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HIGHLIGHTED TOPICS:



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Find out how to be prepared for the upcoming filing season challenges, receive useful strategies for the yearend tax planning and tax return preparation process



IRS UPDATE

Get the latest IRS updates, including new tools and programs all CPAs should be aware of, as well as the current status of IRS operations



PREPARING FOR SUNSET

Learn about the criticality of planning for the sunset of the TJCA as it relates to the enormous rewards for thinking ahead and the consequences of failing to do so

THURSDAY, NOV. 2 & FRIDAY, NOV. 3
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MATERIALS AT A GLANCE

The following materials are from the Friday morning sessions of the 2023 WICPA Tax Conference held on Thursday, Nov. 2 & Friday, Nov. 3, including:

- Wisconsin Tax Update
- Wisconsin Department of Revenue Update
- Entity-Level Tax Election & Other State Tax Credit
- Multistate Taxation of Trusts

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Questions? Contact Tammy J. Hofstede, WICPA President and CEO at tammy@wicpa.org.

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Wisconsin Tax Update

Kristina Somers, JD, *Shareholder, Reinhart Boerner Van Deuren s.c.*

Wisconsin Tax Update WICPA 2023 Tax Conference November 3, 2023

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Overview

- Sales/Use Tax
- Income/Franchise Tax and Pass-Through Withholding
- Property Taxes, Special Assessments, TIF Districts, Transportation Utility Fees
- Unclaimed Property
- Excise Taxes
- Miscellaneous

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Sales/Use Tax

Recent Laws, Cases, Other Guidance

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Exemptions / Exclusions / Deductions

Sales/Use Tax

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Trailer Type Vehicles - Do Not Qualify for Sales/Use Tax Exemption for "Truck Bodies"

- *William Becker v. Wisconsin Department of Revenue* (WTAC Dec. 29, 2020).
- **Wis. Stat. § 77.54. General Exemptions.** There are exempted from the taxes imposed by this subchapter:
 - (5)(a)4. Motor vehicles or **truck bodies** sold to persons who are not residents of this state and who will not use such motor vehicles or trucks for which the truck bodies were made in this state otherwise than in the removal of such motor vehicles or trucks from this state.

Trailer Type Vehicles - Do Not Qualify for Sales/Use Tax Exemption for "Truck Bodies" (cont'd)

- **Wis. Admin. Code § Tax 11.83. Motor Vehicles.**
 - (4) PURCHASES BY NONRESIDENTS.
 - (a) The sales price for the sales of motor vehicles or **truck bodies** to nonresidents of Wisconsin, including members of the armed forces, who will not use the vehicles or trucks for which the truck bodies were made in Wisconsin other than their removal from Wisconsin is exempt. Truck bodies include semi-trailers. However, the separate sale of a "slide-in" camper to a nonresident is taxable if the sale is sourced to Wisconsin as provided in § 77.522.
- **Trailer type vehicles sold:**
 - Single Axle
 - Tandem Axle
 - Gooseneck

Trailer Type Vehicles - Do Not Qualify for Sales/Use Tax Exemption for "Truck Bodies" (cont'd)

- Prior case (*Dep't of Revenue v. Trudell Trailer Sales, Inc.*, 104 Wis. 2d 39, 42, 310 N.W.2d 612 (1981)) held:

A semitrailer is built to and does carry the cargo. Without it or some other unit to carry the load, a tractor, which is the power unit, serves little or no purpose. When the two pieces of equipment are joined, the semitrailer is the "truck body," and it fits that definition and purpose when constructed and sold. No basis exists for distinguishing that type of truck body from one with a self-contained motor.
- All trailers designed to haul cargo ≠ "truck bodies."
- Must be a symbiotic relationship between (i) trailers sold and (ii) motor vehicles that power their movement.
- Here, automobiles and pickup trucks do not require "truck bodies."
- **Wisconsin Tax Appeals Commission** concluded: trailers did not qualify for exemption.

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Trailer Type Vehicles - Do Not Qualify for Sales/Use Tax Exemption for "Truck Bodies" (cont'd)

- Circuit Court (La Crosse Co. June 27, 2022):
 - Reviewed whether semitrailer definition extends to other trailers that require the support of a motor vehicle to hold cargo.
 - Concluded trailers = exempt "truck bodies"
 - Reversed the Wisconsin Tax Appeals Commission.
 - Appealed by the Wisconsin Department of Revenue to the Court of Appeals.

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Trailer Type Vehicles - Do Not Qualify for Sales/Use Tax Exemption for "Truck Bodies" (cont'd)

- Court of Appeals, 2022AP1349 (July 25, 2023) (unpublished):
 - Reversed the Circuit Court and affirmed the Wisconsin Tax Appeals Commission determination.
 - "As the DOR asserts, the language that 'trucks for which the truck bodies were made' requires that the truck body be a part of a complete truck. Becker's trailers are not made to be a part of a complete truck. Rather, they are pulled behind trucks or cars. Thus, they are not truck bodies under the plain language of the statute." 2022AP1349, ¶ 12.

Lease Payments - Aircraft Maintenance Services / Parts Exemption -> Does Not Apply

- *Citation Partners, LLC v. Wisconsin Department of Revenue* (WTAC Dec. 4, 2019).
- Citation Partners owns a Cessna Citation aircraft.
- 2013 Wis. Act 185 provided sales tax exemption for:
 - Parts used to modify or repair aircraft.
 - Aircraft maintenance services.

Lease Payments - Aircraft Maintenance Services / Parts Exemption -> Does Not Apply (cont'd)

- Wisconsin Tax Appeals Commission found:
 - Lessor was obligated to arrange for and pay all repair and maintenance.
 - Lease payments were not partial reimbursement for repair and maintenance parts or services.
 - Exemption did not apply -> lease payments = fully taxable.

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Lease Payments - Aircraft Maintenance Services / Parts Exemption -> Does Not Apply (cont'd)

- Wisconsin Tax Appeals Commission did note that lessor's purchases of aircraft maintenance and repair services = exempt.
- Dodge County Circuit Court (Case No. 19-CV-612; August 20, 2020) - reversed in favor of the taxpayer.
 - Citation = agent of lessees.
 - Exemption applied, as it would apply to any direct purchaser of repairs, maintenance, or parts.

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Lease Payments - Aircraft Maintenance Services / Parts Exemption -> Does Not Apply (cont'd)

- Reversed by the Wisconsin Court of Appeals on November 23, 2021 (2020AP1683).
 - Lease payments subject to tax.
 - "Sales tax cannot be avoided by dividing up a lease price into categories or affixing labels."

Lease Payments - Aircraft Maintenance Services / Parts Exemption -> Does Not Apply (cont'd)

- Plain language of the statute (Wis. Stat. § 77.52(2)(a)10) exempts "the repair, service, alteration, fitting, cleaning, painting, coating, towing, inspection, and maintenance of any aircraft or aircraft parts"
- The plain language "does not exempt a lease from sales tax."
- Exemptions are strictly construed.

Lease Payments - Aircraft Maintenance Services / Parts Exemption -> Does Not Apply (cont'd)

- Affirmed by the Wisconsin Supreme Court on March 1, 2023 (2023 WI 16).
 - 4-3 decision
- Majority:
 - Looked to definitions of:
 - "Sales price" = "the total amount of consideration" - with no deduction for seller's or lessor's costs.

Lease Payments - Aircraft Maintenance Services / Parts Exemption -> Does Not Apply (cont'd)

- Found "[a]s part of the total amount the Lessees pay to lease the aircraft, Citation Partners charges per-flight-hour rates for aircraft repairs and engine maintenance."
- Acknowledged rates correspond to amount Citation spends on aircraft repairs and engine maintenance.
- But concluded per-flight-hour charges for aircraft repairs and engine maintenance = part of total consideration for lease of aircraft.

Lease Payments - Aircraft Maintenance Services / Parts Exemption -> Does Not Apply (cont'd)

- Deferred to Commission's findings of fact.
- Reviewed legal conclusions de novo.
 - Found that Citation Partners did not sell its Lessees "parts used to modify or repair aircraft" or "repair, service . . . and maintenance of any aircraft."
 - Rather, found that it is leasing an aircraft, not selling aircraft repairs or maintenance.
 - No agency relationship - Lessees had no right of control.

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Lease Payments - Aircraft Maintenance Services / Parts Exemption -> Does Not Apply (cont'd)

- Dissent:
 - Focused on the aircraft exemption provisions - and concluded that the "plain meaning of those statutes grants Citation Partners the sales tax exemption it seeks."
 - Found "the majority chooses to follow the error-strewn path of the Tax Appeals Commission (TAC), which contravenes the clear statutory direction to exempt the sale price of aircraft parts and aircraft maintenance from state sales taxes"

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Lease Payments - Aircraft Maintenance Services / Parts Exemption -> Does Not Apply (cont'd)

- Found "the legislature granted a broad exemption for the sales price of aircraft parts."
- Concluded "the TAC's material factual findings that underlie its legal conclusion are not supported by substantial evidence"
 - For example, the TAC found the Lessee's responsibilities did not include any maintenance related expenses - but the dissent read the relevant agreement to require Lessee to be responsible for maintenance.

Lease Payments - Aircraft Maintenance Services / Parts Exemption -> Does Not Apply (cont'd)

- Also found the TAC ignored the jointly-submitted Stipulation of Facts.
- Concluded TAC's material findings must be set aside.
- Found that "there is nothing in either statute that limits its use when obligations to pay for aircraft maintenance and parts are incurred pursuant to written documents rather than directly to the vendor."
- Focused on the more specific statutes.
- Noted that the majority did not review the TAC's decision.

Indirect Materials - Purchased for Resale to Federal Government

- *Oshkosh Corporation v. Wisconsin Department of Revenue* (WTAC Oct. 10, 2022).
- Contracts with federal government.
 - Direct materials (e.g., raw materials) purchased.
 - Indirect materials (e.g., office supplies and equipment, computer supplies and equipment, building repairs and supplies, repairs to security cameras, crane inspection, gas purchases, building prototypes, hand tools, cleaning supplies, vehicle leases, landscaping services and supplies, books, and training supplies) purchased.

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Indirect Materials - Purchased for Resale to Federal Government (cont'd)

- Indirect materials:
 - Reimbursed by - but not physically transferred to federal government.
 - Federal Acquisition Regulations - provided for the transfer of title to indirect materials from a contracting party to the federal government.
- Refund claims

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Indirect Materials - Purchased for Resale to Federal Government (cont'd)

- Wis. Stat. § 77.51:
 - (13rm) "Retail sale" or "sale at retail" means any sale, lease, or rental for any purpose other than resale, sublease, or sub rent.
 - (14) "Sale" includes any of the following: the transfer of the ownership of, title to, possession of, or enjoyment of tangible personal property, or items, property, or goods under s. 77.52(1)(b), (c), or (d)"

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Indirect Materials - Purchased for Resale to Federal Government (cont'd)

- Wisconsin Tax Appeals Commission concluded that the statutory language straightforwardly includes the transfer of title to tangible personal property.
- Expressed concern that "businesses can evade paying taxes in the State of Wisconsin by creating what amounts to a fictional resale, but which satisfies the letter of the law."
- Asks "Does this mean that a furniture manufacturer can now contract with a large client to transfer the title of their office supplies and operating equipment, avoiding taxation?"

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Indirect Materials - Purchased for Resale to Federal Government (cont'd)

- Circuit Court (Dane Co. June 29, 2023).
- Affirmed WTAC ruling and order.
- When Oshkosh transferred title of indirect materials to the federal government as dictated by the model provisions of the Federal Acquisitions Regulations in their contract, this was sufficient to be a "sale" under the plain meaning of Wis. Stat. § 77.51(14).

Indirect Materials - Purchased for Resale to Federal Government (cont'd)

- Circuit Court reasoned the transfer of title was more than a "legal fiction" because the contract terms vest title and beneficial ownership in the federal government:
 - The indirect materials are limited to use in connection with federal contracts.
 - The federal government retains the right to access, inspect, and control the disposal of indirect materials.
 - The federal contracts define and allocate risk of loss for indirect materials.

Sales/Use Tax Exemption for Data Center Equipment and Materials

- 2023 Wis. Act 19 created sales/use tax exemption under Wis. Stat. § 77.54(70) for certain tangible personal property used at a data center.
- Effective October 1, 2023.

Sales/Use Tax Exemption for Data Center Equipment and Materials (cont'd)

- Wis. Stat. § 77.54(70)(a)
- The sales price of tangible personal property "used exclusively for the **development, construction, renovation, expansion, replacement, repair, or operation** of a **qualified data center**, as defined in s. 238.40(1)(b)"

Sales/Use Tax Exemption for Data Center Equipment and Materials (cont'd)

- Wis. Stat. § 77.54(70)(a)

". . . and **used solely** at the qualified data center including computer server equipment and the chassis for such equipment; networking equipment; switches; racks; fiber-optic cabling, copper cabling, and other cabling, including cabling used to connect one or more qualified data centers; trays; conduit; substations; uninterruptible energy equipment; supplies; fuel piping and storage; duct banks; switches; switchboards; batteries; testing equipment; backup generation equipment; modular data centers and preassembled components; monitoring equipment; security systems; and electricity."

Sales/Use Tax Exemption for Data Center Equipment and Materials (cont'd)

- Wis. Stat. § 77.54(70)(b)
- The sales price of tangible personal property "used in the **development, construction, renovation, expansion, replacement, or repair** of a **water cooling or conservation system** **used exclusively** to cool or conserve water for one or more qualified data centers"

Sales/Use Tax Exemption for Data Center Equipment and Materials (cont'd)

- Wis. Stat. § 77.54(70)(b)
". . . including chillers, mechanical equipment, refrigerant piping, fuel piping and storage, adiabatic and free cooling systems, cooling towers, water softeners, air handling units, indoor direct exchange units, fans, ducting, and filters."

Sales/Use Tax Exemption for Data Center Equipment and Materials (cont'd)

- Wis. Stat. § 77.54(70)(c)
- The sales price of tangible personal property "sold to a construction contractor that, in fulfillment of a real property construction activity, transfers the tangible personal property or property under § 77.52(1)(c) to a qualified data center, as defined in § 238.40(1)(b), if such tangible personal property or property under § 77.52(1)(c) becomes a component of the qualified data center."

Sales/Use Tax Exemption for Data Center Equipment and Materials (cont'd)

- Wis. Stat. § 238.40(1)(b):
- A "qualified data center" means one or more buildings owned, leased, or operated by the same business entity or its affiliate. The buildings must be used to centralize the processing, storage, management, retrieval, communication, or dissemination of data and information.

Sales/Use Tax Exemption for Data Center Equipment and Materials (cont'd)

- Wis. Stat. § 238.40:
- The Wisconsin Economic Development Corporation ("WEDC") is responsible for certifying a qualified data center for purposes of the exemption.
- The buildings must create a minimum qualified investment in the state within 5 years from the date WEDC certifies the data center (e.g., \$50,000,000 for buildings in a county having a population of not more than 50,000).

Increase in Retailer's Discount

- 2023 Wis. Act 19 amends Wis. Stat. § 77.61(4)(c).
- Increases retailer's collection discount deduction from 0.5% to 0.75% of the tax payable and the discount limit will increase from \$1,000 to \$8,000 maximum.
- Applies to sales and use taxes payable after October 1, 2023.

Increase in Retailer's Discount (cont'd)

- The retailer's discount is computed on the total sales tax as follows:
 - \$0 to \$10 - discount is equal to total sales tax
 - \$10 to \$1,333 - discount is \$10
 - Greater than \$1,333 - discount is the total sales tax amount x .0075, but cannot exceed \$8,000 per reporting period

Imposition

Sales/Use Tax

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City of Milwaukee and Milwaukee County - Higher Sales/Use Taxes

- 2023 Wis. Act 12 authorized the City of Milwaukee to impose a 2% sales/use tax under Wis. Stat. § 77.701 and Milwaukee County to impose a 0.4% sales/use tax under Wis. Stat. § 77.70. Effective June 22, 2023.
 - City of Milwaukee Common Council voted to impose the City sales/use tax of 2%, effective January 1, 2024.
 - Milwaukee County Board raised the county sales/use tax from 0.5% to 0.9%, effective January 1, 2024.

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City of Milwaukee and Milwaukee County - Higher Sales/Use Taxes (cont'd)

- Total sales/use tax rate in City of Milwaukee = 7.9%
- Total sales/use tax rate in Milwaukee County (outside City of Milwaukee) = 5.9%
- Total sales/use tax rate in other counties = 5.00 - 5.50%

Online Marketplace - Liable for Sales Tax on Admissions

- *StubHub, Inc. v. Wisconsin Department of Revenue* (WTAC Feb. 28, 2023).
- Sales of tickets/admissions - 2008 -> 2013
- What is being sold?
 - Ticket = Right to admission (represented by the ticket)
 - Tickets not separate from the admissions
 - "This novel argument is not persuasive to the Commission, and the Commission declines to upend years of precedent."

Online Marketplace - Liable for Sales Tax on Admissions

- Who is selling the tickets?
 - User Agreement - expressly disclaims agency relationship
 - Anonymity of ticketholder
- Does it matter who owns the property or services being transferred?

Online Marketplace - Taxable for Sales of Admissions (cont'd)

- What is StubHub selling/what services is it providing?
 - Similar to auctioneer?
 - FanProtect Guarantee - StubHub would find replacement tickets or offer a refund.
 - More than a passive marketplace - "no open-air market with which the Commission is familiar offers, on behalf of a stall holder in the market, replacement products or refunds for items which prove unsatisfactory to consumers."

Online Marketplace - Taxable for Sales of Admissions (cont'd)

- Final sales price
 - StubHub sets its fees -> added to the price set by the ticketholder = StubHub determined the final sales price.
 - "StubHub's complete control over the ultimate purchase price paid by the ticket buyer, as well as StubHub's control over the receipt and accounting of payment made by the ticket buyer"

Online Marketplace - Taxable for Sales of Admissions (cont'd)

- Retailer?
 - "[T]he statute does not require that a person making a sale at retail be or be deemed to be a retailer in order for its sales to be subject to tax."
- Nexus
- Penalties
 - Not applicable - Tax Bulletins 114 and 172 applied only to "ticket brokers"

Administrative Rules - Marketplace Providers and Sellers

- Changes published in Administrative Register 810B, CR 22-017. Effective July 1, 2023.
- Wis. Admin. Code § Tax 11.55 is renamed from "Agents, consignees, lienors, and brokers" to "Repossessions and sales of property to enforce liens."
- Wis. Admin. Code § Tax 11.55(1) and (2), relating to disclosed and undisclosed principals - repealed.

Administrative Rules - Marketplace Providers and Sellers (cont'd)

- Persons selling products and services on behalf of others are retailers and must collect tax regardless of whether the person they are selling on behalf of is disclosed to the purchaser.
- These agents, consignors, and brokers are often "marketplace providers" under the provisions created in 2019 Wis. Act 10, effective January 1, 2020.

Administrative Rules - Marketplace Providers and Sellers (cont'd)

- Wis. Admin. Code § Tax 11.555 "Marketplace providers and sellers" explains the various requirements by all types of sellers that facilitate sales of taxable products and services on behalf of other sellers.

Administrative Rules - Marketplace Providers and Sellers (cont'd)

- Wis. Admin. Code § Tax 11.555 provides information about:
 - Marketplace provider's requirement to notify the seller they are collecting and remitting tax
 - Who can be audited and held liable for tax
 - Requests for waiver from marketplace provider responsibilities
 - When the Department of Revenue may regard the seller as a retailer

Administrative Rules - Marketplace Providers and Sellers (cont'd)

- Wis. Admin. Code § Tax 11.555 provides information about:
 - Marketplace provisions applying to both online and physical marketplaces
 - Reporting and recordkeeping requirements
 - A marketplace being required to collect and remit tax on taxable sales it facilitates on behalf of a nonprofit organization, even if the nonprofit organization would qualify for the occasional sales exemption.

Administrative Rules - Marketplace Providers and Sellers (cont'd)

- Wis. Admin. Code § Tax 11.88(6), "Consignment sales," was repealed and recreated to explain that a recreational vehicle dealer that advertises and sells a recreational vehicle on behalf of another person is a marketplace provider and required to collect and remit the tax.

Classification of Property

Sales/Use Tax

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Definition of "Real Property Construction Activities"

- 2023 Wis. Act 12, amends Wis. Stat. § 77.51(12t):

"Real property construction activities" means "activities that occur at a site where tangible personal property or items or goods under s. 77.52(1) (b) or (d) that are applied or adapted to the use or purpose to which real property is devoted are permanently affixed to that real property."

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Definition of "Real Property Construction Activities" (cont'd)

- Wis. Stat. § 77.51(12t):
- "Real property construction activities" does "not include affixing property subject to tax under s. 77.52(1)(c) to real property or affixing to real property tangible personal property that remains tangible personal property after it is affixed."

Definition of "Real Property Construction Activities" (cont'd)

- Wis. Stat. § 77.51(12t):

"The department may promulgate rules to determine whether activities that occur at a site where tangible personal property or items or goods under s. 77.52(1)(b) or (d) are affixed to real property are real property construction activities for purposes of this subchapter."

Changes to Definition of "Real Property Construction Activities" (cont'd)

- Wis. Stat. § 77.51(12t):

"If the classification of property or an activity is not identified by rule, the department's determination of whether personal property becomes part of real property shall be made by considering the following criteria:

- (a) Actual physical annexation to the real property.
- (b) Application or adaptation to the use or purpose to which the real property is devoted.
- (c) An intention on the part of the person making the annexation to make a permanent accession to the real property."

Proposed Legislation

Sales/Use Tax

Expanding Electricity and Natural Gas Exemption

- 2023 Senate Bill 22 and 2023 Assembly Bill 20 proposed expanding the exemption for electricity and natural gas to all months of the year.
- The exemption currently only applies to electricity and natural gas sold from November through April for residential use.

Income/Franchise Tax and Pass-Through Withholding

Recent Laws, Cases, and Other Guidance

Deductions / Refund Claims

Income/Franchise Tax

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Royalty Deduction - Disallowed

- *Skechers USA, Inc. v. Wisconsin Department of Revenue* (WTAC Feb. 24, 2023).
- Entities:
 - Skechers USA, Inc. ("Skechers") = Corporation headquartered in California
 - Skechers USA Inc. II ("SKII") = Delaware corporation (subsidiary)
 - Corporate franchise tax assessments of Skechers USA, Inc. - tax years 2000 and 2001-2003

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Royalty Deduction - Disallowed (cont'd)

- Skechers contributed its domestic intellectual property to SKII
- Licensing agreement
 - Skechers required to pay operating margin (in excess of 2%) to SKII as royalty
 - Skechers claimed Wisconsin franchise tax deduction for royalties paid
- Wisconsin Department of Revenue disallowed deductions claimed by Skechers

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Royalty Deduction - Disallowed (cont'd)

- Wis. Stat. § 71.30(2):

ALLOCATION OF GROSS INCOME, DEDUCTIONS, CREDITS BETWEEN 2 OR MORE BUSINESSES. In any case of 2 or more organizations, trades or businesses (whether or not incorporated, whether or not organized in the United States and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the secretary or his or her delegate may distribute, apportion or allocate gross income, deductions, credits or allowances between or among such organizations, trades or businesses, if he or she determines that such distribution, apportionment or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations, trades or businesses
- *Hormel Foods Corp. v. Wisconsin Dep't of Revenue* (WTAC Mar. 29, 2010)

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Royalty Deduction - Disallowed (cont'd)

- Non-tax intellectual property benefits & economic substance?
 - Identify and protect existing intellectual property
 - Number of SKII employees increased
 - Larger office space needed
 - Third party licensing revenue grew
- Sham transaction?
 - KPMG - State Tax Minimization Project
 - No changes in operations or management of the intellectual property

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Refund Claim for Manufacturing Credit - Barred

- *General Mills, Inc. v. Wisconsin Department of Revenue* (WTAC Oct. 26, 2022).
- 2013 tax year:
 - Originally filed return - manufacturing credit not claimed.
 - Field audit.
 - Subsequent to the field audit, amended 2013 return filed - on July 21, 2017 (before the end of the four-year statute of limitations, which expired August 15, 2018).
 - Second amended 2013 return filed on August 15, 2018.

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Refund Claim for Manufacturing Credit - Barred (cont'd)

- Wis. Stat. § 71.75:

* * *

(2) With respect to income taxes and franchise taxes, except as otherwise provided in subs. (5) and (9) . . . refunds may be made **if the claim therefor is filed within 4 years of the unextended date** under this section on which the tax return was due.

