

← Parking and storage — aircraft; Containers, packaging and shipping materials — plastic garment bags. *Luetzow Industries vs. Wisconsin Department of Revenue* (Circuit Court for Milwaukee County, April 15, 1994). The issues in this case are:

- A. Whether gross receipts from airplane hangar leases are subject to or exempt from sales tax.
- B. Whether gross receipts from sales of garment bags to dry cleaning

establishments are subject to or exempt from sales tax.

The Circuit Court for Milwaukee County previously issued a decision in this case, on May 15, 1991. See *Wisconsin Tax Bulletin 75* (January 1992), page 13, for a summary of that decision.

The Court of Appeals dismissed the department's October 23, 1991 petition for review of the Milwaukee County Circuit Court's May 15, 1991 decision, on the basis that the Circuit Court decision was not a final order.

The Circuit Court issued a final judgment on April 15, 1994. The Court concluded as follows:

- A. The airplane hangar lease receipts are subject to sales tax.
- B. The gross receipt from the sale of garment bags to dry cleaning establishments are exempt from sales tax.

The department appealed the April 15, 1994 decision to the Court of Appeals on July 12, 1994. □



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:

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INDIVIDUAL INCOME TAXES

1 Interest From Madison Community Development Authority Bonds

Statutes: Sections 66.4325(5m) and 71.05(6)(a)1, Wis. Stats. (1993-94)

Facts and Question: The Community Development Authority of the City of Madison, Wisconsin, has issued Lease Revenue Bonds, Series 1995, for the Monona Terrace Community and Convention Center Project.

Is the interest received from these bonds taxable for Wisconsin income tax purposes?

Answer: No. Interest received from community development authority bonds issued on or after January 28, 1987, is exempt from Wisconsin income tax under sec. 66.4325(5m), Wis. Stats. (1993-94). (Note: Community development authority bonds issued prior to January 28, 1987, are also tax-exempt. See the tax release titled "Interest Received From Community Development Authority Bonds" in *Wisconsin Tax Bulletin* 50 (April 1987), page 8.) □

2 Medical Care Insurance Deduction — Nursing Home Insurance

Statutes: Section 71.05(6)(b)17 through 20, Wis. Stats. (1993-94)

Note: This tax release applies only with respect to taxable years beginning on or after January 1, 1993.

Background: Section 71.05(6)(b)17 through 20, Wis. Stats. (1993-94), provides a deduction for a portion of the amount paid for medical care insurance by a self-employed person or by a person who is an employe if

the person's employer pays no amount of money toward the person's medical care insurance for the person, his or her spouse, and dependents. The deduction is claimed as a subtraction from federal adjusted gross income when computing Wisconsin taxable income.

"Medical care insurance" means a medical care insurance policy that covers the person, his or her spouse, and dependents and provides surgical, medical, hospital, major medical, or other health service coverage, and includes payments made for medical care benefits under a self-insured plan. "Medical care insurance" does not include hospital indemnity policies or policies with ancillary benefits such as accident benefits or benefits for loss of income resulting from a total or partial inability to work because of illness, sickness, or injury. [Sec. 71.05(6)(b)17.a, 18.a, 19.a and 20.a, Wis. Stats. (1993-94).]

Facts and Question: A self-employed person pays premiums for nursing home insurance. Benefits will be paid under the insurance plan when nursing home care is recommended by a physician due to inability to perform certain activities of daily living or cognitive impairment. There is no express requirement of the need for medical care as a precondition to admission to a nursing home. Surgical, medical, and hospital care are not the principal reasons for the plan's coverage of nursing home costs.

May the premiums paid for this nursing home insurance be used in the computation of the medical care insurance deduction?

Answer: No. The premiums paid for this nursing home insurance cannot be used for the medical care insurance deduction. Because this nursing home insurance plan does not fall clearly

within the terms "surgical, medical, hospital, major medical... coverage," as used by sec. 71.05(6)(b)17 through 20, Wis. Stats. (1993-94), premiums paid under this policy are not included as "medical care insurance." □

3 Medical Care Insurance Deduction — Premiums Paid By a Statutory Employe and Former Employe

Statutes: Section 71.05(6)(b)17 through 20, Wis. Stats. (1993-94)

Note: This tax release applies only with respect to taxable years beginning on or after January 1, 1993.

