Tax Law

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This chapter covers in varying detail the principal 2009 court decisions and legislative changes affecting Wisconsin taxpayers and tax attorneys. Although most 2009 income tax, franchise tax, sales and use tax, and property tax developments are discussed, this chapter is not all-inclusive.[1]

CASE LAW

Individual and Fiduciary Income Tax

S Corporation Losses Disallowed. In *Roden v. Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-167 (Tax App. Comm'n Jan. 26, 2009), the Wisconsin Tax Appeals Commission held it was proper for the Wisconsin Department of Revenue (DOR) to disallow losses claimed by S-corporation shareholders. The shareholders claimed losses with respect to the expenses of a loss S corporation that were paid by a profitable S corporation also owned by the shareholders. Under I.R.C. § 1366, a shareholder may deduct his or her share of the S corporation losses only to the extent of the shareholder's adjusted basis in the corporation's stock and in any indebtedness of the S corporation

[1] Textual references to the Wisconsin Statutes are indicated as "chapter xxx" or "section xxx.xx," without the designation "of the Wisconsin Statutes." Unless otherwise indicated, in the "Statutory Developments" section of this chapter, all references to the Wisconsin Statutes are to the 2007–08 Wisconsin Statutes, as affected by acts through 2009 Wisconsin Act 100.

to the shareholder. The commission concluded that the shareholders failed to meet their burden of proof that the DOR erred in disallowing the losses, because the shareholders (1) did not provide sufficient evidence to show that they made an actual economic outlay, (2) did not meet the *incorporated pocketbook* exception, and (3) did not demonstrate the necessity of repayment of the funds advanced to the loss corporation. (The incorporated pocketbook exception generally holds that an S corporation acts as the shareholder's agent by making payments on the shareholder's behalf, thus allowing the shareholder/taxpayer to increase his or her basis even though the payments came from a related corporate entity and not from the taxpayer directly.)

Corporate Franchise and Income Tax

Apportionment. In *Ameritech Publishing, Inc. v. Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-075 (Tax App. Comm'n Jan. 22, 2008) and No. 01-I-227(F), 2008 Wis. Tax LEXIS 18 (Tax App. Comm'n Feb. 28, 2008), *aff'd*, No. 2008CV001394 (Wis. Cir. Ct. Dane County Jan. 6, 2009), the tax appeals commission ruled that the taxpayer's relevant income-producing activity, the sale of a service, advertising (approximately 90% in the Yellow Pages), was performed in Wisconsin because virtually all members of the target audience were located in Wisconsin (as opposed to its costs of producing the advertisements and delivering them to potential customers in Wisconsin, which costs were incurred in large part outside Wisconsin). On appeal, the Dane County Circuit Court, applying the due-weight-deference standard, affirmed. The taxpayer has appealed this decision to the Wisconsin Court of Appeals.

In *OSB, Inc. v. Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-166 (Tax App. Comm'n Jan. 26, 2009), *reh'g denied*, ¶ 401-197 (Tax App. Comm'n Mar. 16, 2009) (notice of nonacquiescence filed Apr. 3, 2009), the commission ruled that OSB, a personal holding company, was doing business both in Wisconsin and in Delaware (its state of incorporation), and as a result, all its income is allocated to its state of incorporation pursuant to section 71.25(5)(b)2. Because section 71.25(5)(b)2. has since been repealed (see below), this case is now largely only historically significant with respect to the personal holding company issues. Still currently significant, however, is the commission's ruling that the DOR has the burden of proof on the issue whether section 71.25(5) (allocation and apportionment) imposes a tax (as opposed to providing an exemption).

Income and Deductions. In *Minocqua Country Club, Inc. v. Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-055 (Tax App. Comm'n Nov. 7, 2007), *aff'd*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-198 (Wis. Cir. Ct. Oneida County Apr. 1, 2009), the tax appeals commission ruled that deposits made by country-club members and shareholders in connection with an expansion of the club's golf course and a substantial renovation of its clubhouse constituted taxable gross income to the country club instead of nontaxable contributions to capital. On appeal, the Oneida County Circuit Court, on de novo review, affirmed.