* * *

(4) Except as provided in subs. (5) and (5m), no refund shall be made . . . for any year that has been the subject of a field audit if the audit resulted . . . in an assessment that is final . . . and if the department of revenue notifies the taxpayer that unless the taxpayer appeals the result of the field audit . . . the field audit is final."

Refund Claim for Manufacturing Credit - Barred (cont'd)

- Wis. Stat. § 71.75:

* * *

(5) A claim for refund may be made within 4 years after the assessment of a tax . . . including penalties and interest, under this chapter, assessed by office audit or field audit and paid if the assessment was not protested by the filing of a petition for redetermination. . . . If a claim is filed under this subsection, the department of revenue may make an additional assessment in respect to any item of income or deduction that was a subject of the prior assessment. No claim for refund may be made in respect to items that were not adjusted in the notice of assessment or of refund."

Refund Claim for Manufacturing Credit - Barred (cont'd)

- Wisconsin Department of Revenue - argued refund claim barred (under Section 71.75(5)) because the manufacturing credit was not a subject of the audit and assessment.
- Taxpayer - argued it followed the permitted time period (under Section 71.75(2)) to file a refund claim.
- Wisconsin Tax Appeals Commission - concluded "Section 71.75(5) Wis. Stat. bars a claim for refund in respect to items *not adjusted in the notice of assessment or refund.*"

Imposition

Income/Franchise Tax

Pass-Through Withholding Filings Required - Based on Wisconsin Income

- *RADS Partnership et al. v. Wisconsin Department of Revenue* (WTAC Aug. 16, 2022).
- Watermark Wisconsin LP = California limited partnership with principal offices in California.
 - Invested in Watermark Montclair Wisconsin Hotels LLC - which invested in real estate in Wisconsin.
- Taxpayers (CA/DE limited partnerships, partnership, and trust with principal location in California) = limited partners in Watermark Wisconsin LP.
 - All partners of the partnerships and beneficiaries of the trust = California residents.

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Pass-Through Withholding Filings Required - Based on Wisconsin Income (cont'd)

- Mostly ordinary losses for tax years 2006-2013.
- Income (section 1231 gain) for 2013.
- Wisconsin Department of Revenue assessed:
 - Pass-through withholding tax (plus interest, underpayment interest, penalties, and late filing fees) for the pass-through entities.
 - Fiduciary tax (plus interest, penalties, and late filing fees) for the trust.

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Pass-Through Withholding Filings Required - Based on Wisconsin Income (cont'd)

- Wis. Stat. § 71.775(2)(a):

For the privilege of **doing business in this state** or **deriving income from property located in this state**, a **pass-through entity** that has **Wisconsin income** for the taxable year that is **allocable to a nonresident partner, member, shareholder, or beneficiary** shall pay a **withholding tax**.

- Wis. Stat. § 71.775(1)(b):

"Pass-through entity" means a **partnership**, a limited liability company, a tax-option corporation, an estate, or a **trust** that is treated as a pass-through entity for federal income tax purposes.

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Pass-Through Withholding Filings Required - Based on Wisconsin Income (cont'd)

- Wis. Stat. § 71.775(3):

(3) EXEMPTIONS

- (a) A nonresident partner's, member's, shareholder's, or beneficiary's share of **income** from the pass-through entity that is attributable to this state shall not be included in determining the withholding under sub. (2) if any of the following applies:

* *

2. The partner's, member's, shareholder's, or beneficiary's share of **income** from the pass-through entity that is attributable to this state is less than \$1,000.

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Pass-Through Withholding Filings Required - Based on Wisconsin Income (cont'd)

- Wis. Stat. § 71.80(25):
 - (25) Net operating and business loss carry-forward and carry-back.
 - (a) No offset of Wisconsin income may be made under s. 71.05(8)(b)1., 71.26(4)(a), or 71.45(4)(a) unless the incurred loss was computed on a return that was filed within 4 years of the unextended due date for filing the original return for the taxable year in which the loss was incurred.

Pass-Through Withholding Filings Required - Based on Wisconsin Income (cont'd)

- Wisconsin Tax Appeals Commission concluded:
 - Income triggered pass-through withholding and obligation/trust (fiduciary tax) filing and payment obligation
 - Failure to submit required forms within 4 years of the unextended due date of the 2013 return (April 15, 2018) resulted in obligation to pay pass-through withholding/fiduciary tax.

Income Taxable for Online Sales Platform?

- *ASAP Cruises, Inc. v. Wisconsin Department of Revenue* (WTAC May 23, 2022).
- ASAP Cruises provides online platform through which independent travel agents book travel for their customers.
- Tax Years 2012-2017.

Income Taxable for Online Sales Platform? (cont'd)

- Wisconsin Tax Appeals Commission concluded that:
 - ASAP Cruises sold travel services.
 - ASAP Cruises used the services of Independent Travel Consultants (who were paid commissions).
 - ASAP Cruises was doing business in Wisconsin.
 - Travel services are not tangible personal property.
 - Travel services are not protected by Public Law 86-272.

Income Taxable for Online Sales Platform? (cont'd)

- Circuit Court (Dane Co. May 31, 2023):
 - Found that the Wisconsin Tax Appeals Commission improperly granted summary judgment.
 - Regarding the affidavit provided by ASAP Cruises, the Circuit Court found: "in the light most favorable to ASAP, a reasonable person could infer . . . that ASAP's business activity was not to sell services but was instead to sell the software contained on its online platform."

Income Taxable for Online Sales Platform? (cont'd)

- The material dispute created by the affidavit testimony is genuine.
- The standard is not whether the affidavit testimony is "self-serving" or other "evidence in the record . . . corroborates [the] statement."
- Wisconsin Tax Appeals Commission "committed a procedural error when it granted summary judgment."

Early Withdrawal from 401(k) - Penalty

- *Scott Cech v. Wisconsin Department of Revenue* (WTAC June 5, 2023).
- Taxpayer took an early distribution from his 401(k) plan and used most of the funds on a first home purchase.
- Taxpayer included the amount of the distribution in his federal and Wisconsin tax returns as taxable income, but did not report an early withdrawal penalty on either return.

Early Withdrawal from 401(k) - Penalty (cont'd)

- I.R.C. § 72(t)(1) imposes additional tax on early distributions from a "qualified retirement plan."
- I.R.C. § 4974 defines "qualified retirement plan."
- Pursuant to Wis. Stat. § 71.83(1)(a)(6), "[a]ny natural person who is liable for a penalty for federal income tax purposes under . . . § 4974 . . . of the Internal Revenue Code is liable for 33 percent of the federal penalty"

Early Withdrawal from 401(k) - Penalty (cont'd)

- The I.R.C. § 72(t)(2)(F) exception to the early withdrawal penalty for first time homebuyers applies to distributions from an "individual retirement plan" and only up to \$10,000.
- Central issue was whether a 401(k) is an "individual retirement plan" within the meaning of the first time homebuyer exception to either the Wisconsin or federal early distribution penalties.

Early Withdrawal from 401(k) - Penalty (cont'd)

- The *pro se* taxpayer made no legal arguments addressing the main issue and did not prove his entitlement to the exemption.
- The Wisconsin Tax Appeals Commission cited an IRS webpage "Retirement Topics - Exceptions to Tax on Early Distributions" as the most helpful source in assessing the issue.

Early Withdrawal from 401(k) - Penalty (cont'd)

"Retirement Topics - Exceptions to Tax on Early Distributions"

| Exception | The distribution will NOT be subject to the 10% additional early distribution tax in the following circumstances: | Qualified Plans (401(k), etc.) | IRA, SEP, SIMPLE IRA* and SARSEP Plans | Internal Revenue Code Section(s) |
|------------|---|--------------------------------|--|----------------------------------|
| Homebuyers | qualified first-time homebuyers, up to \$10,000 | no | yes | 72(t)(2)(F) |

<https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-tax-on-early-distributions>

Retirement Plan Distributions - Taxed

- *Edward Lewis v. Wisconsin Department of Revenue* (WTAC Dec. 6, 2022).
- Tax years 2016, 2017, 2018, and 2019
 - IRS audited 2016
 - On audit, Wisconsin taxed distributions from retirement plans and assessed early withdrawal penalties.
 - Wisconsin Department of Revenue filed motion for summary judgment.
 - Taxpayer did not file any responsive pleadings.

Individual Income Tax Rate - Decrease

- 2023 Wis. Act 19 reduced tax rate for first and second brackets. Effective for taxable years beginning after December 2022.
- Individual income tax rate for the first bracket reduced from **3.54% to 3.5%**. Applies to (a) fiduciaries, single individuals and heads of household on the first \$13,810 of taxable income; (b) married persons filing jointly on the first \$18,420 of taxable income; and (c) married persons filing separately on the first \$9,210 of taxable income.

Individual Income Tax Rate - Decrease (cont'd)

- Individual income tax rate for the second tax bracket reduced from **4.65% to 4.40%**.
- The second bracket applies to (a) fiduciaries, single individuals and heads of household on taxable income exceeding \$13,810 but not exceeding \$27,630; (b) married persons filing jointly on taxable income exceeding \$18,420 but not exceeding \$36,840; and (c) married persons filing separately on taxable income exceeding \$9,210 but not exceeding \$18,420.

Apportionment of Income of Interstate Brokers-Dealers, Investment Advisers, Investment Companies, and Underwriters

- 2023 Wis. Act 19 revises the apportionment rule (Tax 2.495) regarding brokerage houses, investment advisers, investment companies, and underwriters.
- Applies retroactively to taxable years beginning on January 1, 2022.

Apportionment of Income (cont'd)

- Department of Revenue's authority to substitute net gains (net of commissions) from sales of trading assets does not apply to any taxpayer who:
 - before January 1, 2023, elected to use the customer billing address method and has not revoked that election and;
 - for any taxable year beginning on or after January 1, 2022, determines its receipts factor by using the average of the receipts factors determined using gross receipts, net of commissions, and net gain, net of commissions, from sales of trading assets for the taxable year, with all other components of the receipts factor remaining the same.

Apportionment of Income (cont'd)

- Any such taxpayer may compute its receipts factor using that averaging method.
- The Department of Revenue cannot require any taxpayer who elected before January 1, 2023, to use the customer billing address method, and who has not revoked that election, to use any other method of determining its receipts factor.

Credits

Income/Franchise Tax

Manufacturing and Agricultural Credit

- 2023 Wis. Act 12 made changes to the manufacturing tax credit to limit any effect on the ability of taxpayers who only have personal property assessed as manufacturing property to claim the manufacturing credit.
- Effective for taxable years beginning after December 31, 2023.

Manufacturing and Agricultural Credit (cont'd)

- Any establishment classified as manufacturing prior to January 1, 2024, is presumed to be engaged in manufacturing and does not need to submit an application.

Manufacturing and Agricultural Credit (cont'd)

Manufacturing Classification

- A person wishing to classify their establishment as manufacturing must file an application no later than July 1 of the taxable year to claim the credit.
- The Department of Revenue must make a determination and provide written notice by December 31.
- A determination regarding classification may be appealed to the State Board of Assessors.

Manufacturing and Agricultural Credit (cont'd)

- Changes to Wis. Stat. § 71.07(5n) definition of "Manufacturing Property Factor"
- The term "real and personal property assess under s. 70.995" is replaced by "land and depreciable property" in both the numerator and denominator.

Manufacturing and Agricultural Credit (cont'd)

Qualified Production Property

- 2023 Wis. Act 12 expanded the definition of "qualified production property" for purposes of claiming the manufacturing credit to include tangible personal property manufactured in whole or in part by the claimant at an establishment located in Wisconsin and classified as manufacturing under Wis. Stat. § 70.995(5n).

Manufacturing and Agricultural Credit (cont'd)

- "Qualified production property" includes tangible personal property manufactured on property located in Wisconsin and assessed as manufacturing property or approved to be classified as manufacturing real property under Wis. Stat. § 70.995, even if it is not eligible to be listed on the manufacturing roll until January 1 of the following year.

Manufacturing and Agricultural Credit (cont'd)

Eligible Qualified Production Activities Income

- If the claimant's entire qualified production activities income results from the sale of tangible personal property that was manufactured, produced, grown, or extracted entirely in Wisconsin by the claimant, it is not necessary to multiply the qualified production activities income by the manufacturing or agricultural property factor.

Research Credit

- 2023 Wis. Act 19 increased the refundable portion of the research credit.
 - For taxable years beginning after December 31, 2023.
 - Lesser of (i) 25% of the current research credit or (ii) the unused amount after subtracting the current year research credit used to offset any tax liability.

Research Credit (cont'd)

- Wisconsin Department of Revenue issued Publication 131 in August 2023, updating its guidance on tax incentives for conducting qualified research in the state, including:
 - What constitutes qualified research
 - How to claim the research credit and sales/use tax exemption
 - What records the taxpayer must keep to document qualified research

Research Credit (cont'd)

Wisconsin Department of Revenue Publication 131

- The updated publication notes that Wisconsin laws define which expenses are eligible to be used in the calculation of the credit by referencing the definition of "qualified research" found at IRC Sec. 41 and the related federal regulations.
- However, because Wisconsin has not adopted Sec. 13206 of the Tax Cuts and Jobs Act (P.L. 115-97), the pre-2022 rules apply for Wisconsin purposes.

Miscellaneous

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Disclosure to Wisconsin Economic Development Corporation

- 2023 Wis. Act 19 expands the Wisconsin Economic Development Corporation ("WEDC") authority to examine tax returns to the extent necessary to administer tax benefit programs, including review of tax benefit applications, compliance with tax benefit certifications, and the confirmation of the amount of tax benefits used. WEDC was also given authority to receive copies of returns and claims for the same purposes.
- Effective October 1, 2023.

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Proposed Legislation

Income/Franchise Tax

Proposed Legislation

- Flat Income Tax - 2023 Senate Bill 1 and 2023 Assembly Bill 1
 - Propose 3.25% flat income tax rate achieved by reductions each year until flat rate imposed in 2026.
- Reduce Income Tax for Third Bracket - 2023 Senate Bill 435 and 2023 Assembly Bill 386
 - Propose reduction of income tax rate from 5.3% to 4.40% for third bracket.

Proposed Legislation (cont'd)

- Increase annual cap of Wisconsin Housing and Economic Development Authority Low-Income Housing Tax Credit Program - 2023 Senate Bill 40 and 2023 Assembly Bill 39
 - Increase annual amount of tax credits WHEDA certifies from \$42 million to \$100 million.
 - Adds requirement that at least 35% of credits are allocated to rural areas.

Proposed Legislation (cont'd)

- Farmland Preservation Agreements and Tax Credits - 2023 Senate Bill 134 and 2023 Assembly Bill 133
 - Proposed increases in farmland preservation tax credit to minimum \$10 per qualifying acre.
 - Adds new category of farmland that qualifies for the tax credit to the extent covered by an agricultural conservation easement.

Proposed Legislation (cont'd)

- Income/Franchise Exemption for Broadband Expansion Grants - 2023 Senate Bill 266 and 2023 Assembly Bill 272
 - Exempts income received from state or federal grant for broadband expansion in Wisconsin.
 - Prohibits claiming the exemption under the bill and the exemption under current law for the same grant.

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Property Taxes

Recent Laws & Cases

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Assessment / Valuation

Property Tax

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Not All Vacant Stores Are Dark Stores

- *Lowe's Home Centers, LLC v. City of Delavan*, 2023 WI 8 (Feb. 16, 2023).
- 2016 and 2017 property tax assessments
 - Lowe's Home Improvement store = 134,574 sq. ft.
 - 14.525 acres
 - \$8,922,300
 - Taxpayer opinion = \$4.6 million

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Not All Vacant Stores Are Dark Stores (cont'd)

- Presumption of correctness
 - Applies with the filing of the assessment along with the assessor's affidavit.
 - Taxpayer must provide significant contrary evidence
- Taxpayer valuation
 - Sales comparison approach
 - Three former American TV locations (two sold to Steinhafel's, one sold and converted to go-kart racing track)
 - Former K-Mart store

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Not All Vacant Stores Are Dark Stores (cont'd)

- Former Lowe's store
- Former Target store
- City valuation
 - Sales comparison approach (different properties)
 - All properties occupied at time of sale
- Can a vacant property sale be a comparable sale? **YES**
 - "A vacant store is considered dark when it is vacant beyond the normal time period for that commercial real estate marketplace and can vary from one municipality to another." WPAM 9-12 (2016).

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Not All Vacant Stores Are Dark Stores (cont'd)

- "Vacant" and "dark" are not synonymous
- All dark stores are vacant but not all vacant stores are dark (dark = subset of vacant).
- "Comparable" properties
 - "Comparable sales refer to properties that are similar to the subject property in age, condition, use, type of construction, location, design, physical features and economic characteristics." WPAM 7-24.
 - If property is occupied = demand for the use.
 - "A property in receivership is often sold under vastly different economic conditions and subject to vastly different incentives from a property that is not in receivership."

Not All Vacant Stores Are Dark Stores (cont'd)

- Exposure time
- Multi-tenant shopping centers (used by City)
 - Less than ideal
 - Adjustments made that were "reasonable, sufficient, and credible"
- Circuit court's factual findings, including credibility determinations:
 - Not clearly erroneous
 - Not "against the great weight and clear preponderance of the evidence."

Not All Vacant Stores Are Dark Stores (cont'd)

- Concurrence (3 justices)
 - Deference to circuit court
 - Should not be given on a circuit court's "general-comparability analysis deference"
 - "If the power to tax is the power to destroy, taxpayers must have access to meaningful appeal when challenging property tax assessments."
 - "If appellate courts defer to circuit courts' legal conclusions in property tax assessment cases, taxpayers will lose any avenue for meaningful appeal."

Presumption of Correctness Overcome -> But Burden of Persuasion Not Met

- *Kerry Inc. v. Wisconsin Department of Revenue* (WTAC Nov. 21, 2022)
- Kerry Inc. = Dairy production business in Owen, Wisconsin.
 - 22.13 acres of land
 - 121,279 sq. ft. improvement - used as dried and liquid food ingredient processing plant.
 - Tax years 2017 and 2018
 - Assessed value = \$3,690,000 (2017) and \$3,735,000 (2018)
 - Kerry Inc.'s opinion of value = \$975,000

Presumption of Correctness Overcome -> But Burden of Persuasion Not Met (cont'd)

- Taxpayer:
 - "bears a heavy burden to show error in the assessments"
 - To overcome the presumption of correctness
 - "Should the taxpayer overcome that burden, the taxpayer continues to carry the burden of persuasion; that is, the taxpayer must show that its opinions of value are more credible than those asserted by the Department."

Presumption of Correctness Overcome -> But Burden of Persuasion Not Met (cont'd)

- Building residual method (used by Wisconsin Department of Revenue)
 - Comparable sales - value for land
 - Compares the residual, "the improvement sale price" to the subject property improvements
 - Although found to be inherently unreliable, use of the building residual method - by and of itself - not enough to overcome the presumption of correctness.
 - In a prior case, use of the building residual method combined with problematic comparable sales = sufficient to overcome the presumption of correctness.

Presumption of Correctness Overcome -> But Burden of Persuasion Not Met (cont'd)

- Wisconsin Department of Revenue methodology:
 - Did not take unique land/parcel factors in account
 - Numerous steps, "each one producing more opportunity for estimation error"
 - Relied on dated sales at trial (2011 sale for the 2017 and 2018 assessments)
 - None of the sales are food-processing plants
 - WDOR did not include even one of 5 possible sales of computer-generated list of candidates with higher correlations to the property
 - Location should not have been 100%

Presumption of Correctness Overcome -> But Burden of Persuasion Not Met (cont'd)

- Taxpayer methodology:
 - More direct - and potentially more reliable.
 - Most of sales were not comparable, had issues affecting the sales price, or both.
 - Occurred after assessment dates
 - Not food grade facilities
 - Vacant for at least six months prior to sale
 - Changed use after sale to non-food grade use
 - Below market rent

Presumption of Correctness Overcome -> But Burden of Persuasion Not Met (cont'd)

- Sales chart contained mathematical errors, which did result (or should have resulted) in material differences to opinion of value.
- Inconsistent adjustments, e.g., to site coverage
- Some sales not adjusted for larger size.
- None of the non-food-processing sales adjusted up for inferior cleanliness standards.
- "These types of errors were extremely damaging to the credibility of Petitioner's value."

Presumption of Correctness Overcome -> But Burden of Persuasion Not Met (cont'd)

- Wisconsin appraiser's license.
- Concerned about familiarity of taxpayer's appraiser with valuing manufacturing property - e.g., "the Wisconsin Property Assessment Manual . . . requires that comps should not be vacant."
- At trial, described property as below average.
 - In post-trial brief, agreed with the WDOR that the building is in fair condition.

Presumption of Correctness Overcome -> But Burden of Persuasion Not Met (cont'd)

- Wisconsin Tax Appeals Commission said it "suspect[ed] that the true fair market value of the Property lies somewhere between the Department's assessed value and the Petitioner's appraised value" - but no authority to split the difference.
- Although overcame presumption of correctness, taxpayer's valuation not more credible -> Did not meet burden of persuasion.

Fifth Amendment Takings Clause

- *Tyler v. Hennepin County, Minnesota*, 598 U.S. 631 (2023).
- Geraldine Tyler owned a condominium that Hennepin County seized and sold for \$40,000 to pay an accumulated \$2,300 in property taxes and \$13,000 in interest and penalties.
- The County kept the excess sale proceeds (of \$25,000) pursuant to Minnesota law. Tyler had no ability to recover the excess sale proceeds under Minnesota law.

Fifth Amendment Takings Clause (cont'd)

- Tyler filed a class action against the County. The District Court granted the County's motion to dismiss.
- On appeal, the Eighth Circuit held that "[w]here state law recognizes no property interest in surplus proceeds from a tax-foreclosure sale conducted after adequate notice to the owner, there is no unconstitutional taking." 26 F.4th 789, 793 (8th Cir. 2022).

Fifth Amendment Takings Clause (cont'd)

- In a unanimous opinion, the Supreme Court overruled the Eighth Circuit and District Court, determining that Tyler plausibly alleged that Hennepin County unconstitutionally retained the excess value of her home above her tax debt in violation of the Takings Clause.
- The County "could not use the toehold of the tax debt to confiscate more property than was due."

Exemption

Property Tax

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"CIP" Equipment Does Not Qualify for Manufacturing Property Tax Exemption

- *Saputo Cheese USA, Inc. v. Wisconsin Department of Revenue*, No. 2022AP195 (Wis. Ct. App. May 24, 2023).
- Saputo manufactures and distributes cheese. After each batch of cheese is complete, Saputo uses clean-in-place ("CIP") equipment to rinse and clean cheese production vats. No raw materials used to produce cheese ever pass through the CIP equipment and the CIP equipment does not operate while the cheese is being manufactured.

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"CIP" Equipment Does Not Qualify for Manufacturing Property Tax Exemption (cont'd)

- Saputo appealed a Circuit Court order that affirmed a Wisconsin Tax Appeals Commission ruling denying that the CIP equipment qualifies for tax exemption under Wis. Stat. § 70.11(27).
- Wis. Stat. § 70.11(27)(b) allows tax exemption for "[m]achinery and specific processing equipment . . . that are used exclusively and directly in the production process in manufacturing tangible personal property"

"CIP" Equipment Does Not Qualify for Manufacturing Property Tax Exemption (cont'd)

- Court of Appeals determined that the CIP equipment is neither "used directly" in production of cheese nor is it used in the "production process" as those terms are defined in the statute.
- The CIP equipment does not process any raw materials and it is not used until after the production process is complete.

"CIP" Equipment Does Not Qualify for Manufacturing Property Tax Exemption (cont'd)

- "To be exempt, the statute requires that the equipment be used before the finished product is conveyed to the first point of storage. Wis. Stat. § 70.11(27)(a)5. This means that the CIP equipment cannot be involved with the manufacturing process because, as Saputo has admitted, the cleaning cycle occurs only after the cheese has been manufactured and cleared from the production equipment." 2022AP195, ¶ 11.

Imposition

Personal Property Tax
Manufacturing
Special Assessments
TIF Districts
Transportation Utility Fees

Personal Property Tax

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Personal Property Tax - Repealed

- 2023 Wis. Act 12, beginning with property tax assessments as of January 1, 2024, repeals Wisconsin's tax on tangible personal property.
- Wis. Stat. § 70.015: "Beginning with the property tax assessments as of January 1, 2024, no tax shall be levied under this chapter on personal property."
- Wis. Stat. § 70.02: Definition of "general property" removes reference to personal property.
- Wis. Stat. § 70.111(28): Exemption for business and manufacturing personal property.