Background: For taxable years beginning in 1993, sec. 71.05(6)(b)17, Wis. Stats. (1993-94), provides a deduction for 25% of the amount paid for medical care insurance by a self-employed person or by a person who is an employe if the person's employer pays no amount of money toward the person's medical care insurance for the person, his or her spouse, and dependents. The deduction is claimed as a subtraction from federal adjusted gross income when computing Wisconsin taxable income.

For taxable years beginning in 1994, the deduction increases to 50% of the amount paid for medical care insurance for both a self-employed person and a person who is an employe whose employer pays no amount toward the person's medical care insurance.

For purposes of federal employment taxes (i.e., social security tax and unemployment tax), sec. 3121(d) of the Internal Revenue Code (IRC) includes as "employees" certain individuals who do not have an employer-employe relationship under the usual common law rules. These indi-

viduals are known as statutory employees. Statutory employees include the following:

- 1) An agent-driver or commission-driver who distributes meat, vegetable, fruit, or bakery products or beverages (other than milk), or delivers laundry or dry cleaning.
- 2) A full-time life insurance sales agent whose principal business activity is selling life insurance or annuity contracts, or both, primarily for one life insurance company.
- 3) An individual who works at home on materials or goods furnished by the employer. The employer must furnish specifications for the work to be done and the work must be returned to the employer or a person named by the employer.
- 4) A traveling or city salesperson (other than an agent-driver or commission-driver) who works full time (except for sideline sales activities) for one firm or person getting orders from customers. The orders must be for items for resale or use as supplies in the customer's business. The customers must be retailers, wholesalers, contractors, or operators of hotels, restaurants, or other businesses dealing with food or lodging.

A statutory employee is considered an employee for purposes of federal employment taxes, but is considered a self-employed independent contractor for reporting business income and expenses.

Facts and Question 1: Under federal law, Taxpayer A is considered a statutory employee. Taxpayer A's employer pays 80% of the premiums for medical care insurance for Tax-

payer A and his family. Taxpayer A pays 20% of the medical care insurance premiums. May Taxpayer A use the 20% he pays for medical care insurance in computing a deduction for medical care insurance paid by a self-employed person?

Answer 1: Yes. Taxpayer A may use the amount he pays for medical care insurance to compute a deduction for medical care insurance paid by a self-employed person. Although sec. 3121(d), IRC, classifies Taxpayer A as a statutory employee, that provision is only applicable for purposes of federal employment taxes. For purposes of the Wisconsin medical care insurance deduction, Taxpayer A is considered self-employed.

Facts and Question 2: Taxpayer B worked for Company C for 30 years, after which he retired. As part of the retirement package, Taxpayer B continues to be covered under Company C's medical care insurance plan. Taxpayer B paid \$200 per month (\$2,400 for the year) for family coverage during 1994 and his former employer (Company C) paid the balance of the medical care insurance premiums.

Taxpayer B worked part-time for Company D for the entire year. He earned \$7,000 during 1994. As a part-time employee, Taxpayer B did not qualify to participate in Company D's medical care insurance plan.

May Taxpayer B use the \$2,400 he paid to compute a deduction for medical care insurance?

Answer 2: Yes. Taxpayer B may use the \$2,400 to compute a deduction for medical care insurance. Section 71.05(6)(b)17 through 20, Wis. Stats. (1993-94), provides that the medical care insurance deduction may be claimed by a person who is an employee if the person's employer pays no amount of money toward the

person's medical care insurance. In this case, the person's employer is Company D, and this employer is not paying any portion of the medical care insurance costs. The only payments are being made by a previous employer. "Employer," as used in the context of this statute, refers to a person's current employer; the statute does not refer to previous employers. □

4 Separate Returns Filed After Joint Return

Statutes: Section 71.03(2)(m)1 and 5, Wis. Stats. (1993-94)

Background: Section 71.03(2)(m)1, Wis. Stats. (1993-94), provides that for a taxable year for which a joint return has been filed, separate returns may be filed by the spouses on or before the last date prescribed by law for timely filing the return of either has elapsed.

Question: For purposes of changing from a joint return to separate returns, what is the "last date prescribed by law for timely filing the return"?

