The taxpayer's position with the corporation was described as "corporate secretary" and "office manager." The corporation's 1993 and 1994 tax returns were filed and signed by the taxpayer, and the taxpayer signed installment agreements with the department in 1993 on behalf of the corporation for delinquent taxes. The taxpayer was given check writing authority in July of 1994, at which time her title was stated as vice-president.

The Commission concluded that the taxpayer was a responsible person under sec. 71.83(1)(b)2, Wis. Stats. and sec. 77.60(9), Wis. Stats., and was personally liable for the corporation's unpaid withholding and sales taxes. The taxpayer had the **authority** and the **duty** to pay the corporation's withholding and sales and use taxes, and the taxpayer **intentionally breached that duty**.

The taxpayer served as the vice-president and had **authority** to make financial decisions for the corporation. The taxpayer was a signatory on three of the corporation's checking accounts and signed installment agreements with the department. The taxpayer was aware of the corporation's tax problems and was **duty-bound** to address them. The taxpayer was directly involved in the payment of creditors and payroll (including the taxpayer and another officer); therefore, the taxpayer **intentionally breached her duty** to pay the corporation's delinquent taxes.

The taxpayer has not appealed this decision. □

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 Gain on the Sale of Assets Used in Farming or Business Assets to Related Person

Statutes: Section 71.05(6)(b)9, Wis. Stats. (1995-96), sec. 71.05(6)(b)25, Wis. Stats., as created by 1997 Wisconsin Act 27, and sec. 71.83(1)(d), Wis. Stats., as created by 1997 Wisconsin Act 27 and as amended by 1997 Wisconsin Act 237

Note: This tax release applies only with respect to taxable years beginning on or after January 1, 1998.

Background: Section 71.05(6)(b)9, Wis. Stats. (1995-96), provides an exclusion for 60% of the capital gain on the sale or disposition of assets held more than one year. Capital gains and capital losses are netted before applying the percentage. Section 71.05(6)(b)25, Wis. Stats., as created by 1997 Wisconsin Act 27, provides a subtraction modification to individuals for gains not excluded from taxation under sec. 71.05(6)(b)9, Wis. Stats. (1995-96), on certain assets.

Conditions to Qualify for Subtraction Modification Provided by Sec. 71.05(6)(b)25

The subtraction for gain on the sale or disposition of assets by individuals applies if the following conditions are met:

1. The assets must have been sold or otherwise disposed of to persons who are related to the seller or transferor by blood, marriage, or adoption within the 3rd degree of kinship.

2. The assets must be assets which were used in farming or business assets.

3. Shares in a corporation or trust qualify if, at the time of the sale or disposition, the corporation or trust meets the following standards under sec. 182.001(1), Wis. Stats.

   - Its shareholders or beneficiaries do not exceed 15 in number. Lineal ancestors and descendants and aunts, uncles, and 1st cousins thereof count collectively as one shareholder or beneficiary, but this collective authorization shall not be used for more than one family in a single corporation or trust.

   - It does not have more than two classes of shares.

   - All its shareholders or beneficiaries, other than any estate, are natural persons.

4. The assets must have been held more than one year.

5. The subtraction applies only to capital gain as computed under the Internal Revenue Code which applies for Wisconsin purposes for the year of sale; it does not include amounts treated as ordinary income because of the recapture of depreciation or any other reason.

Penalty

If a person who purchases or otherwise receives assets used in farming or business assets, of which the gains realized by the transferor on the sale or disposition of such assets are exempt from taxation under sec. 71.05(6)(b)25, Wis. Stats., as created by 1997 Wisconsin Act 27, sells or otherwise disposes of the assets within two years after the person purchases or receives the assets, the person shall be subject to a penalty. (Section 71.83(1)(d), Wis. Stats., as created by 1997 Wisconsin Act 27 and as amended by 1997 Wisconsin Act 237.)

The penalty is equal to the amount of income tax that would have been imposed on the transferor on the capital gain if the subtraction modification did not apply, multiplied by a fraction, the denominator of which is 24 and the numerator of which is the difference between 24 and the number of months between the date on which the person who is liable for the penalty purchased or otherwise received the assets and the month in which the person sells or otherwise disposes of the assets.

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

"Business assets" means assets used in an activity carried on for a livelihood or in good faith to make a profit. The facts and circumstances of each case determine whether or not an activity is a business. Regularity of activities and transactions and the production of income are important elements. You do not need to actually make a profit to be in a business as long as you have a profit motive. You do need, however, to make ongoing efforts to further the interests of your business.

"Business assets" includes assets used in the performance of services by an individual as an employe and assets used in the conduct of a trade or business by an individual who is self-employed.

"Business assets" does not include investment or rental property unless the individual is subject to federal self-employment tax on the earnings from the activity.

"Farming" means the cultivation of land or the raising or harvesting of any agricultural or horticultural commodity including the raising, shearing, feeding, caring for, training, and management of animals. Trees (other than trees bearing fruit or nuts) shall not be treated as an agricultural or horticultural commodity. (**Note:** Trees may qualify as a business asset.)