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Personal Property Tax - Repealed (cont'd)

- References to personal property taxes removed from definition of property taxes eligible for various types of credits effective for taxable years beginning after December 31, 2023:
 - Veterans and Surviving Spouse Property Tax Credit - Wis. Stat. § 71.07(6e)(a)5.
 - School Property Tax Credit - Wis. Stat. § 71.07(9)(a)3.
 - Homestead Credit - Wis. Stat. § 71.52(7).

Personal Property Tax - Repealed (cont'd)

- Classification Changes (Wis. Stat. § 70.17):
 - Manufactured and mobile homes (if not exempt)
 - Buildings, improvements, and fixtures on leased lands, exempt lands, forest croplands, and managed forest lands.
 - Leasehold improvements?

Personal Property Tax - Repealed (cont'd)

- 2023 taxes
 - Property tax bill in December 2023, payable by January 31, 2024.
- Omitted property
- Manufacturing real property returns

Manufacturing

Manufacturing

- Excluded from Wisconsin Department of Revenue assessment: ". . . property not contiguous with or located within 1,000 feet of the parcel on which the production process . . . occurs" Wis. Stat. § 70.995(5).
- New manufacturing classification request required?
 - Ownership or name - NO
 - Location - YES

Manufacturing (cont'd)

- Revocation - not retroactive. Wis. Stat. § 70.995(5n)(b).
- Personal property used in manufacturing - if manufacturing activity terminates, the Wisconsin Department of Revenue must be notified within 60 days. Wis. Stat. § 70.995(5n)(b).

Special Assessments

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Special Assessment - Service of Appeal

- *Greenwald Family Limited Partnership v. Village of Mukwonago*, 2023 WI 53.
- Greenwald Family Limited Partnership ("Greenwald") owns properties in the village of Mukwonago.
- In 2019, the village created a special assessment district and levied special assessments against properties in the district, including one owned by Greenwald.

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Special Assessment - Service of Appeal (cont'd)

- Greenwald filed an action in Circuit Court challenging the special assessment pursuant to Wis. Stat. § 66.0703.
- Greenwald served the summons and complaint on the Mukwonago **village attorney**.

Special Assessment - Service of Appeal(cont'd)

- Wis. Stat. § 66.0703(12)(a) "The person appealing shall **serve a written notice of appeal upon the clerk of the city, town or village** and execute a bond to the city, town or village in the sum of \$150 with 2 sureties or a bonding company to be approved by the city, town or village clerk, conditioned for the faithful prosecution of the appeal and the payment of all costs that may be adjudged against that person"

Special Assessment - Service of Appeal (cont'd)

- The Village moved to dismiss the complaint, arguing that the Circuit Court lacked subject matter jurisdiction or competency to proceed because Greenwald did not serve a written notice of appeal on the village clerk. The Circuit Court granted the motion and dismissed the action.
- Court of Appeals affirmed - the Circuit Court dismissal.

Special Assessment - Service of Appeal (cont'd)

- In a 4-3 opinion, the Wisconsin Supreme Court affirmed the Court of Appeals, finding the meaning of Wis. Stat. § 66.0703(12)(a) unambiguous.
- "The statute's plain meaning mandates service of written notice on the Village clerk, which Greenwald did not accomplish. Therefore, Greenwald's failure to comply with § 66.0703(12)(a) requires dismissal of the action." 2023 WI 53, ¶ 3.

Special Assessment - Service of Appeal (cont'd)

- Wis. Stat. § 801.14(2), which provides for service on the attorney of a party to the proceeding, did not apply in this case because the Village clerk was not a "party" to the action. 2023 WI 53, ¶ 47.

Special Assessment - Service of Appeal (cont'd)

- Dissent: Service was proper under several alternatives.
- The Village attorney was a proper party to receive service under Wis. Stat. § 801.14(2) and had either (i) held himself out as a person "apparently" able to receive process, under Wis. Stat. § 801.11(4)(b) or (ii) had consented to accept service in an email, representing consent on behalf of the Village of accept service in the manner it was received, under Wis. Stat. § 801.18(5)(d). 2023 WI 53, ¶ 50.

TIF Districts

Exceptions for Pleasant Prairie Tax Incremental District Removed

- 2023 Wis. Act 8 eliminates an exception to the Wisconsin Statutes governing the establishment and operation of tax incremental districts (TID).
- The exception related to TID Number 2 in the Village of Pleasant Prairie, which terminated in 2022. TID Number 2 was not subject to the generally applicable "12% limit" relating to creation of the TID, nor was it subject to the generally applicable limits on modification of TID boundaries.

Developer-Financed Tax Incremental Districts

- 2023 Assembly Bill 96 and 2023 Senate Bill 103 would allow cities, villages, and certain towns to create developer-financed tax incremental districts (TID), which are excepted from the general rule that the equalized value of taxable property of a TID plus the value increment of all existing TIDs in a city or village may not exceed 12% of the total equalized value of taxable property in the city or village and the requirement that all areas of a TID be contiguous.

Transportation Utility Fees

Transportation Utility Fees Subject to Municipal Levy Limits

- *Wisconsin Property Taxpayers, Inc. v. Town of Buchanan*, 2023 WI 58.
- Town of Buchanan needed money in excess of its current property tax levy limit to fund reconstruction of as much as 44% of its roads over the next 10 years.
- Town residents passed a referendum to raise funds through a transportation utility fee ("TUF").

Transportation Utility Fees Subject to Municipal Levy Limits (cont'd)

- Wis. Stat. § 66.0827 authorizes municipalities to establish utility districts to fund highways, sewers, and other public improvements in the district. The funding for a utility district must be provided through taxation of property in the district.

Transportation Utility Fees Subject to Municipal Levy Limits (cont'd)

- Under the Town's funding scheme, all residential properties pay the same TUF amount annually, but commercial properties must pay a variable fee based on the size and type of business and the number of estimated "trips" on municipal roads the business is expected to generate.
- Result was a net increase in municipal tax revenue of approximately 34% above the property tax levy limit.

Transportation Utility Fees Subject to Municipal Levy Limits (cont'd)

- Wisconsin Property Taxpayers, Inc. brought an action against the Town, alleging the TUF is a property tax subject to municipal levy limits under Wis. Stat. § 66.0602. The Circuit Court granted summary judgment in favor of the Town.
- Parties filed a joint petition for bypass of the Court of Appeals, which the Wisconsin Supreme Court granted.

Transportation Utility Fees Subject to Municipal Levy Limits (cont'd)

- In a unanimous opinion, the Wisconsin Supreme Court held the TUF is a property tax because the utility district is funded by taxation of property in the district.
- Because the Town referendum did not authorize an increase in the levy limit, the taxation of property funding the utility district had unlawfully exceeded the municipal property tax levy limits.

Transportation Utility Fees Subject to Municipal Levy Limits (cont'd)

- "In calculating estimated use of roads, the Town bases the TUF on the class of the property and its commercial characteristics, not the value of the property. Because Wis. Stat. § 66.0827 does not authorize 'taxation of property' to be based on anything other than property value, the TUF's assessment methodology is unlawful." 2023 WI 58, ¶ 18.

Unclaimed Property

Recent Cases

Unclaimed Property - MoneyGram Case

- *Delaware v. Pennsylvania et al.*, 598 U.S. 115 (2023).
- "Official checks" issued by MoneyGram
 - Retail Money Orders
 - Agent Check Money Orders
 - **Agent Checks**
 - **Teller's Checks** (last two, collectively "Disputed Instruments")

Unclaimed Property - *MoneyGram* Case

- Purchaser pays face value of the check to the selling bank plus fees. Bank sends the funds to MoneyGram. Purchaser gives the check to the payee, who can cash the check at a bank, which will then be reimbursed by MoneyGram.
- "Third party bank checks"?
 - Common law applies
 - Escheat to state where company is incorporated.
 - MoneyGram = incorporated in Delaware.

Unclaimed Property - *MoneyGram* Case (cont'd)

- Or "money order, traveler's check, or other **similar** written instrument (other than a third party bank check) on which a banking or financial organization or a business association is directly liable"?
 - If so, the Disposition of Abandoned Money Orders and Traveler's Checks Act - or Federal Disposition Act ("FDA") - applies.
 - Primary escheatment rule = place-of-purchase rule

Unclaimed Property - *MoneyGram* Case (cont'd)

- Special Master appointed
 - First Interim Report - Found Disputed Instruments covered by the FDA
 - Briefs and oral argument
 - Second Interim Report - Concluded many of the Disputed Instruments were or could be "third party bank checks"

Unclaimed Property - *MoneyGram* Case (cont'd)

- U.S. Supreme Court:
 - Disputed Instruments = Prepayment of a specified amount of money to be transmitted to a named payee
 - Similar to money orders
 - Because MoneyGram does not keep records of creditor addresses as a matter of business practice, would otherwise escheat inequitably under common law

Unclaimed Property - *MoneyGram* Case (cont'd)

- No definition for "third party bank check"
 - Special Master "valiantly attempted to bring clarity to this term, adopting three different definitions of 'third party bank check' over the course of this litigation."
 - "Ultimately, between the parties and the Special Master, we have been offered at least six disparate definitions of the term."

Unclaimed Property - *MoneyGram* Case (cont'd)

- Delaware - "'third party bank check' means a check signed by a bank officer and paid through a third party. Not surprisingly, that definition fits the Disputed Instruments like a glove, given that they are signed by bank employees and then ultimately paid through MoneyGram, a nonbank third party when presented."
- No support whatsoever.
- Own expert disagreed.

Excise Taxes

Cigarette Tax

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Increase in Cigarette Tax Stamp Discount

- 2023 Wis. Act 19 amends Wis. Stat. § 139.32(5).
- The discount on cigarette tax stamps purchased by cigarette manufacturers, bonded direct marketers, and distributors is increased from 0.8% to 1.25%.
- Effective for cigarette tax stamps purchased on or after October 1, 2023.

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Miscellaneous

Streaming Companies - Not Subject to Tax Under Illinois' Cable and Video Competition Law

- East St. Louis filed lawsuit against video streaming services.
 - Claimed owed fees, up to 5% of gross revenue.
- Court dismissed the action
 - Found only the Illinois attorney general had enforcement authority under the Cable and Video Competition Law of 2007 (requires video and cable service providers to register with the state).
 - East St. Louis also argued claims of trespassing, unjust enrichment and ordinance violations.

Streaming Companies - Not Subject to Tax Under Illinois' Cable and Video Competition Law

- Seventh Circuit affirmed (October 13, 2023).
 - Not "cable service or video service."
 - No "use" of the public way for communication; no trespass.
 - No "resale" of "cable television service."

No More Free Cheese

- 2023 Wis. Act 7 repealed Wis. Stat. § 41.11(5) "Cheese Distribution".
- The Department of Tourism is no longer required to distribute free cheese to the public at tourist information centers from May to September.
 - Department of Tourism no longer operates tourist information centers (based on statutory change in 2009).

Questions?

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Thank You!

This presentation provides information of a general nature. None of the information contained herein is intended as legal advice or opinion relative to specific matters, facts, situations or issues. Additional facts and information or future developments may affect the subjects addressed in this presentation. You should consult with a lawyer about your particular circumstances before acting on any of this information because it may not be applicable to you or your situation.

9:40 – 10:40 a.m.

Wisconsin Department of Revenue Update

Nate Weber, CPA, *Director, Office of Technical Services Division
of Income, Sales & Excise Tax, Wisconsin Department of Revenue*



Wisconsin Tax Update

WI Dept of Revenue | Division of Income, Sales & Excise Tax
Fall 2023

Updated 10-20-2023



Mission

Strengthen Wisconsin through fair tax and lottery administration, while educating and serving the public, our customers and communities.

Vision

To be the premier agency in providing innovative, accessible resources, and exceptional customer service built on a foundation of trust, inclusivity and creativity.

Values

- Integrity
- Knowledge
- Innovation
- Empathy
- Inclusivity
- Security



Topics

- ▷ Income/Franchise Tax Update
- ▷ Sales/Use Tax Update
- ▷ Unclaimed Property Update
- ▷ Personal Property Tax
- ▷ Other Updates
- ▷ My Tax Account (MTA) Updates
- ▷ Statistics
- ▷ Contact Us



3

Internal Revenue Code Update



4

Internal Revenue Code (IRC) Update

Tax Year 2023

- ▷ Wisconsin follows the IRC as of December 31, 2020, with certain exceptions
- ▷ Wisconsin computes depreciation and amortization using IRC in effect on January 1, 2014, with certain exceptions
- ▷ Wisconsin has not adopted federal bonus depreciation provisions
- ▷ Wisconsin follows changes to IRC section 179 expensing



IRC Update

Federal laws that have passed since December 31, 2020:

- Public Law 117-2 – American Rescue Plan Act of 2021
- Public Law 117-6 – PPP Extension Act of 2021
- Public Law 117-44 – Surface Transportation Extension Act of 2021
- Public Law 117-52 – Further Surface Transportation Extension Act of 2021
- Public Law 117-58 – Infrastructure Investment and Jobs Act
- Public Law 117-103 – Consolidated Appropriations Act, 2022
- Public Law 117-167 – Supreme Court Security Funding Act of 2022
- Public Law 117-169 – Inflation Reduction Act of 2022
- Public Law 117-263 – James M. Inhofe National Defense Authorization Act – 2023
- Public Law 117-286 – HR 5961
- Public Law 117-328 – Consolidated Appropriations Act, 2023



IRC Update – Potentially Adopted

WI Senate Bill 389 and Assembly Bill 406

- ▷ Updates Wisconsin's definition of Internal Revenue Code to December 31, 2022
- ▷ Adopts most federal IRC provisions, with exceptions
- ▷ Does not adopt depreciation changes – WI follows IRC as of 1/1/14



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IRC Update – Potentially Adopted

▷ Public Law 117-2 (American Rescue Plan Act)

- **IRC 32: Earned income credit** – Allows married filing separate individual who lives apart from spouse the last 6 months of the year or has a divorce or separation instrument by the end of the tax year to claim EIC
- **IRC 32: Earned income credit** – Raises investment income limit to \$11,000
- **IRC 864: Election to allocate interest on a worldwide basis** – Repeals retroactively to 2021 taxable year
- **Numerous retirement provisions** - Automatically apply for Wisconsin under secs. 71.01(7n), 71.22(5m)(a), 71.34(1m)(a), and 71.42(2m), Wis. Stats.



8

IRC Update – Potentially Adopted

▷ Public Law 117-58 (Infrastructure Investment and Jobs Act)

- **IRC 7508A: Extensions** – retroactive to taxable years after December 31, 2020
 - Treats multiple declarations of federally declared disasters as a separate incident period allowing for a 60-day extension for each incident period. Previously, if a subsequent federally declared disaster occurred during a current disaster period, the extension would extend 60 days beyond the first day of the incident period for the subsequent disaster.
 - Adds "significant fires" to the list of reasons certain deadlines may be extended.
- **IRC 118: Contributions to the capital of a corporation** - Certain contributions received by a regulated public utility are excluded from gross income of a corporation.



IRC Update – Potentially Adopted

▷ Public Law 117-58 (Infrastructure Investment and Jobs Act)

- **IRC 142 & 146: Exempt facility bonds** – Added qualified broadband projects and carbon dioxide capture facilities to the list of federally exempt interest (Note: interest not included in federal adjusted gross income is added back to Wisconsin income – sec. 71.05(6)(a), Wis. Stats.)



IRC Update – Potentially Adopted

▷ Public Law 117-169 (Inflation Reduction Act of 2022)

- **IRC 40A, 6426, & 6427: Sustainable aviation fuel credit** – Amount of credit is included in gross income
- **IRC 179D & 312: Energy efficient commercial buildings deduction & effects on earnings and profits** – Expanded eligibility. Efficiency requirements updated. Deduction decreased. For purposes of determining E&P for real estate investment trust corporations, the deduction is allowed in the year placed in service as opposed to over a period of five taxable years.
- **IRC 6418, 50, 39: Transfers of certain credits** - Certain taxpayers (not tax-exempt entities) are allowed a one-time transfer of certain tax credits. Any payments received in exchange for the transfer of credits are excluded from income, and any amounts paid to obtain a transferred credit cannot be deducted from income.



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IRC Update – Potentially Adopted

▷ Public Law 117-328 (Consolidated Appropriations Act 2023)

- **IRC 45E: Small employer pension plan startup costs-**
 - Federal** - If the employer claims the credit under sec. 45E(a) or 45E(f), IRC, they may not deduct the startup costs used to compute those credits
 - Wisconsin** – Employer may make a different election and deduct the startup costs
- **Sections 529 & 408: Qualified tuition programs & individual retirement accounts** - Certain distributions from a qualified tuition program that have been maintained for a 15-year period are excluded from gross income of the distributee. The distributions may be transferred to a Roth IRA and treated as a "qualified rollover contribution".
- **Section 529A: Qualified ABLE programs** – Changes the age requirement from 26 to 46



12

IRC Update – Potentially Adopted

▷ Public Law 117-328 (Consolidated Appropriations Act 2023)

- **Section 1042: Sales of stock to employee stock ownership plans or certain cooperatives** – Allows the deferral of tax for certain sales of employer stock to employee stock ownership plan sponsored by S corporation
- **Sections 170 & 6662-6664: Charitable contributions and gifts, accuracy and fraud penalties** – Qualified conservation contributions by a pass-through entity are not treated as qualified conservation contributions if the amount of contribution exceeds 2.5 times the sum of each owner's basis in the pass-through entity.



13

IRC Update – Potentially Adopted

▷ IRC 1202: Small business stock gain exclusion

- Continuous conformity to IRC 1202
- Retroactive adoption to taxable years beginning after December 31, 2018 (amended WI returns allowed if passed)
- Federal exclusion is 100% for stock acquired after 9/27/2010
- WI exclusion (if not passed) is 50% for stock acquired after 12/31/13



14

IRC Update – Potentially Adopted

▷ WI Senate Bill and Assembly Bill 364

- **IRC 223: Health savings accounts** - Extends health savings account safe harbor for the absence of telehealth deductible for plan years before January 1, 2025
- Continuous conformity and retroactive to taxable year 2022



15

IRC Update – Not Adopted

▷ **IRC 461: Excess business loss limitation**

- Excess loss limitation extended through December 31, 2026 (Public Law 117-2)
- Excess loss limitation extended through December 31, 2028 (Public Law 117-169)
- Wisconsin has not adopted federal excess business loss limitation

▷ **IRC 108: Student loan forgiveness**

- IRC 108(f)(5) - most student loans discharged after December 31, 2020, and before January 1, 2026, are not included in federal gross income (Public Law 117-2)
- Wisconsin follows the old sec. 108(f)(5), IRC (as of 12/31/20), which excludes student loan discharges on account of death or total and permanent disability
- Wisconsin allows exclusion under sec. 108(f)(1) for individuals who work for a certain period of time in certain professions (e.g., Public Service Loan Forgiveness program)



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IRC Update – Not Adopted

▷ IRC 162(m): Excessive employee remuneration

- **Federal** - A publicly-held corporation may not deduct more than \$1,000,000 of compensation paid to any covered employee for the performance of services. The law expands the definition of "covered employee" to CEO, CFO, and the next 5 highest paid employees for purposes of limiting publicly held corporations from deducting certain excessive employee remuneration. Excludes commission and performance-based pay.
- **Wisconsin** - The changes to the definition of "covered employee" by Public Laws 115-97 and 117-2 do not apply for Wisconsin



17

Wisconsin Income/Franchise Tax Law Changes



18

Tax Rate Reduction

2023 Wis. Act 19

- ▷ Effective for tax year 2023 and thereafter
- ▷ Affects individual taxpayers and fiduciaries
- ▷ Tax rate for first income bracket reduced from 3.54% to 3.5%
- ▷ Tax rate for second income bracket reduced from 4.65% to 4.4%
- ▷ See [Wisconsin Tax Bulletin 222](#), page 3 for details on the income ranges for these brackets



19

Capital Loss Deduction

2021 Wisconsin Act 157

- ▷ Capital loss deduction increased from \$500/year to \$3,000/year (\$1,500 for married persons filing a separate return)
- ▷ Applies to individuals, and partnerships and tax-option (S) corporations making the entity-level tax election
- ▷ Effective for taxable years beginning **after December 31, 2022**



20

Commercial Loan exemption

2023 Wis. Act 19

- ▷ Created 71.05(1)(i) and 71.26(1)(i), Wis. Stats.
- ▷ Effective for taxable years beginning January 1, 2023
- ▷ Income from a corporation or a tax option (S) corporation that is a financial institution, including interest, fees, and penalties, derived from a commercial loan is exempt from Wisconsin corporate and individual income tax.
- ▷ The loan must be for five million dollars or less
- ▷ The loan must be provided to a person residing or located in Wisconsin and used primarily for a business or agricultural purpose.



21

Interstate Broker Dealers Apportionment

2023 Wisconsin Act 19

- ▷ A brokerage house, investment adviser, investment company, or underwriter that is engaged in business both in and outside this state must apportion its apportionable income according to sec. Tax 2.495, Wis. Adm. Code.
- ▷ The Act revises sec. Tax 2.495(4), Wis. Adm. Code, to provide that in certain instances DOR cannot order or permit the substitution of net gains for gross receipts in the receipts factor if the use of gross receipts results in substantial distortion of the taxpayer's receipts factor.



22

Interstate Broker Dealers Apportionment

Specifically, DOR cannot substitute net gains for sales of trading assets if:

- ▷ The taxpayer, before January 1, 2023, elected to source its sales of trading assets using the customer billing address method; and
- ▷ The taxpayer has not revoked that election; and
- ▷ The taxpayer, for any taxable year beginning after December 31, 2021, determines its receipts factor under sec. Tax 2.495(4), Wis. Adm. Code, by using the average of the receipts factor determined by using (a) gross receipts, net of commissions, and (b) net gain, net of commissions, from sales of trading assets for the taxable year, with all other components of the receipts factor remaining the same.



23

Refundable Research Credit Increase

2023 Wisconsin Act 19

- ▷ Up to 15% of the research credit computed/claimed on eligible expenses for the taxable year may be refunded, if not used to offset tax due for that taxable year (starting in taxable years beginning after December 31, 2020)
- ▷ The Act increases the refundable portion from 15% to 25% effective for taxable years beginning on or after January 1, 2024



24

Manufacturing and Agriculture Credit

2023 Wis. Act 12

- ▷ Repeals personal property taxes in Wisconsin starting with assessment year 2024 and makes changes to the manufacturing and agriculture credit
- ▷ Qualified Production Property
 - Persons must sell qualified production property to be eligible
 - Qualified production property includes tangible personal property manufactured in whole or in part by the claimant on property that is located in this state and assessed as manufacturing property under sec. 70.995, Wis. Stats. [Real property]
 - The Act expands the definition of "qualified production property" to include tangible personal property manufactured in whole or in part by the claimant with an establishment that is located in this state and **classified** as manufacturing under sec. 70.995(5n), Wis. Stats. [Important for those who don't have real property assessed as manufacturing property]



25

Manufacturing and Agriculture Credit

- ▷ Classifying Personal Property as Manufacturing Property
 - An application must be filed with DOR no later than July 1 of the taxable year.
 - DOR must make a determination and provide notice by December 31 of the year in which the application is filed.
 - An establishment classified as manufacturing prior to January 1, 2024, is presumed to be engaged in manufacturing and does not need to submit an application.



26

Manufacturing and Agriculture Credit

- ▷ Manufacturing Property Factor
 - The Act amended the definition of "manufacturing property factor"
 - Real and personal property assessed under sec. 70.995, Wis. Stats., was replaced with the term "land and depreciable property" for the numerator and denominator.
- ▷ If all qualified production activities income results from sale of tangible personal property that was manufactured, produced, grown, or extracted entirely in Wisconsin, it is not necessary to multiply the qualified production activities income by the property factor.



27

Pass-Through Entity Representative



28

Pass-Through Entity Representative

- ▷ Under sec. 71.80(26)(a), Wis. Stats., each pass-through entity (PTE) must designate a pass-through member or other person with substantial presence in the United States as the pass-through entity representative (PTR).
- ▷ PTR may be different than federal representative.
- ▷ If PTE did not designate a PTR, the department will send a written request for a PTR.
- ▷ If PTE does not designate a PTR within 60 days of the department's request, the department may designate a PTR and notify, in writing, the PTE.
 - PTE may at any time provide a written statement to the department designating a new PTR.



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Pass-Through Entity Representative

- ▷ Form 2 (fiduciary, estates, trusts), Form 3 (partnerships), and Form 5S (tax-option (S) corporations) have a section for the PTE to designate a PTR.
- ▷ PTE may also designate a PTR by submitting a Form PT-R, *Pass-Through Entity Representative*, or a separate statement, that includes all the information requested on Form PT-R, signed by an authorized agent of the PTE.
- ▷ The department will treat the most recently appointed PTR as the sole active PTR under sec. 71.80(26), Wis. Stats.



