

The July 6, 1993 South Carolina Supreme Court decision (No. 23886) in *Geoffrey, Inc. v. South Carolina Tax Commission*, determined the licensing of intangibles (trademarks, trade names, and merchandising techniques) to a South Carolina retailer, by a foreign corporation with no other activity in South Carolina, created income tax nexus. The South Carolina Supreme Court found that Geoffrey's receipt of royalty income from licensing the trademarks and trade names satisfied the Due Process Clause of the U.S. Constitution because Geoffrey purposefully directed its activity toward South Carolina, a finding consistent with the U.S. Supreme Court decision in *Quill Corp. v. North Dakota*, 504 US \_\_\_\_ (1992).

The South Carolina Supreme Court also ruled that the presence of Geoffrey's intangibles in South Carolina, along with Geoffrey's receipt of royalty income from their use in South Carolina, satisfied the Commerce Clause of the U.S. Constitution because they represented a "substantial nexus" with the state. Geoffrey requested the U.S. Supreme Court to review the South Carolina Supreme Court decision. However, the U.S. Supreme Court denied their request on November 29, 1993, Docket No. 93- 520.

It has been determined that the mere presence alone of tangible personal property in a state does not create a franchise tax filing requirement in every instance, (*Wisconsin Dept. of Revenue v. Amerco Lease Company*, Wis. Tax Rep. (CCH) Par 202-952 (1987), and *Dept. of Taxation v. Blatz Brewing Company*, 12 Wis. 2d 615 (1961)). However, the intangibles listed in this tax release are distinguished from those cases because each example reflects more than a passive ownership of property in Wisconsin, which passive ownership was determined not to constitute

"doing business" by *Amerco* and *Blatz*. Therefore, the mere presence alone of a taxpayer's intangible property in Wisconsin is not in itself sufficient to create nexus. However, the presence of intangibles in Wisconsin may create nexus for Wisconsin income or franchise tax purposes if **all three** of the following conditions are met:

1. The property or service (source of income) to which the intangible pertains must be present in Wisconsin. For example, in *Geoffrey*, Toys R Us stores were present in South Carolina.
2. The taxpayer must be involved in the licensing of the intangible in Wisconsin in the course of an income producing business activity. According to *Geoffrey*, it was determined that, "By licensing intangibles which could be used in South Carolina and receiving income in exchange for their use, the taxpayer had the minimum connection with the state necessary for the imposition of income tax."
3. The licensing of the intangible must be substantial, as required by the U.S. Commerce Clause, rather than de minimus.

### III. Definitions

For purposes of this tax release, the following definitions apply:

**Income Producing Activity** — sec. Tax 2.39(6)(c)3, Wis. Adm. Code — the act or acts directly engaged in by the taxpayer for the ultimate purpose of obtaining gains or profit. Income producing activity includes but is not limited to the sale, licensing the use of, or other use of intangible personal property, such as patents, copyrights, trademarks, and trade names.

**Intangibles** — property that is a "right," such as a patent, copyright,

or trademark, or one which is lacking physical existence, such as goodwill.

**Intangible Property** — property that has no intrinsic and marketable value, but is merely the representative or evidence of value, such as certificates of stock, bonds, promissory notes, copyrights, and franchises.

**Lease** — to transfer for term specified therein from lessor to lessee property therein demised, and an agreement under which owner gives up possession and use of property for valuable consideration and for definite term.

**License** — permission to do a particular thing, to exercise a certain privilege, to carry on a particular business, or to pursue a certain occupation.

### IV. Examples of Intangibles

The following examples describe when the presence of various types of intangibles in Wisconsin may create nexus for Wisconsin income or franchise tax purposes. In each example it is assumed the taxpayer has no other nexus creating activity in Wisconsin. This list of examples is not meant to be all-inclusive.

#### *Type of Intangible:*

**Example 1. Copyright:** Bookmark Inc., a New York corporation, is in the business of licensing copyrights. Bookmark Inc. licenses copyrights to Press Inc., a Wisconsin publisher. Bookmark Inc. receives a specific amount per book from Press Inc. as a result of the copyrights licensed.

Bookmark Inc. has Wisconsin franchise or income tax nexus.