Procedure. In *Reliable Plating Works, Inc. v. Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-180 (Tax App. Comm'n Feb. 5, 2009), the commission dismissed the taxpayer's petition for review on the ground it was filed late. The taxpayer received the DOR's notice of action on July 7, 2008, and so the 60-day deadline expired on September 5, 2008. The commission received the taxpayer's petition for review on September 8, 2008, via regular mail. (The commission did not mention when the taxpayer actually mailed its petition; taxpayers are well advised to file by certified mail or hand deliver petitions to the commission.)

Sales and Use Tax

Taxable Services. In *Manpower, Inc. v. Wisconsin Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-223 (Tax App. Comm'n Aug. 12, 2009), the commission held that temporary staffing services are not subject to sales and use tax. Sales and use tax only applies to the 11 types of services listed in section 77.52(2). The DOR argued the hiring of "temporary help services" would be subject to tax when temporary employees engage in any of the 11 types of taxable services listed in the statute. The commission affirmed the rule that ambiguities in the interpretation of statutes imposing tax must be resolved in favor of the taxpayer. The commission distinguished temporary help from other types of services on the following bases: the temporary workers were not under the staffing agency's control, the work performed by the temporary workers at a customer's business may change from day to day based on the changing needs of the customer, the record-keeping requirements would be significantly more burdensome than required of other sellers, and the workers often worked as substitutes for the customers' own employees, whose wages clearly were not subject to sales tax.

In *Milwaukee Symphony Orchestra, Inc. v. Wisconsin Department of Revenue*, 2009 WI App 69, 318 Wis. 2d 261, 767 N.W.2d 360 (review granted), *rev'g* [2 Wis.] St. Tax Rep. (CCH) ¶ 401-100 (Wis. Cir. Ct. Dane County Apr. 23, 2008), *rev'g* [2005–2007 Transfer Binder] [Wis.] St. Tax Rep. (CCH) ¶ 400-959 (Tax App. Comm'n Dec. 15, 2006), the court of appeals determined the commission properly concluded that the taxpayer's sale of admissions to symphonies were for entertainment events and therefore were taxable admissions. Section 77.52(2)(a)2. provides for the taxation of the sale of admissions to amusement, athletic, entertainment, or recreational events, with certain listed exceptions. The court applied the due-deference standard of review. The Wisconsin Supreme Court has accepted this matter for review.

Penalties. In *Edi Marketing v. Wisconsin Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-224 (Tax App. Comm'n Aug. 7, 2009), the commission upheld the imposition of a late filing fee and a negligence penalty for the late filing of sales and use tax returns. Reasoning that an employer cannot delegate away its responsibility to timely file returns, the commission held that a trusted employee's intentional concealment of his failure to file did not constitute good cause or responsible cause pursuant to subsections 77.60(2) and (4), respectively.

Real-estate-transfer-fee Exemptions

In *Erin L.L.C. v. Wisconsin Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-267 (Tax App. Comm'n Dec. 4, 2009), the commission held a transfer of real estate was made solely pursuant to a release of a security interest and therefore was exempt from the real estate transfer fee. Section 77.25(14) exempts transfers solely made in connection with the creation or release of security interests. The taxpayer originally acquired the real estate in 1999 to hold as security for a loan to a corporation. After the loan was satisfied in 2007, the taxpayer transferred the property to a limited liability company (LLC) owned by the same family members who owned the corporation. The commission reasoned the statute addresses only the purpose for the transfer (pursuant to a security interest) and does not explicitly limit transfers on a release of a security interest to transfers back to the property's original owners.

In *Collegiate, L.L.C. v. Wisconsin Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-256 (Tax App. Comm'n Sept. 11, 2009), the commission held the transfer of real estate from one LLC to another did not qualify for an exemption from the real estate transfer fee, even though both LLCs were owned by the same family members. Section 77.25(15s) provides for an exemption for transfers between an LLC and its members if all the members are related family members. Although the family could have structured the transaction as a two-step exchange pursuant to this exemption, the commission reasoned the narrow statutory language did not allow a single-step shortcut to be respected as an exempt transfer.