"Related person" means an individual related to the seller or transferor by blood, marriage, or adoption within the 3rd degree of kinship. This includes a X

- Child
- Grandchild
- Great grandchild
- Parent
- Brother or sister
- Nephew or niece
- Grandparent
- Great grandparent
- Aunt or uncle

Question 1: When computing Wisconsin taxable income, is a subtraction allowed from federal adjusted gross income for the entire gain on the sale of an asset used in farming or a business asset to a related person?

Answer 1: No. The subtraction applies only to the portion of the gain that is treated as a capital gain for federal income tax purposes. It does not apply to any portion of the gain that is treated as ordinary income for federal income tax purposes due to the recapture of depreciation or for any other reason. In addition, the asset must have been held for more than one year.

Example 1: You purchased equipment for use in your business in 1994 for $12,000. In 1998 you sold the equipment to a related person for $4,000. You had previously claimed depreciation on the equipment of $10,000. Therefore, you compute a gain on the sale of $2,000. The entire $2000 gain is due to depreciation deductions so you must report the gain as ordinary income on your federal income tax return. Because the entire $2,000 gain is treated as ordinary income, no portion of the gain may be claimed as a subtraction for Wisconsin. The subtraction for gain on the sale of business assets sold to a related person only applies to gain which is treated as capital gain for federal income tax purposes.

Example 2: You sold raised dairy cattle to a related person for $10,000. You had held the cattle for 20 months. Because you held the cattle for less than 24 months, the entire $10,000 gain is reported as ordinary income on your federal income tax return. Even though you held the cattle for more than one year, you may not claim a subtraction for gain on the sale of assets used in farming to a related person because the gain is treated as ordinary income for federal income tax purposes.

Example 3: You sold farm equipment which you had owned for four years to a related person for $50,000. You report a gain on this sale on your federal income tax return of $10,000. You report $6,000 of the gain as ordinary income and $4,000 as capital gain. The $4,000 capital gain qualifies for the subtraction for gain on the sale of assets used in farming to a related person.

Question 2: How is the amount of the subtraction for gain on the sale of assets used in farming or business assets to a related person determined?

Answer 2: For federal income tax purposes, capital gain (including capital gain from the sale of assets used in farming or business assets) which was originally reported on federal Form 4797, *Sales of Business Property,* is included on federal Schedule D, *Capital Gains and Losses.* The capital gains and losses are carried over to Wisconsin Schedule WD where they are netted and a 60% capital gain exclusion is applied to net capital gain on assets held more than one year.

You must first complete Wisconsin Schedule WD before you can determine your subtraction for gain on the sale of assets used in farming or business assets to a related person. All capital gains and losses must be netted on Schedule WD before you can determine the amount of your subtraction.

The amount of your subtraction for gain on the sale of assets used in farming or business assets to a related person is reported on line 11 of Form 1 or line 15 of Form 1NPR.

(**Note:** All line references are to the 1998 Wisconsin forms.)

Net losses You may *not* claim a subtraction for gain on the sale of assets used in farming or business assets to a related person if either of the following applies:

- The netting of all long-term capital gains and losses on Schedule WD results in a net long-term capital loss on line 15 of Schedule WD, *or*

- The netting of all short-term and long-term capital gains and losses on Schedule WD results in a net loss on line 16 of Schedule WD.

Example 1: Your Schedule WD shows the following amounts:

Long-term capital gain on the sale of business asset to a related person	$10,000
Long-term capital loss on the sale of stock	(12,000)
Net long-term capital loss (line 15, Schedule WD)	$ (2,000)

You may not claim a subtraction for gain on the sale of the business asset to a related person.

Example 2: Your Schedule WD shows the following amounts:

Short-term loss on the sale of stock	$(20,000)
Long-term capital gain on the sale of asset used in farming to a related person	12,000
Net loss (line 16, Schedule WD)	$ (8,000)

You may not claim a subtraction for gain on the sale of the asset used in farming to a related person.

Net gains If you have a net long-term capital gain on line 15 of Schedule WD and a net gain on line 16 of Schedule WD, your subtraction for gain on the sale of assets used in farming or business assets to a related person is one of the following:

- If the amounts reported in Parts I and II of Schedule WD consist only of capital gains (no losses), your subtraction is equal to 40% of the gain on the sale of the assets used in farming or business assets. Therefore, you will have subtracted 100% of the gain (60% as a capital gain exclusion and the remaining 40% as a subtraction).

Example 3: Your Schedule WD shows the following amounts:

Short-term gain on the sale of stock	$ 2,000
Long-term gain on the sale of stock	5,000
Long-term gain on the sale of business asset to a related person	20,000
Net gain (line 16, Schedule WD)	$27,000
Capital gain exclusion (60% of $25,000 as shown on line 18, Schedule WD)	15,000
Taxable gain (line 19, Schedule WD)	$12,000

You may subtract $8,000 ($20,000 x 40%) for gain on the sale of the business asset to a related person.

- If (1) the only gain reported on Schedule WD is from the sale of assets used in farming or business assets to a related person and (2) you show a loss on line 14, column (f) of Schedule WD and/or on line 7 of Schedule WD, your subtraction is equal to the amount on line 19 of Schedule WD. This is the amount remaining after netting the capital gain and all long-term and short-term losses and applying the 60% capital gain exclusion.