**Example 2. Custom Software:** Comp. Design Inc., a Missouri corporation, is in the business of licensing custom software. Comp. Design

Inc. enters into custom software licensing agreements with Wisconsin companies who sell the software packages to other Wisconsin customers. Comp. Design Inc. receives 1% of each sale to a Wisconsin customer under its licensing agreements.

Comp. Design Inc. has Wisconsin franchise or income tax nexus.

**Example 3. Franchise:** Taxpayer A, a resident of Iowa in the business of franchising corndog stands, grants Taxpayer B, a resident of Wisconsin, a franchise which allows Taxpayer B to sell corndogs under the name of Taxpayer A at a specified location in Wisconsin. Taxpayer A receives a percentage of Taxpayer B's sales of corndogs.

Taxpayer A has Wisconsin franchise or income tax nexus.

**Example 4. Operating Permit:** MST, a Missouri corporation, owns several operating permits to transport several types of property in Wisconsin and a number of other midwest states. MST conducts some transportation business of its own outside Wisconsin, but also offers to lease the operating permits for Wisconsin to anyone wishing to transport the types of property covered by the Wisconsin permits. A Wisconsin transportation firm leases one of the Wisconsin operating permits from MST, paying MST a specified amount for each mile traveled in Wisconsin under the permit.

MST has Wisconsin franchise or income tax nexus.

**Example 5. Patent Right:** JCN, a New York corporation, owns patent rights to various processes in a manufacturing system. JCN licenses these rights to manufacturers for use in the manufacture of products, and licenses the right to use one of the processes to a Wisconsin manufacturer. JCN

receives a specific amount for each item manufactured in Wisconsin under its patent.

JCN has Wisconsin franchise or income tax nexus.

**Example 6. Sanction:** TTN, a Wyoming firm, represents a group of cowboys who perform in rodeos. As part of its regular company policy, TTN sanctions rodeos. RYD, a Wisconsin company, is planning a rodeo for local residents. RYD pays TTN a fee to sanction the rodeo based on a specific amount per each person attending the rodeo.

TTN has Wisconsin franchise or income tax nexus.

**Example 7. Territorial Right:** Washmaster Inc., an Illinois corporation, receives exclusive territorial rights from Ridgeview Inc., also an Illinois corporation, to sell washers and dryers in 24 southern Wisconsin counties. Washmaster Inc. later licenses territorial rights to 12 of the counties to Speedmatic Inc., a Wisconsin corporation. The terms of the license provide that 2% be paid to Washmaster Inc. on all of the sales made by Speedmatic Inc.

Washmaster Inc. has Wisconsin franchise or income tax nexus.

**Example 8. Trade Name:** TN, a Missouri corporation in the business of licensing trade names for hair care products, grants Hair By Hare, a Wisconsin shampoo manufacturer, a license to use TN's trade name on its bottles of shampoo. TN receives a percentage of sales of all shampoo sold by Hair By Hare.

TN has Wisconsin franchise or income tax nexus.

**Example 9. Trade Secret:** TS Inc., a Texas corporation, purchases recipes for cookies from various individ-

uals throughout the United States and licenses the use of the recipes, as trade secrets, to a Wisconsin bakery. The Wisconsin bakery uses the recipes in the production of its cookies and pays TS Inc. a specific amount per dozen cookies produced.

TS Inc. has Wisconsin franchise or income tax nexus.

**Example 10. Trademark:** TM Inc., an Arizona corporation, owns the trademark to a line of paper products. TM Inc. licenses the use of the trademark to the Wisconsin manufacturer of the paper goods. The Wisconsin manufacturer pays a 1% license fee to TM Inc. on all TM Inc. products sold.

TM Inc. has Wisconsin franchise or income tax nexus.

**Example 11. Membership:** ISC, a Florida corporation, owns memberships in several information network systems located outside Wisconsin. ISC leases one of the memberships to TEC, a Wisconsin company. TEC pays ISC a specific amount for each minute it uses the information network.

ISC has Wisconsin franchise or income tax nexus.

## 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 January 1995 issue of the *Sales and Use Tax Report*. A copy can be found in *Wisconsin Tax Bulletin 90* (January 1995), pages 39 to 42.