In *Central Dodge Title v. Wisconsin Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-257 (Tax App. Comm'n Oct. 6, 2009), the commission held the transfer of real estate pursuant to a parking transaction like-kind exchange qualified as a transfer from agent to principal. A parking transaction is one in which the taxpayer acquires the replacement property before selling the relinquished property. Section 77.25(9) provides an exemption for transfers between principal and agent that are made without actual consideration. The title company acted as a qualified intermediary by holding title to real estate on behalf of a limited partnership in a transaction intended to be treated as a reverse like-kind exchange under I.R.C. § 1031. The agreements between the parties stated that the title company was not acting as an agent of the limited partnership except for the limited purpose of qualifying for the real-estate-transfer-fee exemption. The commission reasoned the express statements in the agreement control over the other manifestations of intent contained in the agreements and so no agent-principal relationship existed.

Property Tax

Procedure: Optional Elimination of Right to De Novo Review Upheld. Effective January 1, 2008, the legislature amended sections 70.47 and 74.37 to curtail nonmanufacturing property owners' options for challenging property tax assessments in municipalities that adopt ordinances allowing taxpayers to obtain a 60-day postponement of board of review hearings. *See* 2007 Wis. Act 86. In *Metropolitan Associates v. City of Milwaukee*, No. 08-CV-9866 (Wis. Cir. Ct. Milwaukee County Jan. 20, 2009), the circuit court ruled that such amendments are unconstitutional under the Equal Protection Clause of the Wisconsin Constitution. The court of appeals reversed, finding the applicable sections of Act 86 meet equal-protection concerns. *Metropolitan Assocs. v. City of Milwaukee*, 2009 WI App 157, 321 Wis. 2d 632, 774 N.W.2d 821 (review granted). Although the court of appeals agreed that Act 86 creates a distinct classification of municipalities that enact extension ordinances, it found the certiorari review

available to taxpayers in such municipalities provides the functional equivalent of de novo court review and does not violate equal-protection standards. The Wisconsin Supreme Court has granted the taxpayer's petition for review. Oral argument is scheduled for April 12, 2010.

Procedure: Standard of Review; Scope of Circuit Court Certiorari Review. The Wisconsin Court of Appeals reversed a circuit court for exceeding its certiorari-review jurisdiction in *Sager v. Board of Review*, No. 2009AP972, 2010 WL 59249 (Wis. Ct. App. Jan. 6, 2010) (unpublished opinion not citable per section 809.23(3)). The circuit court conducted independent research via the Internet and other sources to determine whether the board of review's determination was arbitrary and capricious. The court of appeals held such research violated the circuit court's duty to confine its review to the record made before the board of review, based on the scope of certiorari review in effect before the enactment of Act 86.

Procedure: Administrative Appeals; Dismissal for Unverifiable Agent Authorizations. In *Pierce Milwaukee, LLC v. Wisconsin Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-271 (Tax App. Comm'n Dec. 16, 2009), a representative of an Illinois real estate firm timely filed objections to manufacturing property assessments on behalf of several Wisconsin taxpayers. In reviewing the objections, the State Board of Assessors noticed that the accompanying agent authorization forms all appeared to be in the same handwriting, although the names of different corporate officers appeared on signature lines. Additionally, the phone numbers on the authorization forms looked suspicious. After unsuccessfully trying to reach the corporate officers, the board contacted the alleged agent and gave him time to file corrected agent authorizations. The agent eventually did so, but not within the time period set by the board and not within the deadline for filing objections. The board dismissed the objections for lack of jurisdiction. The commission affirmed, holding that the originally filed objections were invalid as a result of the unverifiable agent authorizations and the corrected filings were untimely.