Example 4: Your Schedule WD shows the following amounts:

Net short-term capital loss (line 7, Schedule WD)	$(4,000)
Total long-term capital loss (line 14, column (f) of Schedule WD)	(6,000)
Long-term gain on the sale of asset used in farming to a related person	40,000
Net gain (line 16, Schedule WD)	$30,000
Capital gain exclusion (60% of $30,000 as shown on line 18, Schedule WD)	18,000
Taxable gain (line 19, Schedule WD)	$12,000

You may subtract $12,000 for gain on the sale of the asset used in farming to a related person.

- If (1) the only long-term gain reported on Schedule WD is from the sale of assets used in farming or business assets to a related person, (2) you show a total long-term loss on line 14, column (f) of Schedule WD, and (3) you show a net short-term capital gain on line 7 of Schedule WD, your subtraction is equal to the amount on line 19 of Schedule WD less the amount on line 7 of Schedule WD. This is the amount remaining after subtracting short-term capital gain from the net capital gain after applying the 60% exclusion.

Example 5: Your Schedule WD shows the following amounts:

Net short-term capital gain (line 7, Schedule WD)	$ 5,000
Long-term capital gain on the sale of business asset to a related person	20,000
Long-term capital loss carryover (lines 13 and 14, Schedule WD)	(6,000)
Net gain (line 16, Schedule WD)	$19,000
Capital gain exclusion (60% of $14,000 as shown on line 18, Schedule WD)	8,400
Taxable gain (line 19, Schedule WD)	$10,600

You may subtract $5,600 ($10,600 minus $5,000 short-term capital gain) for gain on the sale of the business asset to a related person.

- If (1) you reported more than one long-term capital gain and (2) you show a loss on line 14, column (f) of Schedule WD and/or on line 7 of Schedule WD, complete the following worksheet to compute your subtraction.
- If (1) you reported more than one long-term capital gain, (2) you show a loss on line 14, column (f) of Schedule WD, and (3) you show a gain on line 7 of Schedule WD, complete the following worksheet to compute your subtraction.

Worksheet for Gain on Sale of Assets to Related Person

(For use when there is more than one long-term capital gain)

1. Amount from line 19 of Schedule WD .... 1. _________
2. Net short-term gain, if any, from line 7 of Schedule WD .... 2. _________
3. Subtract line 2 from line 1........ 3. _________
4. Long-term gain on the sale of asset to related person .... 4. ___________
5. Total long-term capital gain from line 14, column (g) of Schedule WD.......... 5. ___________
6. Divide line 4 by line 5. Fill in decimal amount........ 6. _________
7. Multiply line 3 by line 6. This is your subtraction for gain on the sale of assets to a related person .... 7. _________

Example 6: Your Schedule WD shows the following amounts:

Long-term capital gain on the sale of business asset to a related person	$9,000
Long-term capital gain on the sale of stock	1,000
(Total long-term capital gain reported on line 14, column (g) of Schedule WD, is $10,000.)	
Long-term capital loss carryover	(3,000)
Net long-term capital gain (lines 15 and 16, Schedule WD)	$7,000
Capital gain exclusion (60% of $7,000 as shown on line 18, Schedule WD)	4,200
Taxable gain (line 19, Schedule WD)	$2,800

The amount of your subtraction for gain on the sale of the business asset to a related person is $2,520 computed as follows:

Worksheet for Gain on Sale of Assets to Related Person
(For use when there is more than one long-term capital gain)

1. Amount from line 19 of Schedule WD			1.	2,800
2. Net short-term gain, if any, from line 7 of Schedule WD			2.	-0-
3. Subtract line 2 from line 1			3.	2,800
4. Long-term gain on the sale of asset to related person	4.	9,000		
5. Total long-term capital gain from line 14, column (g) of Schedule WD	5.	10,000		
6. Divide line 4 by line 5. Fill in decimal amount			6.	.9
7. Multiply line 3 by line 6. This is your subtraction for gain on the sale of assets to a related person			7.	2,520

Example 7: Your Schedule WD shows the following amounts:

Net short-term capital gain (line 7, Schedule WD)	$10,000
Long-term capital gain on sale of business asset to a related person	20,000
Long-term gain on sale of stock	5,000
(Total long-term capital gain reported on line 14, column (g) of Schedule WD, is $25,000.)	
Long-term loss on sale of stock	(6,000)
Net gain (line 16, Schedule WD)	$29,000
Capital gain exclusion (60% of $19,000 as shown on line 18, Schedule WD)	11,400
Taxable gain (line 19, Schedule WD)	$17,600

The amount of your subtraction for gain on the sale of the business asset to a related person is $6,080 computed as follows:

Worksheet for Gain on Sale of Assets to Related Person
(For use when there is more than one long-term capital gain)

1. Amount from line 19 of Schedule WD			1.	17,600
2. Net short-term gain, if any, from line 7 of Schedule WD			2.	10,000
3. Subtract line 2 from line 1			3.	7,600
4. Long-term gain on the sale of asset to related person	4.	20,000		
5. Total long-term capital gain from line 14, column (g) of Schedule WD	5.	25,000		
6. Divide line 4 by line 5. Fill in decimal amount			6.	.8
7. Multiply line 3 by line 6. This is your subtraction for gain on the sale of assets to a related person			7.	6,080

Question 3: Does the subtraction for gain on the sale of assets used in farming or business assets to a related person have to be claimed on the original return for the taxable year?

