1, 1991, the tangible personal property (e.g., aerial shells, ground pieces, mortars, and miscellaneous supplies) stored in Wisconsin and subsequently transported outside Wisconsin for use outside Wisconsin was not subject to Wisconsin use tax. Section 77.51(19), Wis. Stats. (1989-90), which was repealed by 1991 Wisconsin Act 39, provided that storage and use, for purposes of imposing Wisconsin use tax, did not include keeping, retaining, or exercising any right or power over tangible personal property for purposes of subsequently transporting it outside Wisconsin for use solely outside Wisconsin.

Note: See the tax release titled "Effective Date of Imposition of Use Tax on Items Stored in Wisconsin and Subsequently Shipped Outside Wisconsin" in *Wisconsin Tax Bulletin* 76 (April 1992), page 12, for more information about the application of the revisions to sec. 77.51(18) and (19), Wis. Stats. (1989-90), by 1991 Wisconsin Act 39. □

3 Lights Used At Outdoor Sporting Facilities

Statutes: Sections 77.51(2), 77.52(2)(a)10 and 77.54(41), Wis. Stats. (1991-92)

Wis. Adm. Code: Section Tax 11.68(3)(f) and (4)(b), December 1992 Register

Background: Section 11.68(4)(b), Wis. Adm. Code, provides that certain types of property have a variety of functions, and may be personal property in some instances and additions to real property in others. When the property is installed primarily to provide service to a building or structure and is essential to the use of the building or structure, it is a real property improvement. However, when similar property is installed to perform a processing function, it may retain its status as personal property.

Effective October 1, 1991, sec. 77.54(41), Wis. Stats. (1991-92), allows builders, contractors, or subcontractors to purchase without sales or use tax, building materials, supplies, and equipment acquired solely for or used solely in the construction, renovation, or development of property that would be exempt under sec. 70.11(36), Wis. Stats. (1991-92). Section 70.11(36), exempts property consisting of or contained in a sports and entertainment home stadium, including but not limited to parking lots, garages, restaurants, parks,

concession facilities, transportation facilities, and facilities and structures while they are being built, constructed by, leased to, or primarily used by a professional athletic team that is a member of a league that includes teams that have home stadiums in other states, and the land on which that stadium and those structures and facilities are located.

Facts and Question 1: To accommodate night sporting events, multiple sets of high intensity lights are constructed around the outside of an outdoor amateur sporting facility. Some of these lights are located on top of high poles, which are anchored in concrete. Other lights are attached to the top of buildings (e.g., a grandstand roof). The lights serve two purposes. First, they illuminate the area where the sporting event is played. Second, they provide lighting for customer safety as spectators and others move around the facility.

Is the installation of the high intensity lights an improvement to real property or are the lights installed as tangible personal property?

Answer 1: The installation of the lights, whether on poles or on the top of buildings, is an improvement to real property. The lights are primarily used to service the real estate and are essential for the use of the real estate.

The contractor is subject to Wisconsin sales or use tax on its purchase of the materials used in installing the poles and lights (sec. 77.51(2), Wis. Stats. (1991-92)).

Facts and Question 2: Assume the same facts as in Facts and Question 1.

Is the charge for the repair of the lights subject to Wisconsin sales or use tax?

Answer 2: No. The repair of the lights is not subject to Wisconsin sales or use tax.

Section 77.52(2)(a)10, Wis. Stats. (1991-92), provides that only the repair of tangible personal property is subject to tax. The lights are real property for purposes of repair.

The contractor is subject to Wisconsin sales or use tax on its purchase of the materials used in the repair (sec. 77.51(2), Wis. Stats. (1991-92)).

Facts and Question 3: Assume the same facts as in Facts and Question 1, except the lights were installed on or after October 1, 1991, in a sporting facility that would be exempt under sec. 70.11(36), Wis. Stats. (1991-92).

Does the contractor owe Wisconsin sales or use tax on the materials used in 1) installing the lights and 2) repairing the lights?

Answer 3: 1) The contractor is not subject to Wisconsin sales or use tax on the purchase of the materials used in the installation of the lights, providing it gives its supplier a properly completed exemption certificate.

2) The contractor is subject to Wisconsin sales or use tax on the purchase of the materials used in repairing the lights. The exemption in sec. 77.54(41), Wis. Stats. (1991-92), only applies to construction, renovation, and development of the sporting facility.

If the installation occurred before October 1, 1991, the contractor is subject to Wisconsin sales or use tax on the purchase of the materials used in the installation or repair of the lights. □