Valuation: Special Purpose Facility. The court of appeals upheld the DOR's assessment of an infant formula manufacturing plant in *Nestlé USA, Inc. v. Wisconsin Department of Revenue*, 2009 WI App 159, ___ Wis. 2d ___, 776 N.W.2d 589 (review granted). The plant was specially designed to meet strict Food and Drug Administration (FDA) regulations and includes expensive features not typical of other food manufacturing plants. The DOR's appraiser considered the highest and best use of the facility to be its existing use as an infant formula plant. Finding no sales of comparable infant formula plants, the appraiser relied on the cost approach in valuing the plant. He assessed the specialized improvements at their full cost without discounting for functional obsolescence. The property owner's appraiser applied an expanded view of highest and best use, opining that the plant would not likely be sold to an infant formula manufacturer given the limited market and that other functional uses should be considered. He applied the comparable sales method based on sales of food processing plants. He also applied the cost approach but discounted the improvements by 80% for functional obsolescence, on the ground that the special features would not be marketable as parts of a general food processing plant. The commission held that the general food processing plants used as comparable sales by the owner's appraiser were not reasonably comparable and that it therefore was inappropriate to use the comparable sales valuation method. The commission further held that the property owner's appraiser's application of a discount for functional obsolescence under the cost approach was improper because, even though there was no evidence of any sales of infant formula plants anywhere in the United States, there were other infant formula plants that could be potential purchasers. The court of appeals affirmed, holding that the owner failed to satisfy its burden of proving the absence of a market for the property as an infant formula plant and therefore failed to rebut the presumption of correctness of the improvements assessment. The supreme court has granted Nestlé's petition for review.

Valuation: "Inextricably Intertwined" Doctrine Applied to Parking Lot. In *Allright Properties, Inc. v. City of Milwaukee*, 2009 WI App 46, 317 Wis. 2d 228, 767 N.W.2d 567 (review denied), the court of appeals reversed the judgment of the circuit court, which had held that the assessment of an airport parking lot based on an income valuation was excessive. The appellate court held the circuit court's ruling that the city erred by not applying the comparable sales valuation method was clearly erroneous because the evidence demonstrated there were no recent sales of reasonably comparable properties, i.e., commercial parking lots. The court of appeals upheld the assessor's reliance on the income approach, finding that the income derived from operating the parking lot was inextricably intertwined and transferable with the land. The court of appeals also rejected the property owner's uniformity challenge, finding that evidence that the per-square-foot land assessment exceeded the land assessments of seven neighboring properties did not rise to the level of establishing a constitutional flaw.

Exemptions: Computers/Multifunction Devices. Section 70.11(39) exempts from personal property tax "mainframe computers, minicomputers, personal computers, networked personal computers, servers, terminals, monitors, … electronic peripheral equipment, [and] printers," but the exemption does not apply to "fax machines, copiers, [or] equipment with embedded computerized components." In *Xerox Corp. v. Wisconsin Department of Revenue*, 2009 WI App 113, 321 Wis. 2d 181, 772 N.W.2d 677 (review denied), the court of appeals upheld the tax appeals commission's ruling that multifunction devices (MFDs) that combine scanners, printers, and fax capabilities are not exempt from property tax. The court gave great weight deference to the commission's decision that MFDs are not exempt, notwithstanding the commission's lack of experience in interpreting and applying this statute. The court held that the commission's experience applying property tax exemptions generally under section 70.11 satisfied the requirement for great weight deference review that the decision maker have "requisite specialized knowledge." The court accepted the commission's definitions of *copier* and *printer*, which distinguish the two on the basis of whether the equipment produces a duplicate of an original document or creates fresh originals each time from computer-generated images, and the court upheld the commission's refusal to consider expert testimony on whether the MFDs at issue do the former or the latter. The court also rejected Xerox's argument that the computer exemption guidelines published in the *Wisconsin Property Assessment Manual* require exemption of the MFDs. Although the guidelines state that "all-in-one" devices are *electronic peripheral equipment* and are exempt provided the device is connected to and operated by a computer, the court upheld the commission's ruling that to be exempt, MFDs must be connected to an *external* computer.

Exemptions: Outpatient Hospital Center. In *Covenant Healthcare System, Inc. v. City of Wauwatosa*, Nos. 2004CV006458, 2006CV005558 (Wis. Cir. Ct. Milwaukee County Mar. 30, 2009), the circuit court held that the portion of a building occupied by an outpatient center owned and operated by an exempt hospital is exempt from property tax. The court rejected the city's argument that an outpatient clinic located outside the four walls of a hospital necessarily is the same as a taxable doctor's office. Here, the evidence established that the outpatient center was reasonably necessary to the efficient functioning of the hospital; the center therefore was exempt pursuant to section 70.11(4m). The court also rejected the city's argument that the plaintiff failed to prove that no part of the net earnings of the hospital inured to the benefit of any shareholder, member, or director, as required under section 70.11(4m). The court held that the term *member* does not include a nonprofit corporate member, and that transfers of funds to related nonprofit entities did not constitute impermissible inurement. The court further found that the statutory requirement that the property not be used for commercial purposes was satisfied. The fact the plaintiff devised a plan to address deficiencies with the hospital in a fiscally responsible manner did not constitute proof the outpatient center was built and operated for commercial purposes. Appeal of this case is currently pending. *Covenant Healthcare Sys.*, Nos. 2009AP1469, 2009AP1470.