Answer 3: No. The subtraction may be claimed on an amended return (Form 1X) filed within four years of the unextended due date of the original return.

Example: You sold assets used in farming to a related person in 1998. The subtraction for gain on the sale of the assets may be claimed either on your original 1998 Wisconsin income tax return (due April 15, 1999) or on an amended 1998 return filed on or before April 15, 2003 (four years from the unextended due date of the original return).

Question 4: If a taxpayer claimed on his or her original return the subtraction for gain on the sale of assets used in farming or business assets to a related person, may the taxpayer later file an amended return on which the subtraction is not claimed?

Answer 4: Yes, an amended return may be filed if a taxpayer decides not to claim the subtraction.

Question 5: Wisconsin law limits the deduction for farm losses. Disallowed farm losses may be carried forward for up to 15 years. The losses which are carried forward may be claimed to the extent they do not exceed the net profits or net gains from the sale or exchange of capital or business assets in the current taxable year from the same farming business or portion of that business to which the limits on deductible farm losses applied in the loss year.

May a taxpayer claim a subtraction for both the gain on the sale of assets used in farming to a related person and for the farm loss carryforward?

Answer 5: Yes, a subtraction may be claimed for both the gain on the sale of assets used in farming to a related person and for the farm loss carryforward.

Example: You have a farm loss carryforward from 1995 of $100,000. During 1998, you sell the farm to a related person realizing a gain of $150,000, of which $50,000 is reported as ordinary income on your federal income tax return and $100,000 is reported as capital gain. Assuming you did not report any other capital gains or losses on Schedule WD, on your Wisconsin income tax return you may claim (1) a capital gain exclusion of $60,000, (2) a subtraction of $40,000 as gain on the sale of assets used in farming to a related person, and (3) a subtraction of $100,000 as a farm loss carryforward.

Question 6: The subtraction for gain on the sale or disposition of assets used in farming or business assets to a related person includes gain on the sale or disposition of shares in a corporation or trust (see “Background” on the first page of this tax release for standards the corporation or trust must meet). Wisconsin law also provides a subtraction for gain on the sale or disposition of small business stock (see the tax release “Exclusion of Capital Gains on Small Business Stock” on page 21 of the October 1995 *Wisconsin Tax Bulletin 94* for information on small business stock requirements). If gain on the sale of stock qualifies as both gain on the sale of assets used in farming or business assets to a related person and gain on the sale of small business stock, may a double deduction be claimed?

Answer 6: No, a taxpayer may claim either the subtraction for gain on the sale of assets used in farming or business assets or the subtraction for gain on the sale of small business stock. A double deduction is not allowed.

Question 7: The subtraction for gain on the sale of assets used in farming or business assets to a related person first applies to taxable years beginning on or after January 1, 1998. If business assets or assets used in farming were sold to a related person before 1998 and the gain on the sale is being reported using the installment method, will the capital gain which is being reported on the 1998 and subsequent year returns qualify for the subtraction?

Answer 7: Yes, capital gain on an installment sale of assets used in farming or business assets to a related person which occurred prior to 1998, but is being reported on a 1998 or subsequent year income tax return, qualifies for the subtraction.

Example: You sold business assets to a related person in 1995. The gain is being reported on the installment method. On your 1998 federal income tax return, you report capital gain of $10,000 from this installment sale. You may claim a subtraction on your 1998 Wisconsin income tax return for gain on the sale of business assets to a related person. (See Question and Answer 2 for information on computing the amount of the subtraction.)

Question 8: The subtraction is available for gain on the sale or disposition of assets “used in farming” to a related person. Does the asset have to be “used in farming” directly by the seller?

Answer 8: No. The “used in farming” requirement may be satisfied by either the seller’s or another person’s use of the asset in farming while the asset is owned by the seller.

Example: You own a farm in Wisconsin but are not engaged in farming. You have been renting the land, buildings, and equipment to another person who is engaged in farming. You receive a cash rental payment each year which is reported as rental income on federal Schedule F. Because the farm and equipment are "used in farming" by the renter while the asset is owned by the seller, any capital gain on a sale of the assets to a related person qualifies for the subtraction.

Question 9: You sell residential rental property to a related person. You owned the property since 1988 and have reported all of your rental income and expenses on federal Schedule E. Does the gain on the sale qualify for the subtraction?

Answer 9: No. Gain on the sale of this residential rental property does not qualify for the subtraction. Rental property is not considered a "business asset" unless the seller is engaged in a business and reports all rental income and expenses on federal Schedule C and income from the rental activity is subject to self-employment tax.

Question 10: A penalty is imposed on the related person who purchases or otherwise receives business assets or assets used in farming if the assets are disposed of within a two-year period. If the related person dies within the two-year period, is the penalty imposed on either the person who inherits the assets or on the estate of the related person?