## 7 Nonprofit Organization's Sales — Admission Event Involves Entertainment

**Statutes:** Sections 77.52(2)(a)2 and 77.54(7m), Wis. Stats. (1993-94)

**Wis. Adm. Code:** Section Tax 11.35(6)(a), June 1991 Register

**Background:** Section 77.54(7m), Wis. Stats. (1993-94), provides an exemption from Wisconsin sales or use tax for:

“Occasional sales of tangible personal property or services, including but not limited to admissions or tickets to an event; by a neighborhood association, church, civic group, garden club, social club or similar nonprofit organization; not involving entertainment for which payment in the aggregate exceeds \$300 for performing or as reimbursement of expenses unless access to the event may be obtained without payment of a direct or indirect admission fee conducted by the organization if the organization is not engaged in a trade or business and is not required to have a seller's permit. For purposes of this subsection, an organization is engaged in a trade or business and is required to have a seller's permit if its sales of tangible personal property and services, not including sales of tickets to events, and its events occur on more than 20 days during the year, unless its receipts do not exceed \$15,000 during the year.”

Section Tax 11.35(6)(a), Wis. Adm. Code, provides that to qualify as an exempt occasional sale, entertainment shall not be involved at an event for which charges constitute admissions.

**Facts and Question 1:** Nonprofit Organization A holds a fair. Nonprofit Organization A charges an admission to enter the fair. Upon admission

to the fair, a person may view animal and product exhibits, attend animal shows, and enjoy various musical and comedy performances. Nonprofit Organization A has paid more than \$300 to persons providing musical and comedy performances.

Nonprofit Organization A allows Nonprofit Organization B, a separate entity, to set up a booth at the fair. From its booth, Nonprofit Organization B sells soft drinks and popcorn for consumption on the premises of the fair. Persons will only have access to Nonprofit Organization B's booth upon paying the admission to the fair. Nonprofit Organization B does not receive any of the admission receipts from the fair and does not pay any amount for the entertainment provided at the fair.

For the calendar year in which this fair is held, Nonprofit Organization B will have taxable receipts from sales of tangible personal property and services of \$15,000 or less. Nonprofit Organization B does not hold a Wisconsin seller's permit.

Are Nonprofit Organization A's gross receipts from the sale of admissions to the fair exempt from Wisconsin sales tax as occasional sales under sec. 77.54(7m), Wis. Stats. (1993-94)?

**Answer 1:** No. Since Nonprofit Organization A is charging admission to enter the fair and Nonprofit Organization A pays more than \$300 for the entertainment at the fair, the gross receipts from the admission to the fair do not qualify as exempt occasional sales under sec. 77.54(7m), Wis. Stats. (1993-94). The admissions to the fair are subject to Wisconsin sales tax under sec. 77.52(2)(a)2, Wis. Stats. (1993-94).

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

Are Nonprofit Organization B's gross receipts from the sale of soft drinks and popcorn at the fair exempt from Wisconsin sales tax as occasional sales under sec. 77.54(7m), Wis. Stats. (1993-94)?

**Answer 2:** Yes. The sales of soft drinks and popcorn by Nonprofit Organization B at the fair qualify as exempt occasional sales under sec. 77.54(7m), Wis. Stats. (1993-94) because:

1. The admission charge is to an event involving entertainment (for which payment exceeds \$300) which is conducted by Nonprofit Organization A, **not** Nonprofit Organization B,
2. Nonprofit Organization B is not “engaged in a trade or business” because its taxable gross receipts for the calendar year are \$15,000 or less, and
3. Nonprofit Organization B does not hold and is not required to hold a Wisconsin seller's permit.

**Facts and Question 3:** Assume the same facts as Facts and Question 1, except that Nonprofit Organization B receives 20% of the admission receipts to the fair and pays 20% of the cost for entertainment at the fair.

Are Nonprofit Organization B's gross receipts from the sale of soft drinks and popcorn at the fair exempt from Wisconsin sales tax as occasional sales under sec. 77.54(7m), Wis. Stats. (1993-94)?