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Pass-Through Entity Representative

- ▶ PTR powers and duties vs. POA authority for audit determinations at the entity level under sec. 71.745, Wis. Stats.

| Authority for Pass-Through Entity Audit Determination | Power of Attorney | Pass-through Entity Representative |
|--|-------------------|------------------------------------|
| Enter into an agreement to extend the limitation period to make an audit determination | No | Yes |
| Enter into settlement agreements and bind pass-through members to adjustments in audit determination | No | Yes |
| File an appeal of the audit determination | No | Yes |
| Elect to reduce an audit assessment under sec. 71.745(8), Wis. Stats. | No | Yes |
| Elect to have an audit assessment assessed to the pass-through members under sec. 71.745(9), Wis. Stats. | No | Yes |



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Pass-Through Entity Representative

- ▶ Form PT-R or a written statement designating a PTR are sent to:
 - DORAuditPassThrough@wisconsin.gov, or
 - MS 6-81
Wisconsin Department of Revenue
Pass-Through Audit Unit
PO Box 8906
Madison, WI 53708-8906



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Entity-Level Tax Election



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Entity-Level Tax Elections

- ▷ 2017 Wisconsin Act 368 created an election for partnerships and tax-option (S) corporations to pay tax at the entity level on behalf of their pass-through members.
- ▷ **Reminder:** The election or subsequent revocation of the election under sec. 71.21(6)(a) or 71.365(4m)(a), Wis. Stats., **must** be made by the extended due date of the entity's income or franchise tax return.
 - Calendar year partnership extended due date: 9/15
 - Calendar year tax-option (S) corporation extended due date: 10/15



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Pass-Through ELT Election Overview

| 2021 Tax Year (Statistics as of July 15, 2023) | |
|---|---------|
| Tax-Option (S) Corporations (Form 55) Filing Stats | |
| Tax-Option (S) Corporation returns filed | 86,789 |
| Tax-Option (S) Corporation entity-level tax elections filed | 6,048 |
| Percent of entity-level tax elections filed | 6.97% |
| Partnership (Form 3) Filing Stats | |
| Partnership returns filed | 85,382 |
| Partnership entity-level tax elections filed | 3,009 |
| Percent of entity-level tax elections filed | 3.52% |
| Pass-Through Entity Filing Stats - TOTAL | |
| Pass-Through entity returns filed | 172,171 |
| Entity-level tax elections filed | 9,057 |
| Percent of entity-level tax elections filed | 5.26% |



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Claiming the Other State Tax Credit with the Pass-Through ELT Election

► Five scenarios to consider when claiming the Wisconsin other state tax credit:

1. ELT election made in Wisconsin only
2. ELT election made in other state only (non-refundable credit for members)
3. ELT election made in other state only (refundable credit for members)
4. ELT election made in other state only (income excludable for members)
5. ELT election made in Wisconsin and in other state



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Claiming the Other State Tax Credit with the Pass-Through ELT Election

▷ ELT election made in Wisconsin only

- Only the pass-through entity may claim the credit (sec. 71.07(7)(b)2., Wis. Stats.)
- Entity's credit is based on net income or franchise tax **paid by the entity** to another state on that income and the net income tax on that income **paid by the entity** on behalf of its shareholders, partners, and members that are residents of this state on a composite return filed with the other state against the net income or franchise tax otherwise payable to this state on income of the same year (sec. 71.07(7)(b)3., Wis. Stats.)
- Use Schedule ET-OS, *Credit for Net Tax Paid to Another State*, to claim the credit



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Claiming the Other State Tax Credit with the Pass-Through ELT Election

▷ ELT election made in other state only (**non-refundable** credit for members)

- In general, the individual Wisconsin members of the pass-through entity may claim the credit for the period they were a Wisconsin resident during the tax year (sec. 71.07(7)(b)2., Wis. Stats.)
- Member's credit is based on the member's allocable share of net income or franchise tax paid by the entity on their behalf
- Individuals use Schedule OS, *Credit for Net Tax Paid to Another State*, Parts III and IV to claim the credit



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Claiming the Other State Tax Credit with the Pass-Through ELT Election

▷ ELT election made in other state only (**refundable** credit to members)

- In general, the individual Wisconsin members of the pass-through entity may claim the credit for the period they were a Wisconsin resident during the tax year (sec. 71.07(7)(b)2., Wis. Stats.)
- Member's credit is based on the member's net income tax paid to the other state on their individual income tax return filed in the other state (sec. Tax 2.955(2)(a), Wis. Adm. Code)
- Individuals use Schedule OS, *Credit for Net Tax Paid to Another State*, Parts I, II, and IV to claim the credit. Do not reduce the net tax on line 22 of Schedule OS by the individual's credit claimed in the other state for tax paid by the entity in the other state.



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Claiming the Other State Tax Credit with the Pass-Through ELT Election

▷ ELT election made in other state only (income excludable for members)

- In general, the individual Wisconsin members of the pass-through entity may claim the credit for the period they were a Wisconsin resident during the tax year (sec. 71.07(7)(b)2., Wis. Stats.)
- Member's credit is based on the member's allocable share of tax paid by the entity on their behalf
- Individuals use Schedule OS, *Credit for Net Tax Paid to Another State*, Parts III and IV to claim the credit



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Claiming the Other State Tax Credit with the Pass-Through ELT Election

▷ ELT election made in Wisconsin and in other state

- Only the pass-through entity may claim the credit (sec. 71.07(7)(b)2., Wis. Stats.)
- Entity's credit based on net income or franchise tax **paid by the entity** to another state on that income and the net income tax on that income **paid by the entity** on behalf of its shareholders, partners, and members that are residents of this state on a composite return filed with the other state against the net income or franchise tax otherwise payable to this state on income of the same year (sec. 71.07(7)(b)3., Wis. Stats.)
- Use Schedule ET-OS, *Credit for Net Tax Paid to Another State*, to claim the credit



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Commonly Used Corporate Franchise/Income Tax Credits, Tax Year 2020
(Statistics as of May 4, 2023)

| Corporate Tax Credit | Number of Claimants Using Credit | Amount of Credit Used | Credit Available | Credit Carried Forward |
|---------------------------------------|----------------------------------|-----------------------|------------------|------------------------|
| Manufacturing credit | 464 | \$123,242,508 | \$248,226,532 | \$124,984,024 |
| Enterprise zone jobs credit | 13 | \$48,716,467 | Refundable | |
| State historic rehabilitation credit | 21 | \$46,112,263 | \$53,832,385 | \$7,720,122 |
| Nonrefundable research expense credit | 454 | \$44,666,993 | \$608,708,136 | \$564,041,143 |
| Refundable research expense credit | 549 | \$10,134,603 | Refundable | |
| Business development credit | 33 | \$8,800,945 | Refundable | |
| Research facility credit | 6 | \$3,558,980 | \$9,484,552 | \$5,925,572 |
| Economic development credit | 12 | \$2,142,679 | \$22,638,793 | \$20,496,114 |



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Commonly Used Individual Franchise/Income Tax Credits, Tax Year 2021
(Statistics as of February 16, 2023)

| Individual Income Tax Credits | Number of Claimants Using Credit | Amount of Credit Used | Credit Available | Credit Carried Forward |
|--|----------------------------------|-----------------------|------------------|------------------------|
| Taxes paid to other states credit | 81,789 | \$459,295,412 | \$474,843,648 | No carryforward |
| School property tax credit | 1,798,031 | \$443,664,380 | \$511,925,346 | No carryforward |
| Itemized deduction credit | 618,669 | \$305,496,454 | \$601,769,830 | No carryforward |
| Manufacturing credit | 6,036 | \$306,135,683 | \$573,336,660 | \$267,200,977 |
| Married couple credit | 618,952 | \$258,920,052 | \$262,919,821 | No carryforward |
| Earned income credit | 198,816 | \$76,532,468 | Refundable | |
| Homestead credit | 102,516 | \$50,027,234 | Refundable | |
| Veterans and surviving spouses property tax credit | 12,935 | \$43,528,470 | Refundable | |
| Nonrefundable research expense credit | 3,761 | \$25,283,059 | \$66,286,464 | \$41,003,405 |
| Agriculture credit | 5,283 | \$19,794,022 | \$81,694,582 | \$61,900,560 |



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Income/Franchise Tax Litigation



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Litigation – Early Withdrawal Penalty

Scott Cech v. Wisconsin Department of Revenue: Wisconsin Tax Appeals Commission, June 5, 2023

- ▷ Issue: Applicability of the first-time homebuyer exception to the penalty on an early withdrawal from a 401(k) retirement account
- ▷ Taxpayer made an early withdrawal from their 401(k) retirement account and used most of the funds to purchase their first home. The gross distribution was included in taxable income on their return, but no penalty for an early withdrawal was reported.
- ▷ Sec. 72(t)(2)(F), IRC, allows an exception to the penalty for distributions, up to \$10,000, from an "individual retirement plan" that are used to purchase a first home. Per the IRS website: [Retirement Topics – Exceptions to Tax on Early Distributions](#)
- ▷ The Commission decided the taxpayer did not meet the first-time homebuyer's exception to the early withdrawal penalty. Taxpayer did not appeal.



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Litigation – Business Purpose

Skechers USA, Inc. v. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, February 24, 2023).

- ▷ Audit period 2000-2003
- ▷ Taxpayer deducted expenses for intercompany transactions relating to licensing intellectual property and management services
- ▷ DOR disallowed expenses under the authority in sec. 71.30(2), Wis. Stats., in order to clearly reflect the income of the taxpayer and to prevent evasion of taxes
- ▷ Commission concluded the transactions did not have economic substance or a valid business purpose other than tax avoidance
- ▷ Taxpayer appealed to the Circuit Court.
- ▷ See [Wisconsin Tax Bulletin 221](#), page 10 (April 2023)



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Litigation: Manufacturing Credit

General Mills, Inc. v. Wisconsin Department of Revenue: Wisconsin Tax Appeals Commission, October 26, 2022

- ▷ Taxpayer has a manufacturing facility located in Milwaukee, Wisconsin.
- ▷ Taxpayer filed a timely Wisconsin corporation income tax return for the 2013 tax year.
- ▷ The manufacturing credit was not claimed on the original 2013 return.
- ▷ A subsequent field audit issued a Notice of Proposed Audit Report (NOPAR) that found numerous adjustments, but the manufacturing credit was neither adjusted nor the subject of a prior assessment.
- ▷ Taxpayer signed NOPAR agreeing in full and sent a check for the full amount.



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Litigation: Manufacturing Credit

- ▷ The department then sent a Notice of Field Audit Action
- ▷ Taxpayer then sent an amended return for the 2013 tax year claiming a manufacturing credit of \$811,220 and requesting a refund.
- ▷ The department denied the claim for refund under sec. 71.75(4), Wis. Stats., which provides that a taxpayer may not file a claim for refund for any tax year covered by a finalized field audit.
- ▷ The Commission agreed with the refund denial, but asserted the proper statute that bars the refund is sec. 71.75(5), Wis. Stats., which bars a claim for refund in respect to items not adjusted in the notice of assessment or refund.
- ▷ Taxpayer did not appeal decision



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Litigation: Pass-Through Withholding

RADS Partnership, Via Cresta, L.P., Laughing Cow, LP, Finger Living Trust, and Westmar LTD (Petitioners) v. Wisconsin Department of Revenue: Wisconsin Tax Appeals Commission, July 25, 2022

- ▷ All Petitioners are pass-through entities, except Finger Living Trust
- ▷ Petitioners did not file withholding returns in 2013
- ▷ Petitioners claimed they did not have to file withholding returns because they had losses from prior years
- ▷ Petitioners did not timely file returns for years in which losses were incurred



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Litigation: Pass-Through Withholding

- ▷ Commission concluded:
 - Pass-through entities are required to file a timely pass-through withholding form in each year where there is "Wisconsin income" (i.e., not allowed to use prior years' losses)
 - Adding the word "taxable" to "income" under sec. 71.775(2)(a) and (3)(a)2., Wis. Stats., changes the meaning of the statute
 - Pass-through entities must use WI Form PW-1 as the pass-through withholding form



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Litigation: Pass-Through Withholding

- ▷ Petitioners appealed to the Dane County Circuit Court on February 20, 2023.
- ▷ The Dane County Circuit Court dismissed the appeal because the department was not properly served, and the Circuit Court therefore lacks jurisdiction.
- ▷ Petitioners appealed to the Wisconsin Court of Appeals.



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Other Income/Franchise Tax Updates & Reminders



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Other Updates and Reminders

- ▷ College savings account subtraction
 - Increases to \$3,860 (\$1,930 if married filing separately) per beneficiary
 - 2022 amount was \$3,560
- ▷ Wisconsin tuition and fees subtraction
 - Subtraction – decreased from \$6,976 to \$6,974
 - Includes fees for course related books if paid to institution as condition of enrollment or attendance
 - Phase-out
 - Single or head of household - \$65,370 to \$78,440
 - Married filing joint - \$104,590 to \$130,730
 - Married filing separate - \$52,300 to \$65,370



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Other Updates and Reminders

- ▷ Mileage rates - 2023
 - 65.5 cents per mile for business miles (28 cents per mile is treated as depreciation)
 - 22 cents per mile for medical or moving purposes
 - 14 cents per mile in service of charitable organizations



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Student Loan Forgiveness & SAVE Plan

- ▷ On June 30, 2023, U.S. Supreme Court blocked one-time student debt relief plan put forth by the Biden-Harris Administration
- ▷ The Biden-Harris Administration created the SAVE plan to replace the existing REPAYE plan
 - This is an income-based repayment (IBR) plan
 - Ability for debt under the SAVE plan to be forgiven is the same as any other IBR
- ▷ Wisconsin excludes student loan forgiveness from income under sec. 108 of the IRC as it existed on December 31, 2020
 - Extent insolvent (108(a)(1)(B)) - report on federal Form 982 marked "For Wisconsin Purposes"
 - Public service loan forgiveness (108(f)(1) and (4))
 - Death or total and permanent disability of the student (108(f)(5))
- ▷ Canceled student debt that is excluded for federal purposes but taxable to Wisconsin should be added to federal adjusted gross income on line 1g of Wisconsin Schedule I



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Manufacturing and Agriculture Credit

- ▷ Credit from prior taxable year
 - Credit reported as income in the current taxable year is not included in the numerator of the production gross receipts factor
 - The numerator is production gross receipts of the manufacturer claiming the credit
 - Production gross receipts are receipts from the lease, rental, license, sale, exchange or other disposition of qualified production property.
 - Qualified production property is the tangible personal property manufactured by the claimant.
 - Therefore, prior years credit is not a production gross receipt. However, the prior year credit is included in the denominator because all sources of gross income are included in the denominator
- See [WTB 220](#), page 10



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Pass-Through Entities: Requirement to file Schedules 2K-1, 3K-1, and 5K-1

- ▷ A pass-through entity is required to do the following by the due date, including extensions, of its income/franchise tax return:
 - Provide a schedule to each owner (partner, shareholder, beneficiary, or member) whose share of income and other items from the entity affect the owner's WI tax liability. The schedule shall separately indicate the owner's share of each item from the entity.
 - Include a copy of the schedule with the entity's WI income/franchise tax return.
- ▷ Trusts and estates use Schedule 2K-1, partnerships use Schedule 3K-1, and tax-option (S) corporations use Schedule 5K-1
- ▷ Failure to file the schedule by the due date may result in a \$50 penalty for each violation (sec. 71.83(1)(a)10., Wis. Stats.).



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Qualified Wisconsin Business (QWIB) – Income Exclusion / Deferral

- ▷ **Capital Gain Exclusion / Deferral**
 - Long-term capital gain from investments made after December 31, 2010, in a qualified Wisconsin business and held for at least five uninterrupted years are excluded from Wisconsin income
 - Exclusion does not apply to any portion of gain due to amount of gain deferred at time of investment
 - See Schedule QI, *Sale of Investment in a Qualified Wisconsin Business*



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Qualified Wisconsin Business (QWIB) Registration

- ▷ A business may register as a QWIB if, in the business's tax year ending immediately before the date of registration:
 - The business has at least 2 full-time employees,
 - The amount of payroll compensation paid by the business in WI is at least 50% of all payroll compensation paid by the business, and
 - The value of real and tangible personal property owned or rented and used by the business in WI is at least 50% of the value of all real and tangible personal property owned or rented and used by the business.
- ▷ Business must register **each year** it desires to be a QWIB (sec. 73.03(69), Wis. Stats.)
 - **Registration for 2023 must be completed by January 2, 2024.**



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QWIB Registration

- ▷ Registration for 2023 must be completed by January 2, 2024.
- ▷ To register your business with the department, use the department's online application here:
 - https://tap.revenue.wi.gov/QualBus/_/
- ▷ A list of QWIBs can be found on the department's website here:
 - <https://www.revenue.wi.gov/Pages/Report/qualified-businesses.aspx>



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Qualified Opportunity Fund (QOF)

- ▷ Certain taxpayers who invest in a QOF may qualify for federal tax benefits:
 - Defer paying tax on capital gains by investing the gains in a QOF
 - Reduce the taxable amount of the deferred capital gains by
 - 10% if QOF investment is made prior to Jan. 1, 2022, and is held for at least 5 years
 - 15% if QOF investment is made prior to Jan. 1, 2020, and is held for at least 7 years
 - Exclude all gains from the sale of a QOF investment by holding the QOF investment for at least 10 years.
- ▷ See sections 1400Z-1 and 1400Z-2 of the Internal Revenue Code (IRC)
- ▷ WI follows the federal tax benefits



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WI Qualified Opportunity Fund (WQOF)

- ▷ A WQOF means a QOF that holds at least 90% of its assets in WI qualified opportunity zone property
- ▷ For taxable years beginning on or after January 1, 2020, a WQOF is required to file WI Form WQOF with the department and provide a copy to each investor by January 31 of the year following the close of the WQOF's taxable year.
- ▷ In addition to the federal QOF tax benefits, certain taxpayers who defer paying tax on their capital gains by investing in a WQOF may qualify for a WI subtraction or basis modification



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WQOF

- ▷ The WI subtraction or basis modification is
 - 10% of the deferred capital gain if
 - The WQOF investment was held for at least 5 years and
 - The taxpayer qualifies for the 10% federal QOF exclusion
 - 15% of the deferred capital gain if
 - The WQOF investment was held for at least 7 years and
 - The taxpayer qualifies for the 15% federal QOF exclusion
- ▷ **Note:** Any failure by a WQOF may result in the WI subtraction or basis modification being denied for investors



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WQOF

Resources:

- ▷ Common Questions:
<https://www.revenue.wi.gov/Pages/FAQS/ise-qualified-zones.aspx>
- ▷ Fact Sheet 1121:
<https://www.revenue.wi.gov/DOR%20Publications/1121opportunityzone.pdf>
- ▷ 2023 Form WQOF instructions:
<https://www.revenue.wi.gov/TaxForms2023/2023-FormWQOF-inst.pdf>
- ▷ Sections 71.05(25m), 71.26(3)(vm), 71.34(1k)(p), and 71.45(2)(a)21., Wis. Stats.



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Worker Misclassification

- ▷ Every person who pays an individual for work must classify the individual as either an employee or independent contractor.
- ▷ Classification is important because it impacts the payer's requirements for:
 - Federal unemployment insurance, income tax withholding, and information return reporting.
 - WI unemployment insurance, income tax withholding, and information return reporting



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Worker Misclassification

- ▷ Misclassification may result in one or more of the following:
 - A penalty equal to the amount of tax that the payer intentionally failed to withhold.
 - \$25,000 fine for willfully misclassifying a construction worker as a nonemployee.
 - \$10 penalty per incorrect or incomplete Form W-2 or 1099.
 - \$50 or \$150 late filing fee.
 - 25% penalty for negligently failing to withhold or filing incorrectly.
 - 1.5% interest per month for delinquent withholding.
 - Disallowed wage expense deduction for failure to file wage statements.
 - \$10,000 fine and/or 9-month prison sentence for willfully failing or refusing to withhold or willfully rendering a false or fraudulent wage statement or report.
- ▷ For more information, see the article on pages 11-12 of WI Tax Bulletin 222.



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Income Tax Form/Processing Updates and Filing Tips



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Form Changes

- ▷ Form 1NPR Instructions – Numerous improvements made
- ▷ Schedule M instructions – Numerous improvements made
- ▷ Schedule FC – Added line for taxpayers to enter farmland preservation agreement contract numbers
- ▷ Schedule MI – Eliminated because manufacturing investment credit had a 15 year carry forward beginning in 2008. Last year to claim credit was 2022
- ▷ Commercial loan exemption
 - Form 5S, Page 5 – New line 18 for tax-exempt income from commercial loans
 - Schedule 5K-1, page 4 – New line 18 for tax-exempt income from commercial loans
 - Form 6, Page 7 – Added specific code to "Other subtractions" on Part II, line 4n-a
 - Schedule 4W – New line 14 for "Financial institution commercial loan exemption"



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Form Changes

- ▷ Schedule OS instructions, *Credit for Net Tax Paid to Another State*
 - Added instructions to clarify whether to compute the credit in Part II or Part III of the form when the individual is a member of a pass-through entity that pays tax at the entity level in another state, but does not elect to pay tax at the entity level in WI.
- ▷ Schedule I instructions – Pending outcome of WI SB 389 / AB 406
- ▷ Reportable transaction address change – From 8958 to 8906
- ▷ Payments – PO Box 93208 was replaced with PO Box 3028 last year. Payments were forwarded to the correct PO Box, but the forwarding service has expired so payments sent to PO Box 93208 will be returned to taxpayers which could result in a late payment, interest, and penalties.



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2023 Filing Season Tips – Individual Income Tax

- ▷ Be sure to include all forms, schedules and attachments with return
 - Software providers are required to allow attachments to e-filed returns
- ▷ Verify estimated payments and credit carryforward prior to filing
- ▷ Review adjustment notices from prior year to ensure you are using the most updated information
- ▷ Omit nontaxable wages from married couple credit calculation (e.g., military pay subtraction)
- ▷ Returns claiming credits passed through from a partnership or S-Corp may be held if partnership or S-Corp has not yet filed
- ▷ Make sure appropriate documentation for contributions or adjustments from pass-through entities (e.g., Schedule SB lines 43-49) are included with return submission



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2023 Filing Season Tips – Individual Income Tax

- Include Schedule U, *Underpayment of Estimated Tax*, on individual income tax return if income earned unevenly throughout the year AND has underpayment interest
 - *Example:* Taxpayer took a large distribution from a retirement account in November and did not have withholding. DOR will assume income is earned evenly throughout year for purposes of computing underpayment, UNLESS Schedule U is filed.
- Check FEINs on W-2s to ensure they are accurate. FEINs autofill in software from year to year, but businesses (employers) may change FEIN.
- Veterans and surviving spouses property tax credit: property taxes must be paid by December 31st. If veteran has passed away during the year the surviving spouse must get recertification from DVA.