Answer 10: No. The penalty is not imposed on either the person who inherits the assets or on the estate of the related person. The transfer of the property to the estate and/or beneficiaries of the deceased is not considered a disposition subject to the penalty imposed by sec. 71.83(1)(d), Wis. Stats., as created by 1997 Wisconsin Act 27 and as amended by 1997 Wisconsin Act 237. □

HOMESTEAD, FARMLAND PRESERVATION, AND FARMLAND TAX RELIEF CREDITS

2 Property Taxes Accrued - Refusal of Lottery Credit

Statutes: Sections 71.07(3m)(a)6, 71.28(2m)(a)6, 71.47(2m)(a)6, 71.52(7), and 71.58(8), Wis. Stats. (1995-96), and sec. 79.10, Wis. Stats. (1995-96), and as amended by 1997 Wisconsin Act 27

Note: This tax release applies only to homestead credit, farmland preservation credit, and farmland tax relief credit for taxable years 1997 and thereafter.

Background: Section 79.10, Wis. Stats., provides for a lottery credit, in the form of a reduction of property taxes assessed on Wisconsin property. The lottery credit is funded through proceeds from the Wisconsin Lottery.

Changes were made to the lottery credit provisions in sec. 79.10, Wis. Stats., by 1997 Wisconsin Act 27. These changes are effective for lottery credits used to reduce 1997 property taxes due in 1998 (claimed in computing 1997 homestead, farmland preservation, and farmland tax relief credits).

As a result of the changes to the lottery credit, the application/certification process for homeowners, where the homeowner could choose whether to claim or not claim the lottery credit, is eliminated. In addition, a lottery credit is automatically allowed on taxable personal property (for example, a mobile home on another person's land), and on every parcel of taxable real property (for example, commercial property, residential property, and parcels consisting of land only - no buildings).

Property taxes accrued, for purposes of determining a homestead credit, farmland preservation credit, or farmland tax relief credit, are defined as property taxes levied under chapter 70, Wis. Stats., less the tax credit, if any, afforded in respect of the property by sec. 79.10, Wis. Stats. Sections 71.07(3m)(a)6, 71.28(2m)(a)6, 71.47(2m)(a)6, 71.52(7), and 71.58(8), Wis. Stats. (1995-96).

Facts and Question 1 - Homestead Credit: Claimant X receives a 1997 property tax bill (payable in 1998) for his homestead, which shows a net amount due before lottery credit of $1,400, a lottery credit of $90, and net taxes due of $1,310. For personal reasons, Claimant X objects to receiving a benefit from the lottery. Therefore, rather than paying the net taxes due after lottery credit, $1,310, he pays the higher amount shown on the property tax bill, $1,400 (i.e., the amount due before the $90 lottery credit deduction).

May Claimant X claim the amount he actually paid, $1,400, in computing his 1997 homestead credit?

Answer 1: No. The allowable property taxes on Claimant X's 1997 homestead credit claim are $1,310, which are the net 1997 property taxes after the lottery credit has been deducted. The allowable property taxes are those levied under ch. 70, Wis. Stats., less the credit afforded under sec. 79.10, Wis. Stats.

Facts and Question 2 - Farmland Preservation Credit: Claimant Y receives three 1997 property tax bills (payable in 1998) for his farm. Each tax bill has a lottery credit. The property tax bills show net amounts due before lottery credit of $2,400,

$1,000, and $900 respectively ($4,300 total), a lottery credit of $100 on each tax bill, and net taxes due of $2,300, $900, and $800 respectively ($4,000 total). For personal reasons, Claimant Y objects to receiving a benefit from the lottery. Therefore, he pays $4,300, the amount due before the lottery credit deductions, rather than $4,000, the net taxes due after lottery credits.

May Claimant Y claim the amount he actually paid, $4,300, in computing his 1997 farmland preservation credit?

Answer 2: No. The allowable property taxes on Claimant Y's 1997 farmland preservation credit claim are $4,000, which are the taxes levied under ch. 70, Wis. Stats., less the lottery credit afforded under sec. 79.10, Wis. Stats.

Facts and Question 3 - Farmland Tax Relief Credit: Assume the same facts as in Facts and Question 2, except that Claimant Y also wishes to claim a 1997 farmland tax relief credit, based on the property taxes for his farmland only. One property tax bill includes taxes for both farmland and buildings, and the other two are for farmland only.

May Claimant Y claim the total amount he actually paid (prorated for the farmland only) in computing his 1997 farmland tax relief credit?

Answer 3: No. The property taxes allowable in computing Claimant Y's farmland tax relief credit are the taxes levied under ch. 70, Wis. Stats., for the farmland, less the lottery credit afforded under sec. 79.10, Wis. Stats.

Note: The lottery credit attributable to farmland taxes on the property tax bill with buildings is the ratio of the assessed value of the farmland to the total assessed value of farmland and buildings. □

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 0.5% county and 0.1% stadium sales and use taxes may also apply. For information on sales or purchases that are subject to the county or stadium sales and use tax, refer to Wisconsin Publication 201, *Wisconsin Sales and Use Tax Information*.

3 Key Making Machines

Statutes: Section 77.54(6)(a) and (6m), Wis. Stats. (1995-96)

Wis. Adm. Code: Section Tax 11.39(1), Wis. Adm. Code, October 1997 Register and Section Tax 11.40(1) and (2), Wis. Adm. Code, April 1994 Register

Background: Section 77.54(6m), Wis. Stats. (1995-96) defines "manufacturing" as "the production by machinery of a new article with a different form, use and name from existing materials by a process popularly regarded as manufacturing."

Section 77.54(6)(a), Wis. Stats. (1995-96), provides an exemption from Wisconsin sales and use tax for "Machines and specific processing equipment and repair parts or replacements thereof, exclusively and directly used by a manufacturer in manufacturing tangible personal property and safety attachments for those machines and equipment."