**Answer 3:** No. The sales of soft drinks and popcorn by Nonprofit Organization B do not qualify as exempt occasional sales because they are sold at an event conducted by both Nonprofit Organization A **and** Nonprofit Organization B for which admission is charged and entertainment is provided at a cost exceeding

\$300. Nonprofit Organization B is considered to be conducting the event with Nonprofit Organization A since it shares in the admission receipts from the event.

**Facts and Question 4:** Company A, a for-profit company, owns a basketball team franchise. Company A charges an admission to enter the arena and watch a basketball game on a Saturday. The basketball team is paid a salary, exceeding \$300, to play on Saturday.

Company A allows Nonprofit Organization B, a separate entity, to sell soft drinks and popcorn for consumption on the premises of the arena. Persons have access to Nonprofit Organization B's concession stand upon paying the admission to the arena.

For the calendar year in which this basketball game takes place, Nonprofit Organization B will have taxable receipts from sales of tangible personal property and services of \$15,000 or less. Nonprofit Organization B does not hold a seller's permit.

Are Nonprofit Organization B's gross receipts from the sale of soft drinks and popcorn at arena exempt from Wisconsin sales tax as occasional sales under sec. 77.54(7m), Wis. Stats. (1993-94)?

**Answer 4:** Yes. The sales of soft drinks and popcorn by Nonprofit Organization B at the arena qualify as exempt occasional sales because:

1. The admission charge is to an event involving entertainment (for which payment exceeds \$300) which is conducted by Company A, **not** Nonprofit Organization B,
2. Nonprofit Organization B is not "engaged in a trade or business" because its taxable gross receipts for the calendar year are \$15,000 or less, and

3. Nonprofit Organization B does not hold and is not required to hold a Wisconsin seller's permit. □

## 8 Transitional Provisions for Repeal of "Central Office Equipment" Exemption

**Statutes:** Sections 77.51(14r) and 77.54(18), Wis. Stats. (1993-94) and sec. 77.54(24), Wis. Stats. (1993-94), as repealed by 1995 Wisconsin Act 27

**Background:** Effective September 1, 1995, the exemption under sec. 77.54(24), Wis. Stats. (1993-94), relating to apparatus, equipment, and electrical instruments in central offices of telephone companies used in transmitting traffic and operating signals (hereafter "sub. (24) equipment"), is repealed.

Section 77.54(18), Wis. Stats. (1993-94), provides that when the sale, lease, or rental of a service or property that was previously exempt or not taxable for sales and use tax purposes becomes taxable, and the service or property is furnished under a written contract by which the seller is unconditionally obligated to provide the service or property for the amount fixed under the contract, the seller is exempt from sales or use tax on the gross receipts for services or property provided until the contract is terminated, extended, renewed, or modified. However, from the time the service or property becomes taxable until the written contract is terminated, extended, renewed, or modified, the user is subject to use tax, measured by the sales price, on the service or property purchased under the contract.

**Question 1:** When does the sale of sub. (24) equipment take place?

**Answer 1:** Under sec. 77.51(14r), Wis. Stats. (1993-94), the sale of sub.

(24) equipment takes place when possession of the equipment transfers from the seller or the seller's agent to the buyer or the buyer's agent. A common carrier and the U.S. Postal Service are deemed agents of the seller.

**Note:** If the purchase includes installation by the vendor, possession may not transfer until the installation is completed. (*Wisconsin Power & Light Co. v. Wisconsin Department of Revenue*, 11/27/84, CCH 202-482).

**Example 1:** Company A ordered sub. (24) equipment on August 1, 1995, from Company B. The sub. (24) equipment was delivered by common carrier to Company A on August 15, 1995. The exemption for sub. (24) equipment applies since the equipment was "sold" before September 1, 1995 (when the common carrier delivered the equipment to Company A).

**Example 2:** Assume the same facts as Example 1 except that the sub. (24) equipment is not delivered to Company A until October 1, 1995. The exemption for sub. (24) equipment does not apply to the sale of the sub. (24) equipment because the equipment was "sold" after September 1, 1995 (when the common carrier delivered the equipment to Company A).