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2023 Filing Season Tips – Individual Income Tax

- Verify certificate of compliance number entered for farmland preservation claims (Sch FC-A) & don't include dashes in number
- Verify farmland preservation agreement numbers entered for farmland preservation claims (Sch FC) & don't include dashes in the number



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2023 Filing Season Tips – Pass Through Entities

- Nonresident individuals part of multiple business (i.e., income from multiple sources) should not be included on composite individual returns (Forms 1CNP or 1CNS); they should file a 1NPR.
- Entity-level tax election: Copies of other state returns should be attached to return when claiming credit for taxes paid to other states – computed on Schedule ET-OS and attached to Form 2, 3, or 5S.
- Manufacturing Credit: Include parcel numbers when submitting Schedule MA-M
- Pass-through withholding tax withheld from lower-tier entity should be entered on Part 1A of Form PW-1 – Do not enter FEIN in Part 1A for the entity filing the PW-1



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2023 Filing Season Tips – Pass Through Entities

- ▷ Attach credit schedules when filing electronically (e.g., attach Schedule FC/FC-A, *Farmland Preservation Credit*, to the Form 2, *Fiduciary Income Tax for Estates and Trusts*)
- ▷ Form 2 for periods longer than 12 months are not accepted
- ▷ Forms 1CNP/CNS, Composite Partner/Shareholder Individual Income Tax Returns: Do not duplicate SSNs on Schedule 2



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Sales and Use Tax Update



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Sales and Use Tax Rate Increase

2023 Wis. Act 12

- ▷ Effective for sales and purchases on or after January 1, 2024
- ▷ City of Milwaukee imposes new 2% sales and use tax
- ▷ Milwaukee County sales and use tax increases from 0.5% to 0.9%
- ▷ Applies to retailers registered to collect Wisconsin sales and use tax making taxable sales to these locations, **regardless of retailer's location** (unless an exemption or small seller exception applies)



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Reminder - Baseball Stadium Sales and Use Tax

- ▷ Baseball stadium tax ended March 31, 2020
- ▷ Tax collected for periods after sunset date must be returned to customer or to DOR if customer cannot be located (penalties may apply)
- ▷ Review client records
 - DOR continues to receive complaints of retailers, primarily restaurants, that continue to collect the 0.1% baseball stadium tax



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Real Property Construction Activities

2023 Wis. Act 12

- ▷ Effective June 22, 2023
- ▷ The definition of real property construction activities is amended
- ▷ The definition no longer requires a determination to be made based on the intent of the purchaser as long as DOR identifies classification of property by administrative rule
- ▷ Gives DOR authority to determine by rule whether tangible personal property that is affixed to real property is a real property construction activity



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New Exemption – Qualified Data Centers

2023 Wis. Act 19

- ▷ Create sec. 77.54(70), effective October 1, 2023
- ▷ Wisconsin Economic Development Corporation (WEDC) may contract with a business to certify a qualified data center for purposes of claiming the sales tax exemption for:
 - Tangible personal property used exclusively for development, construction, renovation, operation, etc., of a qualified data center
 - Tangible personal property used for water cooling or conservation systems exclusively for qualified data centers
 - Tangible personal property sold to a construction contractor and transferred to a qualified data center as a component in real property construction



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New Exemption – Qualified Data Centers

2023 Wis. Act 19

- ▷ The exemption is not available until a data center is certified by WEDC
- ▷ DOR will provide additional information about claiming the exemption when a qualified data center is certified by WEDC



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Retailer's Discount

2023 Wis. Act 19

- ▷ Effective for taxes payable on or after October 1, 2023
 - Discount increased from 0.5% to 0.75%
 - Limit of a retailer's discount increased from \$1,000 to \$8,000 per reporting period
- ▷ Computation: If the total sales tax is
 - \$0 to \$10; the discount is equal to total sales tax
 - \$10 to \$1,333; the discount is \$10
 - Greater than \$1,333; the discount is the total sales tax amount times 0.0075 but cannot exceed \$8,000 per reporting period



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Wisconsin Rate and Boundary Database Files

- ▷ DOR created a database using street address information from property tax records
- ▷ Added premier resort area and local exposition taxes to downloadable rate and boundary files
 - **Note:** Premier resort area and local exposition taxes are not included on the files available on the Streamlined Sales Tax Governing Board's website.
- ▷ Created a guide to aid in understanding the information in the updated rate and boundary files when programmed in computer systems
- ▷ <https://www.revenue.wi.gov/Pages/SSTP/ratebound.aspx>



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Wisconsin State and Local Sales Tax Rate Look-Up

- ▷ Updated look-up tool to determine proper jurisdiction and tax rate by searching:
 - A street address and the 5-digit zip code, or
 - A 9-digit zip code (Zip+4)
- ▷ Search results will provide general sales and use tax rates (state, county, city) and special local taxes (premier resort, local exposition) for each jurisdiction
- ▷ Street address + 5-digit zip code search is only available for transaction dates beginning on or after 10/1/2023
- ▷ Effective January 1, 2024, retailers may no longer use a 5-digit zip code without a street address to determine jurisdiction and tax rate for a transaction.
- ▷ <https://www.revenue.wi.gov/Pages/Apps/strb.aspx>



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Disregarded Entity's Business Assets

- ▷ A single-owner entity that is disregarded as a separate entity for Wisconsin income and franchise tax purposes under Ch. 71, Wis. Stats., is disregarded as a separate entity for sales and use tax
- ▷ Transactions between the owner and its disregarded entity are disregarded for sales and use tax purposes (i.e., not a "sale" transaction). See sec. 77.51(14g), Wis. Stats.



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Disregarded Entity's Business Assets

- ▷ **Caution:** A sale of an interest in a disregarded entity to an unrelated 3rd party is considered the sale of business assets and subject to tax, unless an exemption applies.
- ▷ One exemption that may apply is the occasional sale of business assets
 - See sec. [Tax 11.34](#), Wis. Adm. Code
 - See [Fact Sheet 2110](#), *Occasional Sales of Business Assets for Examples*.

Note: If the sale of an asset qualifies for the occasional sales exemption, the purchaser is not required to remit use tax on the asset purchase.



85

Disregarded Entity's Business Assets

Example: Company A is the single owner of a disregarded entity (LLC). LLC purchased assets (e.g., office equipment, furniture) for use in LLC's business activities. At a later date, Company B, an unrelated entity, purchased 100% of Company A's interest in LLC. Later, LLC sells one-half of its business assets to Company B.

Treatment of the transactions:

1. LLC purchases business assets – Purchases are subject to tax, unless an exemption applies (e.g., manufacturing)
2. Company A sells 100% of its disregarded LLC interest to Company B – The sale is considered a sale of assets by Company A to unrelated Company B and is subject to tax unless an exemption applies (e.g., occasional sale of business assets)
3. LLC sells ½ of the business assets to Company B – The sale is not recognized as a sale for tax purposes because LLC is disregarded entity of Company B for tax purposes



86

Temporary Event Reporting

- ▷ We continue to identify and educate temporary event operators (persons who arrange, organize, promote or sponsor an event) on requirement to report the event and participating vendors
- ▷ Temporary event is an activity at one place of operation for a brief duration where taxable sales are made
- ▷ Form S-240, *Wisconsin Temporary Event Report* (rev. June 2022) is the only accepted reporting method
- ▷ Penalties may be assessed for failure to report vendors attending temporary events



87

Marketplace Providers and Sellers

Administrative Rule Changes – effective July 1, 2023

- ▷ Renamed sec. Tax 11.55, Wis. Adm. Code from "Agents, consignees, lienors, and brokers" to "Repossessions and sales of property to enforce liens."
- ▷ Repealed sec. Tax 11.55(1) and (2), Wis. Adm. Code relating to disclosed and undisclosed principals.
 - Persons selling products and services on behalf of others are retailers and must collect tax regardless of whether the person they are selling on behalf of is disclosed to the purchaser.
 - Agents, cosigners, and brokers are often "marketplace providers" under the provisions created in 2019 Wisconsin Act 10, effective January 1, 2020.
- ▷ Repealed and recreated sec. Tax 11.88(6), Wis. Adm. Code, "Consignment sales," to explain that a recreational vehicle dealer that advertises and sells a recreational vehicle on behalf of another person is a marketplace provider and required to collect and remit the tax.



88

Marketplace Providers and Sellers

- ▶ Created sec. Tax 11.555, Wis. Adm. Code, which includes:
 - The marketplace provider's requirement to notify the seller they are collecting and remitting tax.
 - Who can be audited and held liable for the tax.
 - Requests for waiver from marketplace provider responsibilities.
 - DOR may regard the marketplace seller as a retailer in certain situations.
 - Marketplace provisions apply to both online and physical marketplaces (e.g., stores).
 - Reporting and recordkeeping requirements, such as filing returns, exemption certificates, bad debt deduction, and nexus provisions (i.e., small seller exception).
 - A marketplace provider is required to collect and remit tax on taxable sales it facilitates on behalf of a nonprofit organization, even if the nonprofit organization would qualify for the occasional sales exemption had it made its own direct sales to customers.



89

Litigation

Oshkosh Corporation: Dane County Circuit Court, June 29, 2023

- ▶ Issue – Whether indirect materials (office equipment and supplies) used in fulfilling contracts with the federal government were purchased by the taxpayer for resale if only the title to, but not possession of, the indirect materials passes to the federal government.
- ▶ Tax Appeals Commission (TAC) concluded:
 - "Sale" in sec. 77.51(14), Wis. Stats., includes the transfer of ownership of, title to, possession of, or enjoyment of tangible personal property
 - Title transfer alone is sufficient to constitute a sale
- ▶ The Circuit Court affirmed the TAC's Final Ruling and Order.
- ▶ The department will not appeal this decision.



90

Litigation

StubHub Inc: Wisconsin Tax Appeals Commission, February 28, 2023

- ▷ Issue - Is sales tax due on secondary ticket sales.
- ▷ Commission concluded:
 - StubHub operated an online marketplace for ticket sales and acted as a retailer, selling tickets to taxable events in Wisconsin, such as amusement, athletic, entertainment, and recreational events.
 - StubHub was liable in the alternative for sales tax with ticketholders who listed tickets on its online marketplace.
 - StubHub met the nexus criteria for being subject to the state's sales tax laws.
 - The penalty imposed by the department was not justified by the facts, law, or relevant publications at the time of the transactions.
- ▷ Taxpayer has appealed.



91

Litigation

Citations Partners LLC: Wisconsin Supreme Court, March 1, 2023

- ▷ Issue – Is the total amount paid for an aircraft lease taxable or is the portion attributable to aircraft maintenance and engine maintenance excluded from tax?
- ▷ Tax Appeals Commission (TAC) ruled the cost of maintenance services and repair parts is expense of lessor, which is included in the "sales price" of the leases.
- ▷ Circuit Court overturned TAC decision
- ▷ Court of Appeals reversed the Circuit Court decision stating tax cannot be avoided by dividing up lease price into categories or affixing labels.
- ▷ Wisconsin Supreme Court affirmed the Court of Appeals' decision



92

Litigation

Green Cab of Madison, Inc.: Circuit Court of Dane County, February 14, 2023

- ▷ Issue - Are lease of taxicabs subject to 5% state rental vehicle fee under sec. [77.995\(2\)](#), Wis. Stats.
- ▷ WTAC concluded:
 - Taxicabs are Type 1 motor vehicles
 - Taxpayer's primary business is rental of driverless vehicle to independent contractor, licensed taxi drivers
 - Rental of driverless vehicles licensed as a taxicab to a driver holding a valid taxicab driver's permit is subject to the state rental vehicle fee
- ▷ Circuit Court agreed that Green Cab's main business involved short-term vehicle rentals without drivers.
- ▷ The time for Green Cab to appeal the Circuit Court's decision has expired, and as no appeal was filed, the decision is now final.



93

Litigation

William Becker: Court of Appeals District 1, July 25, 2023

- ▷ Issue - Are trailers "truck bodies" for purposes of sales tax exemption under sec. [77.54\(5\)\(a\)\(4\)](#), Wis. Stats.
- ▷ Taxpayer sold single-axle, tandem-axle, and gooseneck trailers designed to be used with a motor vehicle (car or pickup truck)
- ▷ WTAC ruled trailers did not qualify for the exemption:
 - *Trudell* decision limits "trucks and truck bodies" exemption
 - Trailer type vehicles sold by Becker have no trucks for which the truck bodies were made
- ▷ Circuit Court found trailers sold are "truck bodies" and qualify for the exemption
- ▷ Court of Appeals found trailers sold by Becker were **not** "truck bodies"
- ▷ Taxpayer has appealed to the Supreme Court



94

Litigation

Verizon Connect NWF, Inc.: Wisconsin Tax Appeals Commission, October 2, 2023

- ▷ Issue - Are fleet management services which gather, analyze, and translate data, and generate reports from vehicle on-board diagnostic systems to an online platform available to customers subject to sales and use tax?
- ▷ WTAC concluded:
 - These fleet management services in *its entirety* are taxable inspection services under sec. 77.52(2)(a)10., Wis. Stats.
 - The fleet management services performs the same diagnostic functions as a mechanic in a modern garage
 - The *Janesville Data* case is not controlling because the facts of that case were significantly different
 - The receipt of the final reported information is the primary purpose of the services and the primary reason customer pay for those services



95

Unclaimed Property Updates



96

Unclaimed Property: Holder Updates

- ▷ Holder reports are due November 1 every year.
- ▷ Holders may request up to a 60-day extension to file the report and remit unclaimed property through My Tax Account. *Caution:* extension requests must be received prior to the November 1 deadline.
- ▷ The Voluntary Disclosure Agreement program for holders ran from February 1, 2022 through February 28, 2023. A total of 740 agreements were completed during this period.
- ▷ Late-filed reports are subject to \$150 penalty. Late payments are subject to a penalty equal to 15% of the value of the property. DOR may impose a further \$100/day penalty for each day past the due date of a written request by DOR to pay or deliver property.
- ▷ DOR will be sending requests to file and educational letters to holders who have not remitted timely reports.



97

Unclaimed Property: Statistics

- ▷ The Unclaimed Property Program is experiencing record growth as a result of the outreach related to holder filing requirements.
- ▷ Increase in Property Counts and Money Reported (FY 2022 – FY 2023)
 - Properties Reported: 705,767 → 728,059
 - Money Reported: \$99,078,598 → \$101,620,656
 - Claims: 37,577 → 53,081
 - Money Claimed: \$31,272,401 → \$40,356,473



98

Unclaimed Property: Litigation

- ▷ *Delaware v. Pennsylvania and Wisconsin, et al.* (United States Supreme Court, February 28, 2023), aka The MoneyGram Case.
- ▷ The issue was whether abandoned proceeds from official checks are sent to the unclaimed property agency of the State in which the owning corporation is incorporated or the state in which the property was purchased.
- ▷ The court found that the abandoned official checks must be reported to and given to the unclaimed property agency of the state where the products were purchased. This means that official checks purchased in Wisconsin will now be reported to and provided to the State of Wisconsin.



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102

Personal Property Tax

Wisconsin Act 12



103

Exempt Personal Property

- ▷ 2023 Wisconsin Act 12
- ▷ Effective – January 1, 2024
- ▷ Exempts personal property from taxation beginning with assessments as of January 1, 2024



104

Exempt Personal Property

- ▷ Establishes a process for municipalities to request DOR adjust the base values of Tax Incremental Districts (TIDs) for personal property
- ▷ Provides a process for manufacturing establishments that do not own real property in this state to continue claiming the manufacturing income tax credit
- ▷ Moves the airline hub exemption from Ch 70 to Ch 76
- ▷ Creates aid payments to taxing jurisdictions for the loss of property tax revenue



105

Exempt Personal Property

- ▷ Exemption applies to:
 - Personal property as defined in sec. 70.04, Wis. Stats.
 - Steam and other vessels, furniture, and equipment
- ▷ Sec. 70.04, Wis. Stats. – definition of personal property. In chapters 70 to 79, "personal property" includes all of the following:
 - (1g) All goods, wares, merchandise, chattels, and effects, of any nature or description, having any real or marketable value, and not included in the term "real property," as defined in s. 70.03



106

Exempt Personal Property

- ▷ Sec. 70.04, Wis. Stats. – definition of personal property. In chapters 70 to 79, "personal property" includes all the following:
 - (1r) Saw logs, timber, and lumber, either upon land or afloat; steamboats, ships, and other vessels, whether at home or abroad; ferry boats, including the franchise for running the same; ice cut and stored for use, sale, or shipment; and manufacturing machinery and equipment, as defined in s. 70.11 (27)
 - (2) Irrigation implements used by a farmer, including pumps, power units to drive the pumps, transmission units, sprinkler devices, and sectional piping
 - (3) An off-premises advertising sign. In this subsection, "off-premises advertising sign" means a sign that does not advertise the business or activity that occurs at the site where the sign is located



107

Taxable Real Property

- ▷ Exemption does not apply to real property as defined in sec. 70.03, Wis. Stats.
 - (1) In chs. 70 to 76, 78, and 79, "real property," "real estate," and "land" include not only the land itself but all buildings and improvements thereon, and all fixtures and rights and privileges appertaining thereto, except as provided in sub. (2) and except that for the purpose of time-share property, as defined in s. 707.02 (32), real property does not include recurrent exclusive use and occupancy on a periodic basis or other rights, including, but not limited to, membership rights, vacation services, and club memberships
 - (2) "Real property" and "real estate" do not include any permit or license required to place, operate, or maintain at a specific location one or more articles of personal property described under s. 70.04 (3) or any value associated with the permit or license



108

Taxable Real Property

- ▷ Exemption does not apply to:
 - Manufactured and mobile homes (not otherwise exempt)
 - Buildings, improvements, fixtures on leased lands, exempt lands, forest croplands, managed forest lands
 - Must be assessed as real property under 70.17(3) starting 2024



109

Buildings, Improvements and Fixtures

- ▷ Starting January 1, 2024, 70.17(3) requires real property assessment for buildings, improvements and fixtures when located on:
 - Leased lands – the landowner leases the land to a tenant who owns a building, improvement or fixture on that land
 - Exempt lands – taxable building, improvements and fixtured on exempt land:
 - 70.174 – provides that improvements on land owned by the United States shall be assessed as real as provided under 70.17 (3)
 - Forest croplands and managed forest lands (MFL):
 - 77.04(1) – buildings on forest crop land shall be assessed as real property
 - 77.84(1) – building, improvements, fixtures on MFL is subject to taxation as real property



110

Leasehold Improvements

- ▷ Leasehold improvements are additions, renovations and similar improvements made to a leased property by the lessee
 - May be real property or personal property
 - Apply state law (70.03, 70.17(3)) and state case law
 - 70.03 defines real property as the land and all buildings, improvements and fixtures
 - 70.17(3) require real property assessment for buildings, improvements and fixtures
 - State court cases provide a three-part test



111

Practitioner Impact

- ▷ Exemption does not impact 2023 and prior personal property taxes
 - No change to 2023 personal property tax bill distribution – by the third Monday in December
 - No change to 2023 personal property tax bill payment date – by January 31, 2024
- ▷ Statements of Personal Property are not required for 2024
 - Act 12 amended 70.35(3) to end collection of the PA-003 with the 2023 assessment
 - *For assessments made before January 1, 2024, each return shall be filed with the assessor on or before March 1 of the year in which the assessment provided by s. 70.10 is made...*



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Resources



- ▷ WI Act 12 Information – DOR overview/summary of act
revenue.wi.gov/Documents/2023-Act12-Information.pdf
- ▷ WI Act 12 – Personal Property Exemption information
revenue.wi.gov/Documents/2023-Act12-PersonalPropertyExemption.pdf
- ▷ [TID Base Value Adjustment Request Due to Personal Property Exemption](#)



113

Personal Property Repeal – Contact Info

- ▷ Property assessment – bapdor@wisconsin.gov
- ▷ Manufacturing
 - Income tax credit – DORFranchise@wisconsin.gov
 - Property assessment – contact the [district office](#) where the property is located
- ▷ Airlines, railroads, telecommunications and utilities – utility@wisconsin.gov
- ▷ Aid payments, local government finance – lgs@wisconsin.gov
- ▷ Tax incremental finance (TIF) – tif@wisconsin.gov



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Other Updates



115

Filing Tips – Sales & Withholding

- ▷ Include city and county sales tax, if applicable
- ▷ Seller permit site locations being updated timely will assist sales tax processing
- ▷ Fiscal-year filers with a quarterly or annual period start date in 2023 and a period end date in 2024, and have Milwaukee County Tax due, will be required to file on paper for the one period
- ▷ 1099s with withholding must be filed to DOR by January 31st! Combined fed-state cannot be used in this case
- ▷ Filing 1099s without withholding directly to Wisconsin by January 31st, will assist fraud prevention and expedite income tax return and refund processing
- ▷ \$10 penalty issued for failing to file W-2s/1099s, filing late, or failing to file electronically if 10 or more filed on paper



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Payroll Service Providers Schemas

- ▷ All software providers and transmitters MUST support the Enrollment schema if they are submitting withholding returns via XML. You can find the EnrollmentDataExchangeV2.0 schema package in the Wisconsin Withholding folder in the FTA State Exchange System. DOR uses the same schema in two distinct ways:
 - 1. Payroll service providers submitting their client lists for withholding tax filing
 - 2. Payroll service providers submitting client lists to facilitate the automated issuance of wage attachment orders and process employer responses
- ▷ The department will provide a 3 month testing window where all providers will be required to test and be accepted. We will notify you when it is time for you to begin testing.
- ▷ Voluntary registration is open, contact DORDeveloperRelations@wisconsin.gov



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Payroll Service Providers Schemas

- ▷ Wage Attachment schema will provide an electronic notice to let DOR know of the employers the PSP represents for doing Wage Certifications/Levies on their clients' employees' wages. DOR will note the PSP authority to do E-Wage Certs on behalf of the customer.
- ▷ Electronic Notice schema provides real time electronic notification of letters going to clients. There is an electronic summary of the notice and a pdf copy of the letter with the schema. Withholding notices include file frequency changes, bills, or other notices.
- ▷ Providers must support the enrollment schema and wage attachments schema to be approved for the notice schema.



118

You Are A Target! Protect Your Clients; Protect Yourself

- ▷ Accounting firms hold valuable client data and e-filing credentials which make them the target of cybercriminals
- ▷ Spear phishing scams from those posing as clients, tax software or cloud storage providers and the IRS are common
- ▷ Each year Wisconsin firms fall victim to these scams. Stolen data can be misused for years to come.
- ▷ Security guides and other resources are available on the IRS's [Identity Theft Information for Tax Professionals](#) page
- ▷ Be on the lookout for data theft red flags:
 - ▷ Increase in rejects because a return was already filed
 - ▷ Clients receive IRS or state authentication letters when they haven't yet filed a return
 - ▷ Clients receive unexpected refunds, transcripts or notices about IRS online accounts
 - ▷ Number of returns e-filed with your EFIN or PTIN exceed the number you submitted
 - ▷ You receive responses to emails you did not send
 - ▷ Unusual computer activity (e.g., running slower, lockouts, cursor moving)



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Data Breach Reporting

- ▷ **IRS Stakeholder Liaison:** liaison will notify IRS Criminal Investigation and others within the agency. For Wisconsin, contact CL.SL.Area.6@irs.gov or 206-946-3703.
- ▷ **States in which you prepare state returns:**
 - ▷ Wisconsin: email DORIDTheft@Wisconsin.gov. Include your organization's name, brief description of the incident and contact information for the individual who will be working with DOR. Do not include personally identifiable information (PII) for impacted employees or customers in your email. DOR's fraud team will contact the firm (typically the same day) to discuss next steps.
 - ▷ Other states: see the Federation of Tax Administrator's [Report a Data Breach](#) page for contact information
- ▷ **Local law enforcement**
- ▷ **Security experts:** it's important to determine the cause and scope of the breach and to prevent further breaches from occurring
- ▷ **Affected staff and clients:** Wisconsin statutes require most businesses to notify individuals if an unauthorized person has acquired their personal information. To learn more, see the [Wisconsin's Data Breach Notification Law](#) guide.
- ▷ **Insurance company:** check if your insurance policy covers data breach mitigation expenses



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Identity Theft Reporting

- ▶ New identity theft reporting form (Form ID-100 Identity Theft Declaration) created in June of 2023
- ▶ Replaces use of DATCP Identity Theft and Non-Consent forms for tax-related ID theft reporting
- ▶ Taxpayers should continue to reach out to DATCP for assistance with credit and consumer issues or education regarding ID theft
- ▶ [Form ID-100](#) is available on DOR's webpage in fillable format but currently must be mailed

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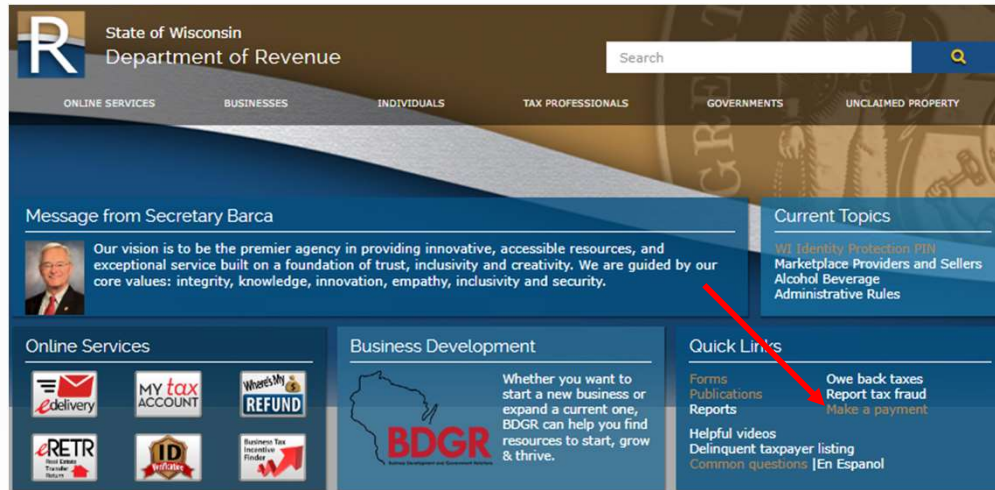
Make a Payment Page