Facts:

- Company A purchases a key making machine.
- The key making machine is used as follows:

  1) Customer Z brings in a key that he would like duplicated.
  2) Company A's machine operator chooses an uncut "blank" that a duplicate can be made from.
  3) Using Customer Z's key as a model, the machine cuts the blank to copy the original.
  4) The new key can be used in the same manner as Customer Z's original key.

Question 1: Does the process of duplicating Customer Z's key qualify as manufacturing under sec. 77.54(6m), Wis. Stats. (1995-96)?

Answer 1: Yes. The process of duplicating the key meets the six elements of manufacturing:

1) Production by machinery,
2) of a new article,
3) with a different form,
4) with a different use,
5) with a different name, and
6) by a process popularly regarded as manufacturing.

Question 2: Does Company A's purchase of the key machine qualify for the manufacturing exemption under sec. 77.54(6)(a), Wis. Stats. (1995-96)?

Answer 2: Yes, provided the machine is used exclusively and directly in the manufacturing process. □

4 Prepackaged Combinations of Food, Food Products, and Beverages

Statutes: Section 77.54(20), Wis. Stats. (1995-96), sec. 77.51(4)(a)(intro.) and (15)(a)(intro.), Wis. Stats. (1995-96), as amended by 1997 Wis. Act 237, and secs. 77.51(4)(cm) and

(15)(cm) and 77.54(20)(bg) and (20m), Wis. Stats., as created by 1997 Wis. Act 237, effective August 1, 1997

Wis. Adm. Code: Section Tax 11.51(2)(c)5, Wis. Adm. Code, December 1996 Register

Note: This tax release supersedes the tax release titled "Prepackaged Combinations of Food, Food Products, and Beverages Constitute Meals," which was published in *Wisconsin Tax Bulletin* 102 (July 1997), page 20.

Background: Section 77.54(20)(intro.), Wis. Stats. (1995-96), provides an exemption from Wisconsin sales and use tax for the gross receipts from sales of, and the storage, use, or other consumption of certain food, food products, and beverages for human consumption.

An exception to this exemption is found in sec. 77.54(20)(c)2.a, Wis. Stats. (1995-96), which provides that sales of "meals" and "sandwiches" are subject to Wisconsin sales or use tax.

Section 77.54(20)(bg), Wis. Stats., as created by 1997 Wis. Act 237, defines "meal" and "sandwich" as follows:

"Meal" includes, but is not limited to, a diversified selection of food, food products, or beverages that are customarily consumed as a breakfast, lunch, or dinner, that may not easily be consumed without an article of tableware and that may not conveniently be consumed while standing or walking. "Meal" does not include frozen items that are sold to a consumer, items that are customarily heated or cooked after the retail sale and before they are consumed, or a diversified selection of food, food products, and beverages that is packaged together by a person other than the retailer before the sale to the consumer.

"Sandwich" means food that consists of a filling; such as meat, cheese, or a savory mixture; that is placed on a slice, or between 2 slices; of a variety of bread or something that takes the place of bread; such as a roll, croissant, or bagel. "Sandwich" includes, but is not limited to, burritos, tacos, enchiladas, chimichangas, pita sandwiches, gyros, and pocket sandwiches. "Sandwich" does not include hors d'oeuvres, canapes, egg rolls, cookies, cakes, pies and similar desserts and pastries, and food that is sold frozen.

Sections 77.51(4)(cm) and (15)(cm), as created by 1997 Wis. Act 237, provide that "gross receipts" and "sales price" mean "the portion of the sales price attributable to taxable goods if exempt food, food products or beverages are packaged with other goods by a person other than a retailer before a sale to a final consumer and if less than 50% of the sales price of the goods packaged together is attributable to goods that are exempt under s. 77.54 (20)."

Facts 1:

- ABC Company offers for sale a combination of meat, cheese, and crackers in one package.
- Each packaged combination contains 6-8 crackers, 6-8 slices of cheese, and 6-8 slices of meat.
- The packaged combination is advertised as constituting a meal and is sold for a single price.
- The packaged combination is packaged together by someone other than ABC Company.

Facts 2:

- DEF Company offers for sale a combination of meat, cheese, crackers, a fruit drink, and a small candy bar in one package.
- Each packaged combination contains 6-8 crackers, 6-8 slices of cheese, 6-8 slices of meat, a fruit drink, and a small candy bar.
- The packaged combination is advertised as constituting a meal and is sold for a single price.
- The packaged combination is packaged together by someone other than DEF Company.
- 50% or more of the sales price of the packaged combination is attributable to goods that are exempt from Wisconsin sales or use tax.

Facts 3:

- GHI Company offers for sale a combination of pizza crusts, shredded cheese, sliced pepperoni, a small package of pizza sauce, a fruit drink, and a small candy bar in one package.
- Each packaged combination contains 3-4 mini pizza crusts, shredded cheese, several slices of pepperoni, a small packet of sauce along with a plastic utensil for spreading the sauce, a fruit drink, and a small candy bar.
- The packaged combination may be eaten heated or unheated.
- The packaged combination is advertised as constituting a meal and is sold for a single price.
- The packaged combination is packaged together by someone other than GHI Company.
- 50% or more of the sales price of the packaged combination is attributable to goods that are

exempt from Wisconsin sales or use tax.