Answer: The "last date prescribed by law for timely filing the return" is the due date (e.g., April 15 for an individual who files on a calendar-year basis) or the extended due date for those individuals who have an extension of time to file their return. Therefore, separate returns may not be filed after a joint return if the due date or extended due date of either spouse's return has passed.

Example 1: A married couple files a joint 1994 income tax return on February 15, 1995. The due date of their return is April 15, 1995. If they change their minds and decide to file separate returns, they must file the separate returns (and pay any balance due) on or before April 15, 1995.

Example 2: A married couple files a joint 1994 income tax return on May 1, 1995. They have an extension of time to file their Wisconsin return until August 15, 1995. If they change their minds and decide to file separate returns, they must file the separate returns (and pay any balance due) on or before August 15, 1995.

Example 3: A married couple files a joint 1994 income tax return on May 1, 1995. The return was filed late because the due date was April 15, 1995. They did not have an extension of time to file their return. They may not file separate returns because such returns would have had to be filed on or before April 15, 1995. □

5 Treatment of Tax-Option (S) Corporation Items When Stock Is Held By a Grantor Trust

Statutes: Sections 71.05(10)(b) and 71.17(4), Wis. Stats. (1993-94)

Facts and Question: The sole shareholder of a tax-option (S) corporation transfers 80% of his shares of stock in the corporation to a grantor trust of which he is the trustee. The corporation earns \$50,000 of ordinary income and makes \$2,000 of charitable contributions. Internal Revenue Code section 1366 treats charitable contributions as a separately stated item that flows through to the shareholders and is claimed on their returns as if paid directly by the shareholders. For federal income tax purposes, the shareholder/grantor reports the entire \$50,000 of tax-option (S) corporation income and claims an itemized deduction for the entire \$2,000 of charitable contributions.

How does the shareholder/grantor treat the tax-option (S) corporation items for Wisconsin income tax purposes?

Answer: The shareholder/grantor treats the tax-option (S) corporation items in the same way as he would if he held all of the shares, the same as for federal purposes. The shareholder/grantor must report the entire \$50,000 of tax-option (S) corporation ordinary income on his Wisconsin individual income tax return. He may claim the entire \$2,000 of charitable contributions that is deductible federally, either as a subtraction from federal adjusted gross income under section 71.05(10)(b), Wis. Stats. (1993-94), or in his Wisconsin itemized deduction credit. □

CORPORATION FRANCHISE AND INCOME TAXES

6 Making or Withdrawing an Election Not to Be a Tax-Option (S) Corporation for Wisconsin

Statutes: Section 71.365(4), Wis. Stats. (1993-94)

Note: This tax release supersedes the tax release with the same title, which was published in *Wisconsin Tax Bulletin* 84 (October 1993), page 20.

Background: Beginning with the 1987 taxable year, a corporation that is an S corporation for federal income tax purposes may elect not to be a tax-option (S) corporation for Wisconsin franchise or income tax purposes. This "opt-out" election requires the consent of persons who hold more than 50% of the shares of the tax-option (S) corporation on the day on which the "opt-out" election is made.

The corporation makes the election by filing Wisconsin Form 5E, "Election by an S Corporation Not to Be Treated as a Tax-Option (S) Corporation," on or before the due date or extended due date of its Wisconsin franchise or

income tax return for the first year affected by the election. Once the election is completed, the corporation or its successor may not claim Wisconsin tax-option status for the next 4 taxable years after the taxable year to which the "opt-out" election first applies. Corporations which make the "opt-out" election are treated as regular (C) corporations for Wisconsin and must file Wisconsin Form 4 or 5 rather than Form 5S.

Facts and Question 1: Corporation X, a calendar year S corporation, files a properly completed Form 5E with the department on February 1, 1995, for the 1994 taxable year. It has not yet filed its 1994 Wisconsin corporation franchise or income tax return, which is due March 15, 1995.

May Corporation X withdraw the "opt-out" election prior to the date that it files its Wisconsin corporation franchise or income tax return?

Answer 1: Yes. An "opt-out" election is not completed until the filing of a Wisconsin corporation franchise or income tax return for the first taxable year affected by the "opt-out" election. To withdraw the election, Corporation X should send a letter to the department requesting the withdrawal. The letter must contain the signatures of shareholders who hold more than 50% of the shares of the corporation.