- ▶ Expanded [Make a Payment page](#) last year to include major tax types
- ▶ Paying electronically reduces processing time, eliminates risk of lost payments, and reduces risk of misapplied payments
- ▶ Page includes all appropriate payment methods by tax type and links to interactive vouchers
 - Confirm PO Box 3028 is on vouchers printed through your software
- ▶ Quick Pay button takes user directly to MTA screen for making unregistered payments for individual income tax, fiduciary income tax, occasional consumer use tax, and non-tax debt



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Make a Payment Page



123

Credit Card and Other Payment Options

- ▶ DOR switched to a new credit card payment processing vendor last year
- ▶ New options available as of January 2023: Apple Pay, PayPal
 - Coming Soon: CheckFreePay
- ▶ [DOR Credit Card and Other Payment Options \(wi.gov\)](https://www.wisconsin.gov/dor/credit-card-and-other-payment-options) provides additional information, including fees

124

Continuous Recruitment Efforts-Agents

- ▷ Revenue Agents are responsible for customer service call center, tax return processing, collections, bill adjustments
- ▷ Three successful rounds of continuous recruitment
 - May 2022-September 2022 – 26 hires
 - January 2023 – May 2023 – 37 hires
 - July 2023 – September 2023 – 23 hires
- ▷ Currently, normal vacancy rates of 5% or less
- ▷ Additional initiatives
 - Limited Term Employees – great way to test out the work
 - Re-thinking training to help keep agents learning and growing



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Continuous Recruitment Efforts-Auditors

- ▷ Slow progress over three rounds
 - June 2022-November 2022 – 5 hires
 - January 2023-May 2023 – 9 hires (5 External Gateway Program Completions)
 - August 2023-November 2023 – in progress – goal: 20
- ▷ Vacancy rate for auditors is still high
- ▷ Additional Initiatives:
 - Launched an Internal Gateway Program
 - help agents earn their 4-year accounting degree so they can become auditors
 - On campus interviews
 - Trying 2 different campuses this fall



126

My Tax Account (MTA) Updates



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MTA: Personal Users

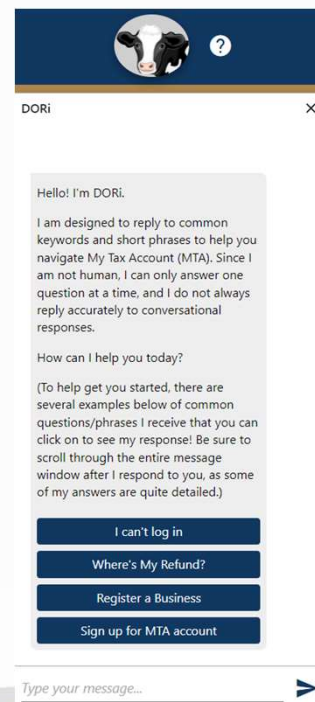
- ▷ Encourage clients to register for My Tax Account (MTA) as personal users
 - Benefits: electronic notice delivery, make/view/cancel estimated payments, check refund status, and more
 - No third-party access yet - when it goes live, your client must have MTA to be able to grant you access, and you must have a valid POA on file with us
 - Email Form A-222 to DORPOA@wisconsin.gov or fax to 608-267-1030
- ▷ WI Identity Protection (IP) PIN
 - Ensures someone cannot file a WI return in your client's name
 - Enrollment is optional and completed via MTA
 - Once enrolled, must list PIN on all future returns (2021 and forward)
 - Different from IRS IP PIN
 - Expires 12/31 each year, new PIN issued in January



128

DORi

- ▷ Virtual assistant (chatbot)
- ▷ Designed to provide automated assistance with My Tax Account navigation and issues
- ▷ Icon on the top of all MTA pages
- ▷ Use the "**DORi**'s answer doesn't make sense" link to help us continuously improve content
- ▷ Tip: use short phrases
- ▷ Not linked to live chat



129

MTA: My Case Manager

- ▷ My Case Manager is available to help you and your clients make the audit process smoother. You can:
 - Follow the progress of the audit
 - Review requests and deadlines
 - Send secure messages back & forth with the auditor
 - Send documents securely (up to 30 MB)
 - Locate the supervisor's contact information
- ▷ Resources:
 - [Publication 701, My Case Manager User Guide](#)
 - [My Case Manager Common Questions](#)
 - [Audit Web Page](#)

130

MTA – M-Forms & Utility Annual Reports

2023 Filing Season

- ▷ Successful transition of manufacturing forms and utility annual reports to My Tax Account (MTA)
- ▷ Benefits:
 - Familiar – consolidated tax filing to a system most businesses already used to file and pay business taxes
 - Ease of use – MTA allows authorized users to complete many tasks, such as:
 - Request extensions, file returns
 - File/pay manufacturing assessment appeals, make penalty payments
 - Modify and manage user access
 - Secure – no downloading forms using third-party software



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MTA – Mfg. Assessment Appeals

- ▷ File appeal and pay fee within My Tax Account (MTA)
- ▷ More timely, efficient and cost effective (saves paper, postage, and more)
- ▷ MTA also alerts you of any fees you owe
- ▷ To file an appeal:
 - Go to My Tax Account
 - Select Manufacturing Real Estate Account
 - Click File/View Return
 - Click Appeal in the top right corner



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MTA – Manufacturing Forms

2024 Filing Season

- ▷ Manufacturing Real Estate form – only form to file due to 2023 Act 12 personal property repeal
- ▷ Forms no longer required include:
 - Manufacturing Personal Property return (Form M-P)
 - Wisconsin Leased or Loaned Personal Property return (Form M-L)
- ▷ SLF's Manufacturing bureau:
 - Working to move buildings on leased land from personal property to real estate
 - Will continue to classify business activity as manufacturing for the purpose of DOR ISE's administration of the manufacturing and agriculture income tax credit



133

WisTax: Replacing WI e-file

- ▷ Retiring WI e-file and adding Form 1 and Schedule CC filing to WisTax
 - WisTax is part of unregistered My Tax Account (no username/password required)
 - MeF no longer available for Schedule CC
- ▷ Homestead credit claimants must file Schedule H separately from Form 1 if using WisTax
- ▷ Not allowed in WisTax:
 - Amended returns
 - Form 1NPR
 - Prior-year returns
 - Various schedules
- ▷ WI participating in the Free File Alliance



134

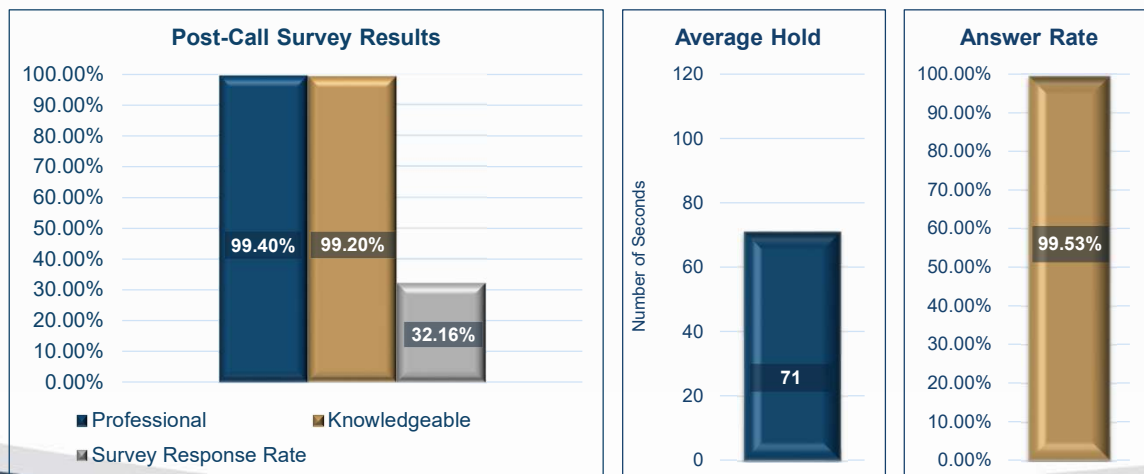
Statistics



135

FY23 IS&E Division Phone Statistics

▷ 725,705 calls handled*



*includes outbound calls

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DOR Initiatives – ID Verification

| | FY23 | FY22 | FY21 | FY20 |
|--|-----------|-----------|-----------|-----------|
| Returns Evaluated | 3,157,506 | 3,150,305 | 3,453,483 | 2,875,034 |
| Quizzes Required | 3,671 | 4,362 | 2,352 | 3,083 |
| PINs Required | 52,135 | 56,373 | 39,226 | 36,480 |
| ID Docs Required | 4,829 | 6,870 | 3,263 | 4,931 |
| ID Docs Reviewed | 6,306 | 5,764 | 4,059 | 6,597 |
| Total ID Verification Actions Required | 60,635 | 67,605 | 44,841 | 44,494 |
| % of Returns Evaluated Requiring ID Verification | 1.92% | 2.15% | 1.30% | 1.55% |
| Refunds Denied for Failure to Verify ID | 23,896 | 10,994 | 6,387 | 12,198 |



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DOR Initiatives – Bad Refunds Stopped

| Bad Refunds Adjusted/Stopped | Fraud Detection With Analytics | Processing Fraud - OCI | Processing Fraud - Tax Ops | Earned Income Credit | Homestead Credit | Total for Specific Initiatives |
|------------------------------|--------------------------------|------------------------|----------------------------|----------------------|------------------|--------------------------------|
| FY23 | \$12,009,837 | \$296,182,433* | \$9,126,383 | \$21,113,030 | \$18,943,325 | \$357,375,008 |
| FY22 | \$5,705,235 | \$10,571,743 | \$6,662,514 | \$23,387,279 | \$23,197,939 | \$69,524,710 |
| FY21 | \$3,190,632 | \$9,878,995 | \$4,631,190 | \$19,748,512 | \$24,148,497 | \$61,597,826 |
| FY20 | \$5,613,849 | \$7,940,577 | \$2,656,902 | \$8,123,852 | \$4,776,598 | \$29,111,778 |
| FY19 | \$8,595,686 | \$5,970,625 | \$6,020,804 | \$20,436,036 | \$14,358,603 | \$55,381,754 |
| FY18 | \$7,052,669 | \$5,869,413 | \$5,628,995 | \$17,943,046 | \$14,862,551 | \$51,356,674 |
| FY17 | \$9,300,745 | \$6,059,255 | \$8,044,070 | \$20,134,976 | \$16,046,799 | \$59,585,845 |
| FY16 | \$11,149,599 | \$8,092,817 | \$6,849,591 | \$19,946,592 | \$17,004,928 | \$63,043,527 |
| FY15 | \$11,050,119 | \$7,335,531 | \$6,889,513 | \$16,682,990 | \$15,828,093 | \$57,786,246 |
| FY14 | \$3,550,473 | \$4,904,089 | \$8,195,222 | \$17,710,656 | \$15,299,425 | \$49,659,865 |
| FY13 | | \$3,434,613 | | \$14,257,838 | \$12,480,794 | \$30,173,245 |
| FY12 | | \$1,702,300 | | \$9,341,511 | \$14,694,458 | \$25,738,269 |
| | | | | | | \$910,334,747 |

*FY23 OCI figure includes \$279,946,028 from one fraudulent return



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Contact Us

- ▶ Visit the "Contact Us" page to find contact information for various areas of DOR
- ▶ Use the "Submit a question" link to email us



Contact Us

Welcome from the Secretary

Sign up for email updates

See all calendars

- Customer service telephone numbers
- All office locations
- By topic
- Records custodian
- **Submit a question**

Individuals

- By topic
- Office locations

Businesses

- By topic
- Office locations

Tax Professionals

- By topic
- Office locations

Governments

- By topic
- Equalization office locations
 - Districts Map
- Local Governments Services
- Manufacturing & Utility office locations
 - Districts Map
- Office of Technical and Assessment Services

Mailing Addresses

- Tax returns
- Open records requests
- Open records fees

Free Tax Help

- Volunteer Income Tax Assistance (VITA) and Tax Counseling for the Elderly (TCE)

Management Contacts

- Office of the Secretary
- Management information
- Organizational Chart

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Submit a Question

- ▶ Subject helps route questions to the appropriate staff to handle

Submit a Question

For questions about responding to an identity verification letter, see our [Identity Verification page](#).

If you searched our website, tried the [refund inquiry](#) option, and still have questions or comments, send the Wisconsin Department of Revenue (DOR) an email using the form below.

Provide **all** the requested information in the boxes below. Do not include any **confidential** information in the message box. We will use the information to reply to your inquiry.

DOR responds to all questions during **normal business hours**; however, we cannot always respond immediately. For the quickest response, be sure to provide us your correct email address. Also, if you have suggestions to improve our website, use this form to submit your comments to our Webmaster.

* Indicates a required field.

| | |
|----------------------|---|
| *Name/Business Name | *Daytime Telephone Number (between 7:45-4:30) |
| <input type="text"/> | <input type="text"/> |
| *Street Address | *Email Address |
| <input type="text"/> | <input type="text"/> |
| *City, State, Zip | *Last 4 of SSN/FEIN |
| <input type="text"/> | <input type="text"/> |
| *Subject | *Message |
| Select a subject | <input type="text"/> |

Submit Message Clear

General "Submit a question" link will show all available subjects in dropdown

*Subject

Select a subject

Select a subject

- Alcohol Beverage, Cigarette, Tobacco and Vapor Products Regulation and Enforcement
- Alcohol, Motor Fuel, Cigarette, Tobacco, and Vapor Products Tax & Permits
- Business Tax Registration - Account Changes
- Business Tax Registration - Questions
- Collections - Debt Referred to DOR for Collection
- Collections - Delinquent Tax Payments
- Collections - Financial Records Matching
- Comment on Administrative Rules
- Homestead Credit
- ID Theft
- Income and Franchise Tax - Corporations
- Income and Franchise Tax - Partnerships and S-Corps
- Income Tax - Farmland Preservation Credit
- Income Tax - Fiduciary, Trust, and Estate
- Income Tax - Individuals
- Income Tax - Individuals - Electronic Filing

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Submit a Question

- To see a filtered list of subjects, choose "By topic" from the "Contact Us" page, choose the topic, then select the email link

The screenshot shows the 'Contact Us' page with several sections:

- Welcome from the Secretary**
- Sign up for email updates**
- See all calendars**
- Customer service telephone numbers**
 - All office locations
 - By topic**
 - Records custodian
 - Submit a question
- Individuals**
 - By topic**
 - Office locations
- Governments**
 - By topic**
 - Equalization office locations
 - Districts Map
 - Local Governments Services
 - Manufacturing & Utility office locations
 - Districts Map
 - Office of Technical and Assessment Services
- Businesses**
 - By topic**
 - Office locations
- Tax Professionals**
 - By topic**
 - Office locations
- Mailing Addresses**
 - Tax returns
 - Open records requests
 - Open records fees
- Free Tax Help**
 - Volunteer Income Tax Assistance (VITA) and Tax Counseling for the Elderly (TCE)
- Management Contacts**
 - Office of the Secretary
 - Management information
 - Organizational Chart
- Homestead Credit**
- ID Theft**
- Individual Income**
 - PO Box 59
 - Madison, WI 53785-0001
 - PO Box 268
 - Madison, WI 53790-0001
 - (608) 266-2486
- Email Questions**
 - [Additional Information](#)
- Local Government Finance**
- Subject**
 - Select a subject
 - Select a subject
 - Income Tax - Individuals
 - Withholding Taxes - Pass-Through Income

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Contact Us

- Practitioner email address and phone number
- Do not share with your clients
 - DORTaxPractitioners@wisconsin.gov
 - (608) 261-5199

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Presenter

- ▷ Nate Weber, Director of Technical Services
 - (608) 266-8025
 - nathaniel.weber@wisconsin.gov



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Thanks!
Any questions?



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11 a.m. – 12 p.m.

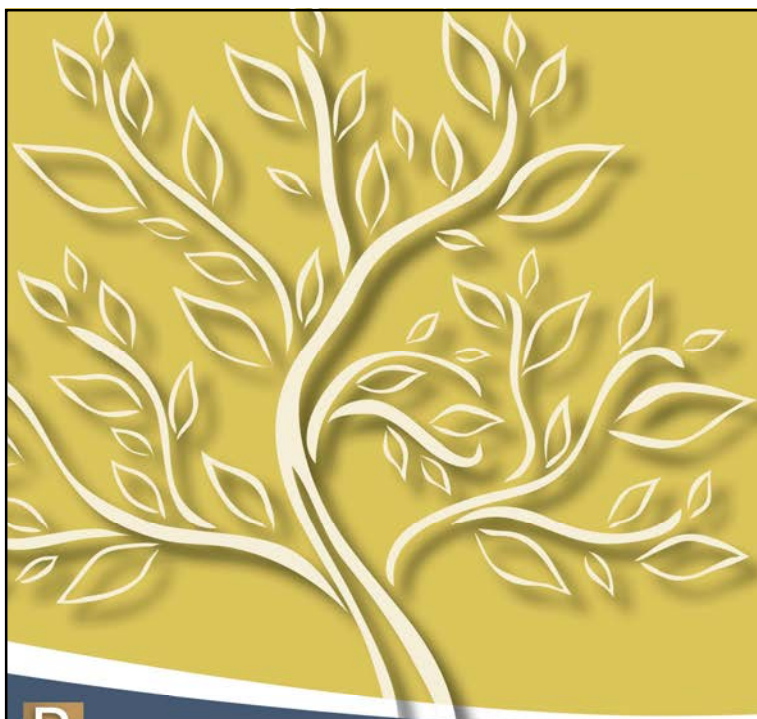
Entity-Level Tax Election & Other State Tax Credit

Joseph Wasicak, CPA, *Technical Specialist, Wisconsin
Department of Revenue*



Pass-Through Entity-Level Tax Election and Wisconsin's Credit for Taxes Paid to Another State

WI Department of Revenue | Division of Income, Sales, and Excise Tax
Fall 2023



Mission

Strengthen Wisconsin through fair tax and lottery administration, while educating and serving the public, our customers and communities.

Vision

To be the premier agency in providing innovative, accessible resources, and exceptional customer service built on a foundation of trust, inclusivity and creativity.

Values

- Integrity
- Innovation
- Inclusivity
- Knowledge
- Empathy
- Security



Topics

- ▷ Wisconsin's Pass-Through Entity-Level Tax Election Overview
- ▷ Different State Pass-Through Entity-Level Tax Elections
- ▷ Claiming Wisconsin's Credit for Taxes Paid to Another State with the Pass-Through Entity-Level Tax Election



3

Wisconsin's Pass-Through Entity-Level Tax Election Overview



4

Pass-Through Entity-Level Tax (ELT) Election Overview

- ▷ 2017 Wis. Act 368
- ▷ Tax-option (S) corporations and partnerships may elect to pay tax on items that would otherwise be reported by the owner(s)
- ▷ Must have consent from owners who hold an aggregate of more than 50% of the shares (or capital and profits interest) on the day of election
- ▷ Election is made on the entity's Wisconsin tax return



5

Pass-Through ELT Election Overview

- ▷ Election must be made (or revoked) by the extended due date of the return
- ▷ S corporations - taxable years beginning on or after January 1, 2018
- ▷ Partnerships - taxable years beginning on or after January 1, 2019



6

Polling Question 1



7

Pass-Through ELT Election Overview

| 2021 Tax Year (Statistics as of July 15, 2023) | |
|---|---------|
| Tax-Option (S) Corporations (Form 55) Filing Stats | |
| Tax-Option (S) Corporation returns filed | 86,789 |
| Tax-Option (S) Corporation entity-level tax elections filed | 6,048 |
| Percent of entity-level tax elections filed | 6.97% |
| Partnership (Form 3) Filing Stats | |
| Partnership returns filed | 85,382 |
| Partnership entity-level tax elections filed | 3,009 |
| Percent of entity-level tax elections filed | 3.52% |
| Pass-Through Entity Filing Stats - TOTAL | |
| Pass-through entity returns filed | 172,171 |
| Entity-level tax elections filed | 9,057 |
| Percent of entity-level tax elections filed | 5.26% |



8

Pass-Through ELT Election Overview

Facts for Calendar Year 2022:

- ▷ Tax-option (S) corporation is 100% owned by Individual A
- ▷ Tax-option (S) corporation makes the election to pay tax at the entity level
- ▷ Individual A is a WI resident and single
- ▷ Federal standard deduction is \$12,950 in 2022
- ▷ WI exemption deduction is \$700
- ▷ Individual A does not have any other sources of income, loss, deduction, etc.
- ▷ Assume all estimated taxes paid and deductible in 2022



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- ▷ Reduction in tax:
\$19,767

| Tax Year 2022 - SALT Limitation | | |
|---------------------------------|------------------|------------------|
| | No ELT Election | ELT Election |
| Wisconsin Form 5S | | |
| Income | \$1,000,000 | \$1,000,000 |
| Wisconsin tax | \$0 | 79\$79,000 |
| Federal Form 1120S | | |
| Gross receipts | \$1,000,000 | \$1,000,000 |
| Expenses (tax paid) | \$0 | (\$79,000) |
| Income | \$1,000,000 | \$921,000 |
| Wisconsin Form 1 | | |
| Wisconsin taxable income | \$999,300 | \$0 |
| Wisconsin tax | \$69,537 | \$0 |
| Federal Form 1040 | | |
| Taxable income | \$987,050 | \$908,050 |
| Federal tax | \$328,164 | \$298,934 |
| Total federal and WI Tax | \$397,701 | \$377,934 |



10

Polling Question 2



11

Pass-Through ELT Election Overview

- ▷ Section 11042 of Public Law 115-97 (Tax Cuts and Jobs Act) created the federal limitation of \$10,000 when claiming itemized deductions for state and local taxes
- ▷ Provision is set to expire for taxable years beginning on or after January 1, 2026



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▷ Increase in tax:
\$1,171

| Tax Year 2022 – No SALT Limitation | | |
|------------------------------------|------------------|------------------|
| | No ELT Election | ELT Election |
| Wisconsin Form 55 | | |
| Income | \$1,000,000 | \$1,000,000 |
| Wisconsin tax | \$0 | \$79,000 |
| Federal Form 1120S | | |
| Gross receipts | \$1,000,000 | \$1,000,000 |
| Expenses (tax paid) | \$0 | (\$79,000) |
| Income | \$1,000,000 | \$921,000 |
| Wisconsin Form 1 | | |
| Wisconsin taxable income | \$999,300 | \$0 |
| Wisconsin tax | \$69,537 | \$0 |
| Federal Form 1040 | | |
| Taxable income | \$930,463 | \$908,050 |
| Federal tax | \$307,226 | \$298,934 |
| Total federal and WI Tax | \$376,763 | \$377,934 |

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Polling Question 3

14

Different State Pass-Through Entity- Level Tax Elections



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| State | Entity-Level Tax (Optional Election) | Member May Claim Nonrefundable Credit for Allocable Portion of Entity-Level Tax Paid | Member May Claim Refundable Credit for Allocable Portion of Entity-Level Tax Paid | Member May Exclude Allocable Portion of Income Passed-Through from Entity Making Entity-Level Tax Election |
|------------|--------------------------------------|---|--|--|
| Wisconsin | Yes | No | No | Yes |
| Alabama | Yes | NA | Yes | No |
| California | Yes | Yes | No | No |
| Oklahoma | Yes | No | No | Yes |



16

Claiming Wisconsin's Credit for Taxes Paid to Another State with the Pass-Through Entity-Level Tax Election



17

Polling Question 4



18

Claiming Wisconsin's Credit for Taxes Paid to Another State with the ELT Election

▷ Five scenarios to consider when claiming Wisconsin's credit for taxes paid to another state:

1. ELT election made in Wisconsin only
2. ELT election made in other state only (**nonrefundable** credit for members)
3. ELT election made in other state only (**refundable** credit for members)
4. ELT election made in other state only (income excludable for members)
5. ELT election made in Wisconsin and in other state



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Claiming Wisconsin's Credit for Taxes Paid to Another State with the ELT Election

▷ ELT election made in Wisconsin only

- Only the pass-through entity may claim the credit (sec. 71.07(7)(b)2., Wis. Stats.)
- Entity's credit is based on net income or franchise tax paid by the entity to another state on that income and the net income tax on that income paid by the entity on behalf of its shareholders, partners, and members that are residents of this state on a composite return filed with the other state against the net income or franchise tax otherwise payable to this state on income of the same year (sec. 71.07(7)(b)3., Wis. Stats.)
- Use Schedule ET-OS, *Credit for Net Tax Paid to Another State*, to claim the credit



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Claiming Wisconsin's Credit for Taxes Paid to Another State with the ELT Election

▷ ELT election made in other state only (**nonrefundable** credit for members)

- In general, the individual Wisconsin members of the pass-through entity may claim the credit for the period they were a Wisconsin resident during the tax year (sec. 71.07(7)(b)2., Wis. Stats.)
- Member's credit is based on the member's allocable share of net income or franchise tax paid by the entity on their behalf
- Individuals use Schedule OS, *Credit for Net Tax Paid to Another State*, Parts III and IV to claim the credit



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PART III – Calculation of Credit (Shareholders, Partners, and Members)

Caution: See Instructions

| | | State 1 | State 2 |
|-----------|---|---------|---------|
| <u>24</u> | Postal abbreviation for state to which tax was paid | 24 | 24 |
| <u>25</u> | Income taxable to both Wisconsin and other state (see instructions) | 25 | 25 |
| <u>26</u> | Total income taxed by the other state (see instructions) | 26 | 26 |
| <u>27</u> | Divide line 25 by line 26. Carry the decimal to four places and fill in on line 27. If line 26 is less than line 25, enter 1.0000 | 27 | 27 |
| <u>28</u> | From the income tax return of the other state, fill in the net tax amount after subtracting all nonrefundable and refundable credits (see instructions) | 28 | 28 |
| <u>29</u> | Multiply line 27 by line 28. Round the result to the nearest dollar. If claiming a credit for net tax paid to Minnesota, Iowa, Illinois, or Michigan, skip lines 30 through 34 and fill in the amount from line 29 on line 36 | 29 | 29 |



22

Claiming Wisconsin's Credit for Taxes Paid to Another State with the ELT Election

▷ ELT election made in other state only (refundable credit to members)

- In general, the individual Wisconsin members of the pass-through entity may claim the credit for the period they were a Wisconsin resident during the tax year (sec. 71.07(7)(b)2., Wis. Stats.)
- Member's credit is based on the member's net income tax paid to the other state on their individual income tax return filed in the other state (sec. Tax 2.955(2)(a), Wis. Adm. Code)
- Individuals use Schedule OS, *Credit for Net Tax Paid to Another State*, Parts I, II, and IV to claim the credit. Do not reduce the net tax on line 22 of Schedule OS by the individual's credit claimed in the other state for tax paid by the entity in the other state.