Facts 4:

- JKL Company offers for sale a combination of a sandwich, a bag of pretzels or potato chips, and cookies in one package.
- The packaged combination is advertised as constituting a meal and is sold for a single price.
- The packaged combination is packaged together by someone other than JKL Company.
- 60% of the sales price of the packaged combination is attributable to goods that are subject to Wisconsin sales or use tax.

Question:

Are the sales of the packaged combinations described in Facts 1 through 4 above subject to Wisconsin sales or use tax?

Answer:

Facts 1 through 3 - No. None of the sales of the packaged combinations described in Facts 1 through 3 above are subject to Wisconsin sales or use tax because (1) the combinations were packaged by someone other than the retailer before the final sale to the customer and (2) more than 50% of the sales price of each of these combinations is attributable to goods that are exempt from Wisconsin sales and use tax under sec. 77.54(20), Wis. Stats.

Facts 4 - Yes. Sixty percent of the sales price of the packaged combination is subject to Wisconsin sales or use tax because less than 50% of the sales price of the goods packaged together by a person other than the retailer is attributable to goods that are exempt from Wisconsin sales and use tax under sec. 77.54(20), Wis. Stats. ☐

5 Transportation Charges

Note: This tax release supersedes the tax release by the same title that appeared in *Wisconsin Tax Bulletin 107* (April 1998), pages 26 to 29. Part C of Answer 1 in the previous tax release has been removed because the answer may differ based on facts in written or oral contracts and agreements between the buyer and the seller and between the seller and the carrier. Because these facts may differ on a case-by-case basis, an all-encompassing answer cannot be adequately addressed in a tax release.

Statutes: Sections 77.51(4)(a)3, (14r), and (15)(a)3 and 77.52(2)(a), Wis. Stats. (1995-96)

Wis. Adm. Code: Section Tax 11.94 (June 1991 Register)

Background:

Law

Section 77.51(4)(a)3 and (15)(a)3, Wis. Stats. (1995-96), provides that gross receipts and sales price, for purposes of imposing Wisconsin sales or use tax, include the total amount of the sale, valued in money, whether received in money or otherwise, without any deduction for the cost of transportation of the property prior to its sale to the purchaser.

Section 77.51(14r), Wis. Stats. (1995-96), provides that a sale or purchase involving the transfer of ownership of property shall be deemed to have been completed at the time and place when and where possession is transferred by the seller or the seller's agent to the purchaser or the purchaser's agent. A common carrier or the U. S. Postal Service shall be deemed the agent of the seller, regardless of any f.o.b. point and regardless of the method by which freight or postage is paid.

Section 77.52(2)(a), Wis. Stats. (1995-96), provides that various services are subject to Wisconsin sales or use tax. Transportation services are not services specifically subject to tax under sec. 77.52(2)(a), Wis. Stats. (1995-96).

Court Decisions

In the cases of *Rhinelander Paper Company, Inc. vs. Wisconsin Department of Revenue* (97 CV 1051, December 18, 1997) and *Trierweiler Construction and Supply Co., Inc. vs. Wisconsin Department of Revenue* (97 CV 1444, December 12, 1997), the Circuit Court held that transportation costs are not part of the sales price of tangible personal property subject to Wisconsin sales or use tax when the buyer arranges for the transportation with a carrier independent of the retailer, and the buyer pays the cost of transportation directly to the independent carrier.

The Department of Revenue did not appeal these decisions. The questions and answers below reflect these Circuit Court decisions.

Question 1: When are transportation charges subject to Wisconsin sales or use tax, and who is responsible for paying the tax to the Department of Revenue?

Answer 1:

A. Seller Contracts With Carrier and Buyer Pays Seller for Transportation of Taxable Tangible Personal Property — Delivery by Common Carrier, Contract Carrier, U.S. Postal Service, or Seller's Vehicle

Example: Seller A hires a common carrier to ship its taxable product to Buyer B. The common carrier charges Seller A $40 for transportation. Seller A charges Buyer B $1,000 for the product, plus $50 for transportation.

1. Carrier

The common carrier is not subject to Wisconsin sales or use tax on its $40 charge to Seller A for transportation because it is providing a service that is not subject to Wisconsin sales or use tax under sec. 77.52(2)(a), Wis. Stats. (1995-96).

Note: In this example, the carrier is not subject to Wisconsin sales or use tax on its sale of the transportation service, regardless of whether the carrier is a common carrier, a contract carrier, or the U.S. Postal Service.

2. Seller

Seller A's total charge of $1,050 to Buyer B (including the $50 transportation charge) is subject to Wisconsin sales or use tax. The sale of the taxable product occurs when Buyer B takes possession of the product from the common carrier. Since the transportation occurs before the sale of the property by Seller A to Buyer B, the $50 transportation charge is included in gross receipts subject to sales tax.

Note: In this example, Seller A's gross receipts subject to Wisconsin sales or use tax include the $50 charge for transportation, regardless of whether delivery is made by a common carrier, a contract carrier, the U.S. Postal Service, or the seller's own vehicle.