Exemptions: Hospital Corporate Headquarters. In *ProHealth Care, Inc. v. City of Pewaukee*, No. 06-CV-415 (Wis. Cir. Ct. Waukesha County July 1, 2009), the circuit court held that office furnishings inside the leased corporate headquarters of a company that owns two tax-exempt hospitals are taxable. The court found that the corporate offices were used to support several for-profit ventures, and that ProHealth Care therefore had failed to establish it used the property exclusively for benevolent purposes.

Exemptions: Church Custodian's Residence Not Exempt. The court of appeals rejected the taxpayer's argument for an extension of section 70.11(4) in *Wauwatosa Avenue United Methodist Church v. City of Wauwatosa*, 2009 WI App 171, 321 Wis. 2d 796, 776 N.W.2d 280 (review denied). The property at issue was a church-owned building in which the church custodian lived. Section 70.11 exempts property owned and used exclusively by churches, including housing for pastors, ordained assistants, members of religious orders, and teachers. The church argued the exemption should be expanded to include residences of persons who are integral to the functioning of a church. The court declined to expand the exemption beyond the clear statutory language. The court further rejected the church's argument that the city had the burden of proving a change in use of the property from the prior year, when the residence was not taxed. The court noted the city had removed the property from the tax rolls when it was occupied by the pastor, and concluded it was not foreclosed from taxing the property when it later became aware of the change in use. Finally, the court rejected the church's argument that the city was obligated to hold a public hearing on whether the residence was exempt.

Assessability: Ownership of Condominium Development. In *Saddle Ridge Corp. v. Board of Review*, No. 2007AP2786, 2009 WL 2615647 (Wis. Ct. App. Aug. 27, 2009) (unpublished opinion citable for persuasive value per section 809.23(3)) (review granted), the court of appeals upheld the circuit court's determination that a

condominium developer was not liable for property taxes assessed for vacant land reserved for development of unbuilt units because the developer did not own the land. The court rejected the assessor's reliance on the common law beneficial ownership test, holding that the comprehensive statutory scheme in chapter 703 applicable to condominiums controls the ownership determination. The court ruled that the vacant land held for development was a *common element* in which the existing unit holders held an undivided percentage interest pursuant to the condominium declaration. Since the developer did not own the vacant land, it could not be assessed property taxes on it. The dissent agreed that the beneficial ownership test was inapplicable but concluded the town assessed units owned by the developer, not reserved vacant land. The dissenting judge would have requested additional briefing on the question whether *units* include the designated but unbuilt units described in the condominium declarations, thereby establishing *parcels* subject to taxation. The Wisconsin Supreme Court accepted review of this case; oral argument is scheduled for April 12, 2010.

STATUTORY DEVELOPMENTS

Individual and Fiduciary Income Tax

Reference to the Internal Revenue Code Updated. For taxable years that begin on or after January 1, 2009, *Internal Revenue Code* for individuals, estates, and trusts (except nuclear decommissioning trust or reserve funds) means the federal Internal Revenue Code (I.R.C.) as amended to December 31, 2008, subject to certain exceptions. 2009 Wis. Act 28, §§ 1526, 1532, 1534 (repealing Wis. Stat. § 71.01(6)(n), amending Wis. Stat. § 71.01(6)(t), creating Wis. Stat. § 71.01(6)(um)). Such exceptions include, among other things, rules relating to the elimination of earnings and profits from pre-1983 S corporation years from an S corporation's earnings and profits and the exclusion for 50% of the gain from the sale or exchange of qualified-small-business stock held for more than five years.