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Example 1

▷ Facts for tax year 2022:

- Tax-option (S) corporation ABC is 100% owned by individual Shareholder D
- Individual Shareholder D is a full-year Wisconsin resident filing as single
- All of ABC's income is reportable to Alabama
- ABC elects to pay tax at the entity level in Alabama
- ABC does not elect to pay tax at the entity level in Wisconsin
- Shareholder D is required to report their allocable share of ABC's items of income, loss, and deductions on their Alabama individual income tax return
- Alabama's ELT election provides for a refundable credit on Shareholder D's Alabama individual income tax return for their allocable portion of tax paid by ABC



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Example 1 (continued)

| | |
|---|------------------|
| ABC's Alabama taxable income (ordinary income) | \$100,000 |
| Alabama's pass-through entity-level tax rate (made up for purposes of this example) | <u>6%</u> |
| ABC's Alabama income tax | \$6,000 |
| Individual Shareholder D's taxable wages in Alabama | \$10,000 |
| Shareholder D's allocable portion of ABC's taxable income | <u>\$100,000</u> |
| Total Alabama taxable income | \$110,000 |
| Alabama individual tax rate (made up for purposes of this example) | <u>4%</u> |
| Net Tax | \$4,400 |
| Shareholder D's refundable credit for income tax paid by ABC | <u>(\$6,000)</u> |
| Shareholder D's individual income tax/(refund) | (\$1,600) |



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Example 1 (continued)

▷ Conclusion:

- Shareholder D's Wisconsin credit for taxes paid to another state is based on the \$4,400 net income tax from Shareholder D's Alabama individual income tax return
- Shareholder D uses Schedule OS, Parts I, II, and IV to compute Wisconsin's credit for taxes paid to another state



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| | | State 1 | State 2 |
|---|--|-----------|---------|
| PART I – Income From Other State | | | |
| | Postal abbr. → | A L | |
| 1 | Wages, salaries, tips, etc | 10000.00 | .00 |
| 2 | Business income / loss | .00 | .00 |
| 3 | Capital gain / loss | .00 | .00 |
| 4 | Other gains / losses | .00 | .00 |
| 5 | IRA distributions, pensions, and annuities | .00 | .00 |
| 6 | Rental real estate, royalties, partnerships, S corporations, trusts, etc | 100000.00 | .00 |
| 7 | Farm income / loss | .00 | .00 |
| 8 | Unemployment compensation | .00 | .00 |
| 9 | Social security benefits | .00 | .00 |
| 10 | Other income | .00 | .00 |
| 11 | Add lines 1 through 10 in each column | 110000.00 | .00 |



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18 Total income taxed by other state – subtract line 17 from line 11 18 110000.00 .00

PART II – Calculation of Credit (Individual, Estate, or Trust Income Tax)

19 Income taxable to both Wisconsin and other state (see instructions) 19 110000.00 .00

20 Total income taxed by the other state (see instructions) 20 110000.00 .00

21 Divide line 19 by line 20. Carry the decimal to four places and fill in on line 21. If line 20 is less than line 19, enter 1.0000 21 1 . 0 0 0 0

22 From the income tax return of the other state, fill in the net tax amount after subtracting all nonrefundable and refundable credits (see instructions) 22 4400.00 .00

23 Multiply line 21 by line 22. Round the result to the nearest dollar. If tax was paid to another state and passed through to you by a tax-option (S) corporation, limited liability company, or partnership, go on to Part III. Otherwise, skip lines 25 through 29 and go on to Part IV. If claiming a credit for net tax paid to Minnesota, Iowa, Illinois, or Michigan, skip lines 30 through 34 and fill in the amount from line 23 on line 35 23 4400.00 .00



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PART IV - Credit Allowed

| | | | | |
|-----------|---|----|-------------|---------|
| 30 | Income taxable to both Wisconsin and other state (see instructions) | 30 | 110000.00 | .00 |
| 31 | Wisconsin income from Form 1, line 7, Form 1NPR, line 30, or Form 2, see instructions | 31 | 110000.00 | .00 |
| 32 | Divide line 30 by line 31. Carry the decimal to four places and fill in on line 32. If line 31 is less than line 30, fill in 1.0000 | 32 | 1 . 0 0 0 0 | |
| 33 | Fill in the Wisconsin net income tax from: • Form 1, line 12, less the amounts on lines 13 through 18 • Form 1NPR, line 46, less the amounts on lines 47 through 49 • Form 2, line 6c, less the amount on line 7 | 33 | 5454.00 | .00 |
| 34 | Multiply line 32 by line 33. Round the result to the nearest dollar | 34 | 5454.00 | .00 |
| 35 | Fill in the amount from line 23 | 35 | 4400.00 | .00 |
| 36 | Fill in the amount from line 29 | 36 | .00 | .00 |
| 37 | Add lines 35 and 36 | 37 | 4400.00 | .00 |



29

| | | | | |
|-----------|---|----|---------|-----|
| 38 | Fill in the smaller of line 34 or line 37. If claiming a credit for net tax paid to Minnesota, Iowa, Illinois, or Michigan, fill in the amount from line 37 | 38 | 4400.00 | .00 |
| 39 | Add the amounts in each column of line 38. Fill in the total here | 39 | 4400.00 | |
| 40 | If you have tax paid to more than 2 states, fill in the amount from line 39 of any additional Schedules OS | 40 | | .00 |
| 41 | Add lines 39 and 40. This is your credit for tax paid to another state (see instructions) | 41 | 4400.00 | |



30

Example 2

► Facts:

- Same facts as example 1, and
- Assume Alabama has 1% franchise tax on ordinary income of a pass-through entity
- There is no individual income tax credit passed through for the franchise tax

| | |
|---|-----------|
| ABC's Alabama ordinary income | \$100,000 |
| Alabama's PTE franchise tax rate (made up for purposes of this example) | <u>1%</u> |
| ABC's Alabama PTE franchise tax | \$1,000 |



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Example 2

► Conclusion:

- Shareholder D's Wisconsin credit for taxes paid to another state is based on the \$4,400 net income tax from Shareholder D's Alabama individual income tax return
- Shareholder D uses Schedule OS, Parts I, II, and IV to compute Wisconsin's credit for taxes paid to another state
- Shareholder D uses Schedule OS, Parts III and IV to report the \$1,000 franchise tax paid by ABC when computing their Wisconsin credit for taxes paid to another state



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| | | State 1 | State 2 |
|---|--|-----------|---------|
| PART I – Income From Other State | | | |
| | Postal abbr. → | A L | |
| 1 | Wages, salaries, tips, etc | 10000.00 | .00 |
| 2 | Business income / loss | .00 | .00 |
| 3 | Capital gain / loss | .00 | .00 |
| 4 | Other gains / losses | .00 | .00 |
| 5 | IRA distributions, pensions, and annuities | .00 | .00 |
| 6 | Rental real estate, royalties, partnerships, S corporations, trusts, etc | 100000.00 | .00 |
| 7 | Farm income / loss | .00 | .00 |
| 8 | Unemployment compensation | .00 | .00 |
| 9 | Social security benefits | .00 | .00 |
| 10 | Other income | .00 | .00 |
| 11 | Add lines 1 through 10 in each column | 110000.00 | .00 |



18 Total income taxed by other state – subtract line 17 from line 11 18 110000.00 .00

PART II – Calculation of Credit (Individual, Estate, or Trust Income Tax)

19 Income taxable to both Wisconsin and other state (see instructions) 19 110000.00 .00

20 Total income taxed by the other state (see instructions) 20 110000.00 .00

21 Divide line 19 by line 20. Carry the decimal to four places and fill in on line 21. If line 20 is less than line 19, enter 1.0000 21 1 . 0 0 0 0

22 From the income tax return of the other state, fill in the net tax amount after subtracting all nonrefundable and refundable credits (see instructions) 22 4400.00 .00

23 Multiply line 21 by line 22. Round the result to the nearest dollar. If tax was paid to another state and passed through to you by a tax-option (S) corporation, limited liability company, or partnership, go on to Part III. Otherwise, skip lines 25 through 29 and go on to Part IV. If claiming a credit for net tax paid to Minnesota, Iowa, Illinois, or Michigan, skip lines 30 through 34 and fill in the amount from line 23 on line 35 23 4400.00 .00



PART III – Calculation of Credit (Shareholders, Partners, and Members)**Caution:** See Instructions

| | | State 1 | State 2 |
|-----------|---|---|--|
| 24 | Postal abbreviation for state to which tax was paid | <div><div>A</div><div>L</div></div> | <div><div></div><div></div></div> |
| 25 | Income taxable to both Wisconsin and other state (see instructions) | 100000.00 | .00 |
| 26 | Total income taxed by the other state (see instructions) | 100000.00 | .00 |
| 27 | Divide line 25 by line 26. Carry the decimal to four places and fill in on line 27. If line 26 is less than line 25, enter 1.0000 | <div><div>1</div><div>.</div><div>0</div><div>0</div><div>0</div><div>0</div></div> | <div><div></div><div>.</div><div></div><div></div><div></div><div></div></div> |
| 28 | From the income tax return of the other state, fill in the net tax amount after subtracting all nonrefundable and refundable credits (see instructions) | 1000.00 | .00 |
| 29 | Multiply line 27 by line 28. Round the result to the nearest dollar. If claiming a credit for net tax paid to Minnesota, Iowa, Illinois, or Michigan, skip lines 30 through 34 and fill in the amount from line 29 on line 36 | 1000.00 | .00 |



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PART IV - Credit Allowed

| | | | | |
|-----------|--|----|---|--|
| 30 | Income taxable to both Wisconsin and other state (see instructions) | 30 | 110000.00 | .00 |
| 31 | Wisconsin income from Form 1, line 7, Form 1NPR, line 30, or Form 2, see instructions | 31 | 110000.00 | .00 |
| 32 | Divide line 30 by line 31. Carry the decimal to four places and fill in on line 32. If line 31 is less than line 30, fill in 1.0000 | 32 | <div><div>1</div><div>.</div><div>0</div><div>0</div><div>0</div><div>0</div></div> | <div><div></div><div>.</div><div></div><div></div><div></div><div></div></div> |
| 33 | Fill in the Wisconsin net income tax from: <ul style="list-style-type: none">• Form 1, line 12, less the amounts on lines 13 through 18• Form 1NPR, line 46, less the amounts on lines 47 through 49• Form 2, line 6c, less the amount on line 7 | 33 | 5454.00 | .00 |
| 34 | Multiply line 32 by line 33. Round the result to the nearest dollar | 34 | 5454.00 | .00 |
| 35 | Fill in the amount from line 23 | 35 | 4400.00 | .00 |
| 36 | Fill in the amount from line 29 | 36 | 1000.00 | .00 |
| 37 | Add lines 35 and 36 | 37 | 5400.00 | .00 |



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| | | | | |
|-----------|---|-----------|---------|-----|
| 38 | Fill in the smaller of line 34 or line 37. If claiming a credit for net tax paid to Minnesota, Iowa, Illinois, or Michigan, fill in the amount from line 37 | 38 | 5400.00 | .00 |
| 39 | Add the amounts in each column of line 38. Fill in the total here | 39 | 5400.00 | |
| 40 | If you have tax paid to more than 2 states, fill in the amount from line 39 of any additional Schedules OS | 40 | | .00 |
| 41 | Add lines 39 and 40. This is your credit for tax paid to another state (see instructions) | 41 | 5400.00 | |



Claiming Wisconsin's Credit for Taxes Paid to Another State with the ELT Election

▷ ELT election made in other state only (income excludable for members)

- In general, the individual Wisconsin members of the pass-through entity may claim the credit for the period they were a Wisconsin resident during the tax year (sec. 71.07(7)(b)2., Wis. Stats.)
- Member's credit is based on the member's allocable share of tax paid by the entity on their behalf
- Individuals use Schedule OS, *Credit for Net Tax Paid to Another State*, Parts III and IV to claim the credit



Polling Question 5



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Claiming Wisconsin's Credit for Taxes Paid to Another State with the ELT Election

▷ ELT election made in Wisconsin and in other state

- Only the pass-through entity may claim the credit (sec. 71.07(7)(b)2., Wis. Stats.)
- Entity's credit based on net income or franchise tax paid by the entity to another state on that income and the net income tax on that income paid by the entity on behalf of its shareholders, partners, and members that are residents of this state on a composite return filed with the other state against the net income or franchise tax otherwise payable to this state on income of the same year (sec. 71.07(7)(b)3., Wis. Stats.)
- Use Schedule ET-OS, *Credit for Net Tax Paid to Another State*, to claim the credit



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Resources

- ▷ [Schedule OS and instructions](#)
- ▷ [Pass-Through Entity-Level Tax: Partnership Determining Income and Computing Tax common questions](#)
- ▷ [Pass-Through Entity-Level Tax: Partnership Partner Reporting common questions](#)
- ▷ [Pass-Through Entity-Level Tax: Tax-Option \(S\) Corporation Determining Income and Computing Tax common questions](#)
- ▷ [Pass-Through Entity-Level Tax: Tax-Option \(S\) Corporation Shareholder Reporting common questions](#)



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Contact Us

- ▷ Practitioner email address and phone number
 - Do not share with your clients
 - DORTaxPractitioners@wisconsin.gov
 - (608) 261-5199



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Presenter

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Thanks!
Any questions?



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11 a.m. – 12 p.m.

Multistate Taxation of Trusts

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Multistate Taxation of Trusts

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I. Trust Situs Concerns

A. Income Tax

With the variation in state income taxation of trust, trust situs for tax purposes may be very significant – particularly in large trusts.

There are eight states that do not have a trust income tax: Alaska, Florida, New Hampshire, Nevada, South Dakota, Texas, Washington and Wyoming. In 2022, Tennessee phased out its taxation of interest and dividends in non-grantor trusts. Some other states, including Wisconsin, will not tax trusts created by residents of other states that transfer situs to those states.

B. Distribution Matters

Although there may be important distinctions in a state's definition of trust "income" or of ascertainable standards, etc., perhaps the clearest example of an important state law difference related to distribution matters concerns total return trusts. The absence of total return trusts in a particular state's statutes may encourage a trustee to seek a different trust situs. Similar considerations may also be present in the power to adjust between principal and income.

C. Investment Matters

Whether the location of a particular investment advisor or fiduciary leads to a move of trust situs, or a trustee simply wishes to be governed by, for instance, the prudent investor rule, investment matters may lead one to take action that impacts trust situs.

D. Asset Protection

Domestic self-settled trusts available in Alabama, Alaska, Colorado,¹ Connecticut, Delaware, Hawaii, Mississippi, Missouri, Nevada, New Hampshire, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Virginia, West Virginia and Wyoming. While a move of a trust to, or decision to create a trust with a situs in, one of such states may, arguably, provide asset protection for an individual, the 2005 changes to the Bankruptcy Code have created a 10-year look back to transfers to such trusts for purposes of determining the exclusion of such transfers from the bankruptcy estate.

In addition, asset protection for beneficiaries may also vary from state to state. This has been highlighted in the adoption of various iterations of the Uniform Trust Code (“UTC”) in a number of states. Perhaps the most controversial provisions of the UTC as promulgated by the Uniform Law Commission relate to the ability of creditors to access a trust beneficiary’s interest for certain obligations including child support, certain government liens, etc. This move from the long-standing rules of many states may make states adopting the UTC less attractive to certain beneficiaries. Wisconsin’s adoption of the UTC in the 2014 version of the Wisconsin Trust Code did not, however, diminish asset protection for trust beneficiaries. Also, there is an effort to consider the introduction of Domestic Asset Protection legislation currently underway in Wisconsin.

E. Perpetuities

Variances in rules relating to the Rule Against Perpetuities or the length of time a trust may continue may clearly be important in dynasty trust planning. Over 20 States have abolished the common law Rule Against Perpetuities, and at least 8 others allow trusts with durations of anywhere from 150 to 1,000 years. Wisconsin is unusual in that it has never had a Rule Against Perpetuities.

F. Fiduciary Matters

Consider, for example, the importance that some fiduciaries may place on the ability to delegate investment responsibility and liability, as under the Uniform Prudent Investor Act. In the minority of states that do not presently have the Act in place, a move may provide some comfort to the trustee.

¹ There are differences of opinion as to whether Colorado truly has a Domestic Asset Protection Trust statute/concept available.

G. Other Factors

- 1. Construction**
- 2. Administrative Efficiency**
- 3. Judicial System**
- 4. Beneficiary Rights**

II. Determination of Situs

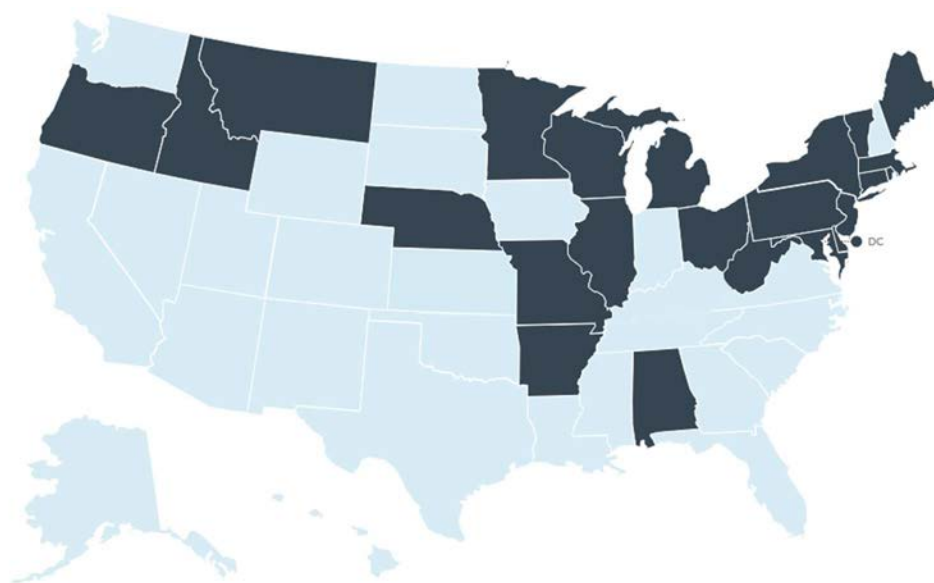
A. Relevant Factors

Although there are a variety of tests, the factors in play are rather common and limited in number. The main factors are:

1. Residence of Trust Creator

Twenty-two states determine tax situs based on the residence of the trust's creator. There are a number of potential arguments suggesting that such determinations are appropriate – however, there are also arguments which would lead to the opposite conclusion. One particular argument is that the nexus of a trust created by a state's resident is connected to the protection of that's state's court system. This is, most commentators appear to concede, relatively persuasive with regard to testamentary trusts. The same spirit of concession may not, however, be as prevalent for *inter vivos* trusts.

- a. Date of Creation**
- b. Date of Funding**
- c. Date Trust Becomes Irrevocable**



Taxation based on Residence of Settlor²

2. Place of Administration

Pabst v. Wisconsin Dept. of Taxation, 19 Wis.2d 313, 120 N.W.2d 77 (Wis. Sup Ct., 1963) is often cited as standing for the proposition that administration within a particular state is sufficient nexus to tax a trust as a resident trust of such state.

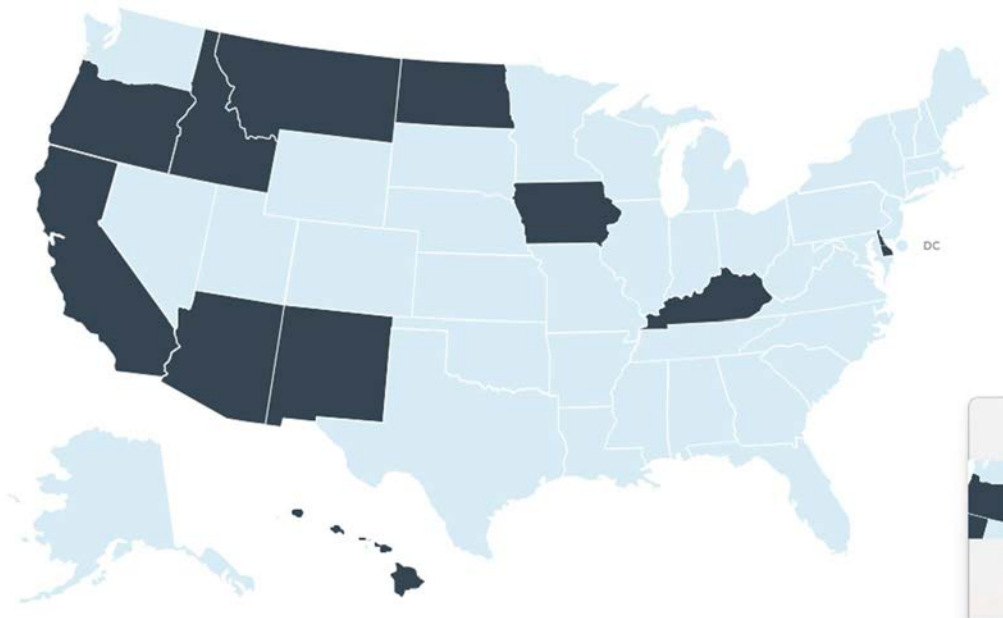
² Wisconsin's rules vary based on when the trust became irrevocable. Trusts which became irrevocable after October 29, 1999 are taxed solely based on the residence of the trust's "fundor." Wis. Stat. §71.14(3m).

Missouri also requires the presence of a resident trustee to impose taxation based on the residence of the trust creator. New York will not impose tax on this base if none of the trustees are resident in New York, all property of the trust is located outside of that state, and all income or gains are attributable to out-of-state sources.

governing instrument, etc. Perhaps the structure chosen as a default rule, can best be explained by the uniform law commission's concern with defining trust situs with multiple trustees from various jurisdictions. See *Comments to UTC §108*.

3. Residence of Trustee

Residence of a trustee should also be sufficient nexus for income taxation in the state of residence. See, e.g., *Harvard Trust Co. v. Commissioner of Corps & Taxation*, 284 Mass. 224, 187 N.E. 596 (1933). See also, *State ex. rel. Wisconsin Trust Co. v. Widule*, 164 Wis. 56, 159 N.W. 630 (1916) (although this decision would not have been reached under the current Wis. Stat. §71.14(3m), the case still stands for the proposition that residence of a trustee is sufficient nexus).