**Question 2:** Who is responsible for the tax on sub. (24) equipment purchased under a written contract dated prior to September 1, 1995, but sold on or after September 1, 1995?

**Answer 2:** For written contracts to purchase sub. (24) equipment entered into prior to September 1, 1995, that the seller is obligated to furnish for a fixed amount under the written contract, a seller is exempt from Wisconsin sales or use tax on the sale of such equipment occurring on or after September 1, 1995, unless the written contract is modified, extended, or renewed by either party on or after September 1, 1995 but prior to the sale of the equipment. (sec. 77.54(18), Wis. Stats. (1993-94).)

The purchaser of the sub. (24) equipment is subject to Wisconsin use tax on the sales price of the sub. (24) equipment if:

- A. The purchaser took possession of the equipment on or after September 1, 1995, and
- B. The written contract was not modified, renewed, or extended by either party on or after September 1, 1995, and prior to the sale of the equipment.

**Example 1:** Company A entered into a written contract with Company B to purchase sub. (24) equipment on August 1, 1995. Delivery of the property by common carrier to Company A takes place on October 1, 1995. Company A does not modify, extend, or renew the written contract. Company B is not subject to Wisconsin sales tax on the sale of the sub. (24) equipment to Company A. However, Company A is subject to Wisconsin use tax on its purchase of the sub. (24) equipment.

**Example 2:** Assume the same facts as Example 1, except that Company B modifies the written contract on September 15, 1995. Company B is subject to Wisconsin sales tax on the sale of the sub. (24) equipment to Company A because Company B modified the written contract on or after September 1, 1995, but prior to the sale of the equipment to Company A.

## 9 Well Inspection and Water Testing

**Statutes:** Sections 77.51(2) and (20) and 77.52(2)(a)10, Wis. Stats. (1993-94)

**Wis. Adm. Code:** Sections Tax 11.67, November 1993 Register, and Tax 11.68, April 1994 Register

**Background:** Section 77.52(2)(a)10, Wis. Stats. (1993-94), provides that the charge for the repair, service, alteration, fitting, cleaning, painting, coating, towing, inspection, and maintenance of tangible personal property is subject to Wisconsin sales or use tax.

Section Tax 11.68(4)(b), Wis. Adm. Code, provides that certain types of property have a variety of functions that 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.

Section Tax 11.67(3)(e)1, Wis. Adm. Code, provides that the development of information pursuant to a contract is a sale of a service that is not subject to Wisconsin sales tax. Although the person performing the service may be under contract to provide such things as plans, designs, and specifications, or to test and evaluate a proposed product, the primary objective of the customer is to obtain the results of the technical skill of the researcher.

**Facts and Question 1:** Company A is hired to inspect and repair (if needed) a well for structural integrity and safety.

Is the charge by Company A subject to Wisconsin sales or use tax?

**Answer 1:** No. The charge by Company A for inspecting and servicing a well is not subject to Wisconsin sales or use tax. The well is real property. However, Company A is subject to

Wisconsin sales or use tax on the purchase of any supplies or materials it uses in the inspection or servicing of the well.

**Facts and Question 2:** Company A sends a sample of well water to a laboratory for testing.

Is the charge by the laboratory to Company A subject to Wisconsin sales or use tax?

**Answer 2:** No. The laboratory is providing a testing service which is not a service subject to tax under section 77.52(2)(a)10, Wis. Stats. (1993-94).

**Facts and Question 3:** A customer hires Company B to inspect and repair (if needed) a water pump attached to a well.

Is the charge by Company B subject to Wisconsin sales or use tax?

**Answer 3:** Yes. Company B is inspecting and/or servicing tangible personal property which is a service taxable under sec. 77.52(2)(a)10, Wis. Stats. (1993-94). Section 77.52(2)(a)10, Wis. Stats. (1993-94), provides that certain property, including a water pump, retains its character as tangible personal property after installation for purposes of inspection or repair.

Company B can purchase the replacement parts it transfers to its customer, without tax as property for resale, provided it gives its supplier a properly completed resale certificate. However, Company B is subject to sales or use tax on the purchase of supplies used in the inspection or servicing of the water pump (e.g., rags, cleaners, etc.) which are not physically transferred to its customer.