3. Buyer

If Seller A does not charge Buyer B Wisconsin sales or use tax on the sale of the taxable product, Buyer B is subject to Wisconsin sales or use tax on Seller A's total charge of $1,050 (including the $50 transportation charge). The sale of the taxable product occurs when Buyer B takes possession of the product from the common carrier. Since the transportation occurs before the sale of the property by Seller A to Buyer B, the $50 transportation charge is included in the sales price subject to sales or use tax.

B. Buyer Contracts With Carrier and Buyer Pays Carrier for Transportation of Taxable Tangible Personal Property — Delivery by Common Carrier, Contract Carrier, or U.S. Postal Service

Example: Seller A charges Buyer B $1,000 for a taxable product. Buyer B hires a common carrier to pick up the product from Seller A and ship it to Buyer B. The common carrier charges Buyer B $40 for the transportation.

1. Carrier

The common carrier is not subject to Wisconsin sales or use tax on its $40 charge to Buyer B for transportation because it is providing a service that is not subject to Wisconsin sales or use tax under sec. 77.52(2)(a), Wis. Stats. (1995-96).

Note: In this example, the carrier is not subject to Wisconsin sales or use tax on its sale of the transportation service, regardless of whether the carrier is a common carrier, a contract carrier, or the U.S. Postal Service.

2. Seller

Seller A is subject to Wisconsin sales or use tax on its $1,000 charge to Buyer B. Seller A does not include the $40 charge for transportation in gross receipts subject to Wisconsin sales or use tax because Seller A does not have any gross receipts from transportation.

Note: In this example, Seller A's gross receipts subject to Wisconsin sales or use tax do not include the $40 charge for transportation, regardless of whether delivery is made by a common carrier, a contract carrier, or the U.S. Postal Service.

3. Buyer

The buyer is not subject to Wisconsin sales or use tax on the $40 transportation charge as a result of the *Rhinelander Paper* and *Trierweiler Construction* cases, because Buyer B, independent of Seller A, arranged for the transportation with an independent carrier and paid the costs directly to the carrier.

Question 2: If a seller charges a purchaser for transportation and the transportation is for both taxable and nontaxable tangible personal property, is the entire charge by the seller for transportation subject to Wisconsin sales or use tax?

Answer 2: No. Only that part of the transportation charge that relates to the sale or purchase of **taxable** tangible personal property is subject to Wisconsin sales or use tax. A reasonable allocation of the total transportation charge is required to determine the taxable and nontaxable transportation charges.

Example: Company J sells office supplies to Company K. Company K will use 20% of the office supplies at its headquarters in Wisconsin. The remaining 80% of office supplies will be resold by Company K. Company K issues a resale certificate to Company J, indicating that 80% of the office supplies are exempt from Wisconsin sales or use tax because they are for resale.

Company J hires a common carrier to transport the office supplies and other tangible personal property to Company K.

Company J bills Company K $1,000 for the office supplies, plus $100 for transportation.

Transportation charges may be allocated between taxable and nontaxable based on the selling price of the of the items transported. Therefore, of the $1,100 that Company J charges to Company K, $200 of the office supplies plus $20 of transportation charges are subject to Wisconsin sales or use tax. The $800 of office supplies that will be resold and $80 of the transportation charges are exempt from Wisconsin sales or use tax. This method of allocating the $100 transportation charge is as follows:

$200 (charge for taxable office supplies) ÷ $1,000 (total charge for office supplies) = 20%.

20% x $100 total transportation charge = $20 taxable transportation charge.

Note: If you have questions about the sales and use treatment of transportation charges that are not addressed in the Background and Questions above, write for a ruling from the Department of Revenue at P.O. Box 8933, Madison, WI 53708-8933. Copies of contracts and invoices between the buyer and the seller and the seller and carrier should be provided with the request for a ruling. □

Private Letter Rulings

"Private letter rulings" are written statements issued to a taxpayer by the department, that interpret Wisconsin tax laws based on the taxpayer's specific set of facts. Any taxpayer may rely upon the ruling to the extent the facts are the same as those in the ruling.

The ruling number is interpreted as follows: The "W" is for "Wisconsin"; the first four digits are the year and week the ruling becomes available for publication (80 days after it is issued to the taxpayer); the last three digits are the number in the series of rulings issued that year. The date is the date the ruling was issued.

Certain information that could identify the taxpayer has been deleted. Additional information is available in Wisconsin Publication 111, "How to Get a Private Letter Ruling From the Wisconsin Department of Revenue."

The following private letter rulings are included:

Sales and Use Taxes

❈ W9831006

May 11, 1998

Type Tax: Sales and Use

Issue: Computer software – programs (canned vs. custom)

Statutes: Sections 77.51(20) and 77.52(1), Wis. Stats. (1995-96)

Wis. Adm. Code: Section Tax 11.71 (April 1993 Register)

This letter responds to your request for a private letter ruling.

Facts

DEF, Inc. (DEF) licensed to ABC Company (ABC) XYZ software. The XYZ software consists of approximately ten standardized modules of which ABC uses six. The cost of the software licensed by ABC was a small piece of ABC's planned new operating system.

DEF's standard Software License and Support Agreement provided for the license of the XYZ software and maintenance and support. An addendum to the standard agreement provided that "software" for purposes of the agreement meant "the computer software modules and related components. . . and any modifications and new versions