Taxation Based on Trustee Residence

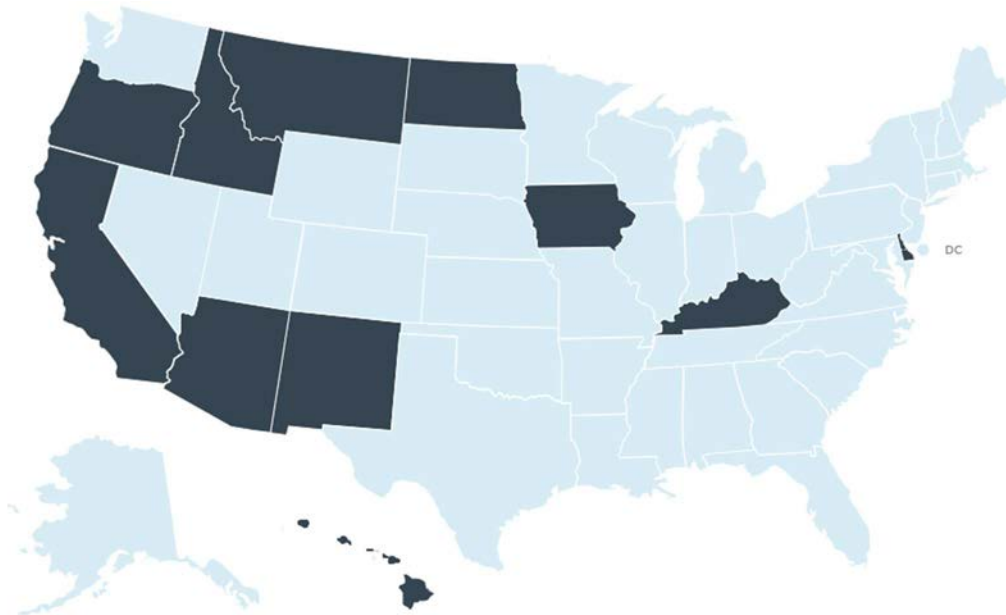
The use of a trust tax system based on trustee residence clearly is an impediment to that state's attraction of trust business.

Note the recent decision in *Bank of America v. Commissioner of Revenue*, 54 N.E.2d 13 (Mass. 2016) which indicates that corporate residence is not necessarily determinative of the

“residence” of a corporate fiduciary. In *Bank of America* the court found that maintenance of over 200 branch offices in the state and the conduct of trust administration activities in the state were sufficient to determine that Bank of America was a resident (or “inhabitant,” to use the language of the decision) of Massachusetts and therefore impose Massachusetts fiduciary income tax.

4. Residence of Beneficiary

Most states do not tax trusts based on the residency of its beneficiaries. However, there are a number that do. The presence of a beneficiary is likely, in the author’s view, a stronger nexus than residence of a grantor of an *inter vivos* trust.



Taxation Based on Residence of a Beneficiary

Taxation of beneficiaries domiciled in a particular state is constitutional -- even if the trust has a different situs and there is no income from property with a situs in that state. *See, e.g., Oklahoma Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 462-63 (1965).

5. Situs of Trust Property

Property with a situs in a particular state may properly be subject to tax by such state. *See, e.g., Shaffer v. Carter*, 252 U.S. 37

(1920) (“Just as a state may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character, and not more onerous in its effect, upon the incomes accruing to nonresidents from their property or business within the state, or their occupations carried on therein, enforcing payment, so far as it can, by the exercise of a just control over persons and their property within its borders.”).

Be careful, though, as the presence of some income from property or assets in a particular state may create tax consequences in that state.

6. Governing Law

Although not commonly considered as a factor for trust situs or tax situs, governing law is a primary factor in Louisiana and a potentially important factor in Idaho regarding tax situs. In addition, governing law can be indicative of residency or a nexus factor. That said, the line between the laws applicable to administration versus meaning and effect is not necessarily as definite as we might think. Consider this chart and allocations of governing law vs. trust situs items from an article/outline entitled *Down the Rabbit Hole and Through the Looking Glass* by Margaret E.W. Sager and Bradley D. Terebelo:

| <u>Theoretically the Law of the “State of Origin” or “Pitching” State</u> | <u>Theoretically the Law of the State of the New Situs or “Receiving” State</u> |
|---|---|
| <u>Validity and Construction</u> | <u>Administration</u> |
| Capacity of Settlor (validity) | |
| Effectiveness of Execution (validity) | |
| Rights of Adoptees (construction) | |
| Rights of Illegitimates (construction) | |
| Rule Against Perpetuities (validity) | |
| Principal versus Income (construction ?) | Principal versus Income (?) |
| Unitrust/Power to Adjust (construction ?) | Unitrust/Power to Adjust (?) |
| Per Stirpes / Per Capita (construction) | |
| Entitlement to Distribution (construction) | |
| | Qualification of Trustees |
| | Removal and Replacement of Trustees |
| | Prudent Investor Act |
| | Self-Dealing of Fiduciary |
| Failure of Beneficiaries (i.e., intestacy; escheat) (construction) | |
| Marital Rights (i.e., election against will; upon divorce) (construction) | |
| | Rights of Creditors |
| Beneficiary Notice Requirements (?) | Beneficiary Notice Requirements (?) |
| Decanting (?) | Decanting (?) |
| | Virtual Representation |
| | Delegation of Fiduciary Responsibilities |
| | Directed Trusts |

Here are a few potential additions to the above list:

Plan of Distribution Effectiveness
Choice of Mandatory Provisions
Right to Substitute
Fiduciary vs. Non-Fiduciary nature of powers or offices
within a trust
Modification of Irrevocable Trusts
Trust Protector Authority/Standards
Material Purpose Definition

What other items might be added? How might they be classified?
Which law determines which classification?

- a. Consider Wis. Stat. §701.0105(2) with respect to mandatory rules:

701.0105 Default and mandatory rules.

* * * * *

(2) The terms of a trust prevail over any provision of this chapter except for the following:

- (a) The requirements for creating a trust.
- (b) The duty of a trustee or a directing party to act in good faith and in accordance with the terms and purposes of a trust instrument and the interests of the beneficiaries.
- (c) The requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful.
- (d) The power of a court to modify or terminate a trust under ss. 701.0410 to 701.0416.
- (e) The effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in ss. 701.0501 to 701.0508.
- (f) The power of the court under s. 701.0702.

(g) The power of the court under s. 701.0708 (2) to adjust a trustee's, directing party's, or trust protector's compensation specified in the terms of the trust.

(h) The effect of an exculpatory term under s. 701.1008.

(i) The rights under ss. 701.1010 to 701.1013 of a person other than a trustee or beneficiary.

(j) Periods of limitation for commencing a judicial proceeding.

(k) The power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice.

(L) The jurisdiction of the court and venue for commencing a proceeding as provided in ss. 701.0202, 701.0203, and 701.0204.

(m) The jurisdiction of the court under ss. 701.0807 (4), 701.0808 (9), and 701.0818 (12).

(n) The legal capacity under s. 701.0818 (2) (c) in which a trust protector who is also serving as a trustee or a directing party must exercise any power granted to the trust protector.

Do any of the above raise questions about whether governing law can be changed on a topic? Or whether administrative situs can be shifted on certain issues?

- b.** Can you include a provision in a trust to allow for a change in governing law? Draftspersons have included such provisions in trusts for many years – although it would appear to be a minority that do so. Are they effective? And to what extent?
- c.** If you can change governing law, what impact does that have on a trust's GST exempt status? Is there a gift implication? Who would be the donor or transferor of any negative answer?

- d. Can you change the governing law of a trust that includes the below?

(1) **Governing Law.** The law of the jurisdiction where the trust is being administered shall govern its administration, but the law of the State of Wisconsin shall be controlling for purposes of determining the validity of the trust and the interpretation of its provisions.

- d. Clients are certainly much more mobile than they used to be. And their moves do raise a host of issues for an estate planner to consider. But what about governing law of a revocable trust? Does a trust created in Wisconsin by a Wisconsin resident become a Minnesota trust at the settlor's death if the settlor moved to Minnesota after the trust's creation? What if amendments are made? What if the trust is restated? What about the exercise of limited powers of appointment granted to beneficiaries?

In addition, there are generation-skipping transfer tax implications to consider if a change in governing law (or trust situs for that matter) results in a lengthening of a GST exempt or grandfathered trust's term. *See*, Treas. Reg. § 26.2601-1(b)(4)(i)(E), ex. 4. Same would be true for the exercise of a limited power of appointment. Treas. Reg. § 26.2601-1(b)(1)(v)(B). Query whether a change of governing law impacts a trust's duration or is that an immutable item at the trust's formation?

Lastly, we should recognize that this topic is likely to garner increased scrutiny with the proliferation of Domestic Asset Protection Trusts. The battle ground that determines what the boundaries of changing governing law might be could very well center on the rights of creditors of trust creators or beneficiaries who seek to establish such trusts or stronger creditor protection in outside jurisdictions.

B. Changing Trust Situs

1. Methods to Change Situs

There are three main ways for trust situs to be changed:

a. Trustee Action

Generally, if authorized in the document or applicable local law, trustee action will be sufficient to alter trust situs. There may be a requirement, however, of notice to beneficiaries, consent by such beneficiaries, or other such limitations on a trustee's ability to change trust situs.

b. Court Proceeding

Resort to the courts is generally available for changing a trust's situs. However, such a change may not alter the trust's tax situs.

c. Change in Circumstances

i. Entity Planning

As referenced above, most states will take certain assets, such as real estate, partnerships, corporations, etc. based on the situs of the property or entity. Some states, however, may have laws that would presume to subject all of a trust subject to tax if, either alone or in conjunction with other factors, the trust contains assets with a physical situs in that state. Moving real estate in that state, for example, into a limited liability company may be enough to avoid taxation based on the property's situs.

ii. Border Crossing

If a trustee or beneficiary moves to another state, they may trigger a change of situs where their residence is the determining factor.

iii. Place of Administration

As referenced above, where a trust's place of administration is can be a tricky question to answer. For example, if a corporate trustee with a presence in one state out-sources (or in-sources) certain administrative or investment functions to an office in another state, where is the place of administration?

iv. Adding Advisors

There are occasions where it makes sense to divide trustee-type responsibilities among various parties and/or retain advisors to handle certain trust tasks. Consider whether the residence of such advisors may make an impact on situs.

d. Decanting

The theory of decanting is relatively simple – a trust may pour-over (decant) to another. The pouring trust ends, while the receiving trust continues (or begins). A number of states, including Wisconsin, have decanting statutes, with the first arising in New York State in 1992. These statutes create a process and conditions for a proper transfer from one trust to another.³

The power to decant may be present under the common law of some states – although the subject has received little treatment in most jurisdictions (at least those without decanting statutes). If the power to decant is not present in the trust instrument, consider whether decanting is advisable or permissible (absent a court's exercise of its equitable powers to modify trusts) due to:

i. Spendthrift Protection

Will spendthrift provisions or ascertainable standards prevent a trustee from distributing assets to another trust (absent specific authority to do so under state law or the governing instrument)?

ii. GST Exempt Status

Treas. Reg. §26.2601-1(b)(4)(i)(D)(1) provides:

A modification of the governing instrument of an exempt trust (including [certain] trustee distribution[s] . . .) by judicial

³ Delaware and Tennessee's decanting statutes differ from New York and Alaska's statutes in that they do not require absolute discretion as a condition to the ability to decant a trust. Rather, they simply require that a trustee have the power to invade trust principal.

reformation, or nonjudicial reformation that is valid under applicable state law, will not cause an exempt trust to be subject to the provisions of chapter 13, if the modification does not shift a beneficial interest in the trust to any beneficiary who occupies a lower generation . . . than the person or persons who held the beneficial interest prior to the modification, and the modification does not extend the time for vesting of any beneficial interest in the trust beyond the period provided for in the original trust.

iii. Rule Against Perpetuities

Is a decant from a trust subject to the Rule Against Perpetuities to one that is not a violation of the Rule itself?

iv. Trust Situs Based on Settlor's Residence

Will a settlor's residence pour with the assets decanted into the new trust?

2. "Unchangeable" Factors

As certain jurisdictions tax trusts based on factors that are set in stone, it may be impossible to alter situs (at least tax situs) in quite a few states. A grantor's domicile is what it is at any point in time (e.g., at death, at funding, at creation, etc.).

a. Constitutionality Questions

Some states, including Wisconsin, purport to require payment of income tax on certain trusts for the duration of the trust. Consider the following:

Wisconsin domiciliary creates and funds a revocable trust. He dies on February 16, 2007 without changing domicile. Upon his death, his trustee is a South Dakota trust company, all aspects of trust administration occur in South Dakota, and all beneficiaries are residents of Nevada. No Wisconsin-situs trust property is present either.

Wis. Stat. §71.14(3m), which is clearly applicable in this hypothetical, reads as follows:

(3m)(a) Subject to par. (b) and except as provided in sub. (2) and s. 71.04 (1) (b) 2., only the following trusts, or portions of trusts, that become irrevocable on or after October 29, 1999, or that became irrevocable before October 29, 1999, and are first administered in this state on or after October 29, 1999, are resident of this state:

1. Trusts, or portions of trusts, the assets of which consist of property placed in the trust by a person who is a resident of this state at the time that the property was placed in the trust if, at the time that the assets were placed in the trust, the trust was irrevocable.
2. Trusts, or portions of trusts, the assets of which consist of property placed in the trust by a person who is a resident of this state at the time that the trust became irrevocable if, at the time that the property was placed in the trust, the trust was revocable.

(b) A trust described under par. (a):

1. Is revocable if the person whose property constitutes the trust may revest title to the property in that person.
2. Is irrevocable if the power to revest title, as described in subd. 1., does not exist.

Contrast the above with Wis. Stat. §71.04(1)(a), a general section on taxability based on situs. It simply states that “All income or loss of resident individuals and resident estates and trusts shall follow the residence of the individual, estate or trust.”

While there is no question of the constitutionality of the choice not to tax non-Wisconsin trusts, the inverse is not as clear. According to the US Supreme Court

[t]he course of decisions does reflect at least consistent adherence to one time-honored concept: that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.

Miller Bros. v. Maryland, 347 U.S. 340, 344-45 (1953). To date, the Supreme Court has not provided any meaningful guidance on what is a “minimum connection” and what is not for state taxation of trusts. And, not surprisingly, the state court decisions are anything but uniform on the subject. See, e.g., *John S. Swift, Jr. Trust v. Dir. of Revenue*, 727 S.W.2d 880 (Sup. Ct. Mo., 1987) (“An income tax is justified only when contemporary benefits and protections are provided the subject property or entity during the relevant taxing period.”) and *Chase Manhattan Bank v. Gavin*, aff’d 249 Conn. 172 (1999), cert. denied 120 S. Ct. 401 (1999) (standing for the proposition that taxation based on the domicile of the grantor at the time his *inter vivos* trust became irrevocable is permissible).

The state of Michigan had a very similar statute to our Wis. Stat. §71.14(3m). However, that statute was declared unconstitutional by a Michigan Court in *Blue v. Michigan Department of Treasury*, Michigan Court of Appeals Decision No. 116666 (Sept. 11, 1990).

The *Blue* case, while interesting to us here in Wisconsin, was decided before *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). This case is often cited as a significant shift in the constitutionality of income taxation of trusts.⁴ *Quill Corp.* dealt with the application of due process concerns and the commerce clause to the constitutionality of assessing and collecting a tax on catalog sales to North Dakota resident by a company with no other North Dakota contacts. Although there are clear differences between catalog sales and trust income taxation, at least one state (well, the District of Columbia) court has held that *Quill Corp.* was a repudiation of the *Swift* line of cases referred to above. *District of Columbia v. Chase Manhattan Bank*, 689 A.2d 539 (D.C. 1997).

⁴ *Safe-Deposit & Trust Co. v. Virginia*, 280 U.S. 83 (1929) was not specifically overruled by *Quill Corp.* However, this case, relied on by various state courts for the proposition that residence of a grantor is insufficient nexus, has not, to the author’s knowledge, been so relied on by a state court since *Quill Corp.* was decided.

What the final answer is regarding constitutionality is still up in the air – although it is worth noting that there has been court activity mostly favorable to taxpayers in federal courts as well as cases in Illinois, Minnesota, New Jersey, North Carolina, and Pennsylvania. The Illinois and Minnesota cases, along with the Michigan history, are interesting to us given the parallels with our current system of taxation of non-grantor trusts. However, we do not have a US Supreme Court or 7th Circuit opinion that would be definitive on these matters in Wisconsin – although the trends seem to be in favor of the taxpayer.

b. Decanting as Potential Solution

If the receiving trust does not have offending characteristic(s), and decanting does not cause or have some of the other issues referenced above, perhaps the problems arising in a decanting trust may be resolved?

3. General Ability Change Trust Situs

While most trusts do (and should) include some reference to the ability to change a trust's situs, generally the law will allow such a change. Scott on Trusts, for example, states:

If it is an inter-vivos trust and the trustee has not become subject to the jurisdiction of any particular court to which he is thereafter accountable, it is not necessary to apply to a court for permission to remove the trust assets to another state and to administer the trust there, unless by the terms by the trust, express or implied, they are not to be removed.

..

[If authority to transfer is unclear, or if the trust is subject to court supervision,] the court will permit a change in the place of administration if this would be in accordance with the intention of the settlor or testator, either express or implied. . . Such a change may be expressly authorized in the Will or trust instrument [for instance, by a provision to that effect, by the appointment of an out-of-state successor fiduciary, or by permitting the appointment of successor fiduciaries without limiting such successors to residents of the original state]. . . Where the intention of the testator is

thus clearly expressed, there is no reason or policy
precluding the carrying out of his wishes.

Scott, A. and Fratcher, W., *The Law of Trusts*, 4th Ed., Vol. VA,
Sec. 614 at p. 353, 355. Nevertheless, the statutes of the current
situs of the trust, and the statutes of the proposed situs, should be
consulted before embarking on any such move.

II. Tax Consequences of Situs

A. What Income is Taxed

For those states that do impose income tax on trusts, most will only apply the tax on accumulated income or capital gain if not distributed for tax and/or property law purposes.

Note: Although most states recognize grantor trust treatment in a manner consistent with the federal tax law, that is not the case across the board. *See, e.g.*, La. R.S. 47:187 (Louisiana) and D.C. Code §47-1809.7, - 1809.8 (District of Columbia). As not all states are explicit regarding grantor trust taxation, there may be additional states that may give rise to inconsistent tax treatment for federal and state income tax purposes.

B. Multiple Situs Problem

Although most states will allow for a credit for taxes paid to another, the credit may only apply to tax consequences of property with a situs in that other state. This may lead to constitutional issues that are not fully resolved. Further, there may be a need to determine a priority of credits for trusts subject to taxation in more than one state.

C. Taxation Based on Residence of a Beneficiary

In addition to taxing trusts based on the residency of trustees, California also applies a tax based on the proportion of beneficiaries residing in California. When there are no California trustees, the trust is responsible for payment of income tax attributable to non-contingent beneficiaries. The tax will apply at the time the subject beneficiary receives a distribution from the trust (thus ending his or her non-contingent status as to the distributed amount).

D. 645 Election with Diversity of Estate and Trust Situs

645 Elections with non-resident or non-reporting trusts might be more challenging.

E. Estate Tax Inclusion

The move of trusts with a situs in a decedent's state that utilized a state qualified terminable interest property election might be included in that state at the surviving spouse's death, even if he or she changes residency. For instance, in *Comptroller of the Treasury v. Taylor*, 189 A.3d 799 (Md. Ct. Spec. App. July 25, 2018), the first spouse died domiciled in Michigan and created a trust to which federal and Michigan QTIP elections were made. The surviving spouse then moved to Maryland and died domiciled there.

The Maryland court held that Maryland cannot tax the QTIP trust because no Maryland QTIP election had been made. The court cited Code of Maryland-Tax-General §7-309(b)(6)(i) (emphasis added): "For purposes of calculating Maryland estate tax, a decedent shall be deemed to have had a qualifying income interest for life under §2044(a) of the Internal Revenue Code with regard to any property for which a marital deduction qualified terminable interest property election was made for the decedent's predeceased spouse on a timely filed Maryland estate tax return."

F. Homeless/Orphan Trusts

An interesting consequence of the crazy-quilt of trust situs determination is the not insubstantial probability of having trusts that have no state filing requirements – something that is very much the case for many states that are administered in Wisconsin but funded by out-of-state donors. In that case, there may be discomfort with the lack of filing and therefore a desire to find a state home.

This is particular of concern in circumstances where the nexus between a state seems tenuous or no longer in existence. Some practitioners choose to ignore state requirements entirely, while others are more likely to tow the line despite how tenuous the connections might otherwise be.

III. Property Law Consequences of Situs

A. Distribution Matters

B. Investment Matters

- C. Asset Protection**
- D. Perpetuities**
- E. Construction**
- F. Fiduciary Matters**
- G. Administrative Efficiency**
- H. Judicial System**
- I. Beneficiary Rights**

IV. Drafting and Planning Considerations

A. Trustee Appointments

Fiduciary appointments are often made based on the skills, abilities and other attributes of a particular person or institution. However, such person or institution may carry certain “situs baggage” that may suggest he, she or it is not the ideal choice from a tax perspective. Reviewing the options, and the consequences of particular choices, with a client is worthwhile. In Wisconsin, however, the utility of this exercise is premised on the notion that Wis. Stat. §71.14(3m) is unconstitutional.⁵

B. Change of Residence of Client

If a client intends to enter a state (like Wisconsin) that taxes trusts based on the residence of a grantor from a state that does not, the client may consider creating an irrevocable (for property law purposes, but not for income or estate and gift tax purposes) trust to hold his or her property prior to assuming the new residence.

C. Discretionary vs. Mandatory Distribution Standards

As some states tax based on the residence of a trust’s beneficiaries, the definition of who is a beneficiary and who is not becomes important. It may be preferable to create discretionary distribution standards to minimize the impact of a state’s trust income tax. In some states, including California, a non-vested interest will not cause a trust to be subject to that state’s trust income tax.

⁵ Note that Wis. Stat. §71.14(3m) is not driven by the residence of the grantor so much as it is driven by the residence of the “fundor” or a trust.

D. Include Decanting Language in a Trust

When a state taxes trusts based on the residence of a grantor, a decanting statute may provide an option to avoid the offending state's taxation of the trust. In the alternative, significant distribution powers may be given to a trustee or significant powers of appointment may be given to an independent party or a beneficiary with a view towards avoiding resident trust status based on the grantor's residence.

E. Divide and Conquer

If there is concern about the taxation of a trust based on the situs of certain property or the beneficiaries, consider whether the segregation of the offending property or beneficial interests will provide a tax savings or other advantages. Consider the application of Missouri's statute, which will provide for taxation of a trust if just one of many beneficiaries is a resident of that state. *See*, Mo. Rev. Stat. §143.331 (a resident trust includes a trust that has "at least one income beneficiary who, on the last day of the taxable year, was a resident of [Missouri].").

F. Duty to Change Situs

Commentary on issues of trust situs has included reference to a possible duty to remove a trust to a more efficient situs. In fact, as referenced above, the Uniform Trust Code includes such a duty. *See*, Uniform Trust Code §108(b) (a trustee must administer the trust "at a place appropriate to its purposes, its administration, and the interests of the beneficiaries."). Should such a duty be waived? or stated explicitly in the trust document?

Note that Wis. Stat. §701.0108(3) provides "a trustee may, but has no affirmative duty to, transfer a trust's principal place of administration to another state or to a jurisdiction outside of the United States."

G. Change of Governing Law if Change of Situs

Generally, the choice of governing law and trust situs need not go hand-in-hand. The author suggests specific reference to the fact that such matters may be handled independent of one another.

H. Take Advantage of Foreign Trust Advantages

While there may be disadvantages to having trusts taxed as foreign trusts during a trust grantor's lifetime, the classification may have certain advantages if trust accumulation is desirable.

The tax definition of US and foreign trusts were changed in 1996. In short, in order to be considered a US trust, a trust must meet two tests:

1. Court Test

The trust must be subject to primary supervision over its administration by a US court.

2. Control Test

Only US fiduciary or fiduciaries have the power to control all substantial decisions of the trust. Substantial decisions would include:

- a.** Timing and amount of distributions;
- b.** Selection of beneficiaries;
- c.** Allocation between principal and income;
- d.** The power to terminate the trust (or the power to block such termination).
- e.** Power to compromise, arbitrate, or abandon claims of the trust and to decide whether to sue on behalf of or defend suits against the trust;
- f.** Power to remove, add or replace a trustee;
- g.** Power to appoint successor trustees (as long as not limited by aspects of changing the trust's situs);
- h.** Power to make investment decisions.

See, I.R.C. §7701(a)(30); Treas. Reg. §301.7701-7(d)(1)(ii).

Upon death, a foreign non-grantor trust may prove advantageous. For US income tax purpose, a foreign trust invested in appropriately sourced income, US income taxes may be deferred. These advantages must be considered with the potential penalties that may apply upon distribution to US beneficiaries. *See*, I.R.C. §663(a)(1).