Except as indicated in Answers 2 and 3 below, once a Wisconsin corporation franchise or income tax return has been filed in accordance with the "opt-out" election, the election is completed and remains effective for the corporation and its successors for at least the next 4 taxable years after the taxable year to which the election first applies.

Facts and Question 2: The facts are the same as in Question 1 except that

Corporation X filed its 1994 Wisconsin corporation franchise or income tax return on February 1, 1995, as a regular (C) corporation.

May Corporation X withdraw the "opt-out" election prior to the March 15, 1995, due date of its Wisconsin corporation franchise or income tax return?

Answer 2: Yes. Although Corporation X filed a Wisconsin corporation franchise or income tax return in accordance with the "opt-out" election, the corporation may withdraw the "opt-out" election prior to the March 15, 1995, due date of its Wisconsin return.

To withdraw the election, Corporation X must take the following action on or before March 15, 1995:

- Send a letter, signed by shareholders holding more than 50% of the corporation's stock, to the department requesting the withdrawal of the election, and
- File an amended Wisconsin franchise or income tax return, Form 5S, as a tax-option (S) corporation.

Note: After the due date for filing the Wisconsin return has passed, the "opt-out" election cannot be withdrawn, and it remains effective for the corporation and its successors for at least the next 4 taxable years after the taxable year to which the election first applies.

Facts and Question 3: The facts are the same as in Question 1 except that Corporation X receives a federal extension until September 15, 1995, to file its 1994 federal income tax return. This extends the due date of its Wisconsin corporation franchise or income tax return to 30 days after the federal due date. On June 1, 1995, Corporation X files its Wisconsin

franchise or income tax return as a regular (C) corporation.

May Corporation X withdraw the "opt-out" election prior to the October 15, 1995, extended due date of its Wisconsin corporation franchise or income tax return?

Answer 3: Yes. Although Corporation X filed a Wisconsin corporation franchise or income tax return in accordance with the "opt-out" election, the corporation may withdraw the "opt-out" election prior to the October 15, 1995, extended due date of its Wisconsin return.

To withdraw the election, Corporation X must take the following action on or before October 15, 1995:

- Send a letter, signed by shareholders holding more than 50% of the corporation's stock, to the department requesting the withdrawal of the election, and
- File an amended Wisconsin franchise or income tax return, Form 5S, as a tax-option (S) corporation.

Note: After the extended due date for filing the Wisconsin return has passed, the "opt-out" election cannot be withdrawn, and it remains effective for the corporation and its successors for at least the next 4 taxable years after the taxable year to which the election first applies.

Facts and Question 4: Corporation Y, a calendar year S corporation, files its 1994 Wisconsin franchise or income tax return as a tax-option (S) corporation on February 1, 1995.

May Corporation Y elect to opt out of Wisconsin tax-option status for the 1994 taxable year prior to the March 15, 1995, due date of its Wisconsin corporation franchise or income tax return?

Answer 4: Yes. Corporation Y must make the "opt-out" election by the due date or extended due date of its Wisconsin corporation franchise or income tax return for the first year affected by the election.

To make the election, Corporation Y must take the following action on or before March 15, 1995:

- File Wisconsin Form 5E, "Election by an S Corporation Not to Be Treated as a Tax-Option (S) Corporation," and
- File an amended Wisconsin franchise or income tax return, Form 4 or 5, as a regular (C) corporation.

Once a Wisconsin return has been filed in accordance with the "opt-out" election, the election is completed and remains effective for the corporation and its successors for at least the next 4 taxable years after the taxable year to which the election first applies.

Facts and Question 5: The facts are the same as in Question 4 except that Corporation Y receives a federal extension of time until September 15, 1995, to file its 1994 federal income tax return. This extends the due date of its Wisconsin corporation franchise or income tax return to 30 days after the federal due date. On May 15, 1995, Corporation Y files its Wisconsin franchise or income tax return as a tax-option (S) corporation.

May Corporation Y elect to opt out of Wisconsin tax-option status for the 1994 taxable year prior to the October 15, 1995, extended due date of its Wisconsin return?

Answer 5: Yes. Corporation Y must make the "opt-out" election by the extended due date of its Wisconsin franchise or income tax return for the first year affected by the election.