Capital Gain Exclusion Reduced. Effective for taxable years beginning on or after January 1, 2009, the net long-term capital-gain exclusion is reduced from 60% to 30%, subject to an exception applying to certain farm assets. 2009 Wis. Act 28, §§ 1543, 1543b (amending Wis. Stat. § 71.05(6)(b)9. and creating Wis. Stat. § 71.05(6)(b)9m.).

Deferral of Gain on Sale of Certain Capital Assets. Effective for taxable years beginning on or after January 1, 2011, a taxpayer may subtract from federal adjusted gross income up to $10 million of a long-term capital gain if the taxpayer (1) deposits the gain into a segregated account in a financial institution, (2) within 180 days after the sale of the asset that generated the gain, invests all the proceeds in the segregated account into a qualified new business venture, and (3) after making the investment, notifies the DOR that the taxpayer will not declare on the taxpayer's income tax return the capital gain because the taxpayer has reinvested the gain. 2009 Wis. Act 28, §§ 1535, 1544 (amending Wis. Stat. § 71.01(13) and creating Wis. Stat. § 71.05(24)).

Top Income Tax Rate Increased. Effective for taxable years beginning on or after January 1, 2009, the top individual income tax rate is increased from 6.75% to 7.75%. The increased rate applies to the following:

1. Fiduciaries, single individuals, and heads of households—all taxable income exceeding $225,000;
2. Married persons filing joint returns—all taxable income exceeding $300,000; and
3. Married persons filing separately—all taxable income exceeding $150,000.

For taxable years beginning after December 31, 2009, the base dollar amounts in the new brackets will be increased each year by a percentage equal to the percentage change between, on one hand, the U.S. consumer price index for all urban consumers, U.S. city average, for the month of August of the previous year, and on the other, the U.S. consumer price index for all urban consumers, U.S. city average, for August 2008 as determined by the Federal Department of Labor. 2009 Wis. Act 28, §§ 1551, 1545, 1547, 1549, 1546, 1548, 1550 (renumbering and amending Wis. Stat. § 71.06(2e) to Wis. Stat. § 71.06(2e)(a), amending Wis. Stat. § 71.06(1p)(d), (2)(g)4., (2)(h)4., and creating Wis. Stat. § 71.06(1p)(e), (2)(g)5., (2)(h)5.).

Jobs Tax Credit Created. Effective for taxable years that begin on or after January 1, 2010, Wisconsin allows certain taxpayers certified by the Wisconsin Department of Commerce (DOC) to claim a jobs tax credit. The DOC may certify a person to receive tax benefits if (1) the person is operating or intends to operate a business in Wisconsin, and (2) the person applies for the credit and enters into a contract with the DOC. A business does not

include a store or shop in which retail sales are the principal business. The amount of the tax credit equals (1) the amount of wages that the taxpayer paid to an eligible employee in the taxable year, not to exceed 10% of such wages, as determined by the DOC, or (2) the amount of costs, as determined by the DOC, incurred by the taxpayer in the taxable year to undertake training activities. 2009 Wis. Act 28, §§ 1540d, 1593b, 1569, 3070 (amending Wis. Stat. §§ 71.05(6)(a)15. and 71.10(4)(i) and creating Wis. Stat. §§ 71.07(3q) and 560.2055).

Corporate Franchise and Income Tax

Definition of Internal Revenue Code. The definition of the *I.R.C.* has been updated and now generally means the I.R.C. as amended to December 31, 2008 (effective for tax years beginning after December 31, 2008). 2009 Wis. Act 28, § 1608 (creating Wis. Stat. § 71.22(4)(um)). Thus, federal laws enacted after December 31, 2008, do not apply. In addition, the list of federal I.R.C. provisions not adopted by Wisconsin continues to grow. The definitions of the I.R.C. for tax years beginning in 2008 were retroactively amended to generally mean the I.R.C. as amended to December 31, 2007. 2009 Wis. Act 28, § 1607 (creating Wis. Stat. § 71.22(4)(u)). The definition of the I.R.C. for prior years was also retroactively amended to adopt generally changes made by Public Law Number 110-458. 2009 Wis. Act 28, § 1600 (repealing Wis. Stat. § 71.22(4)(n)); *id.* §§ 1601, 1602, 1603, 1604, 1605, 1606 (amending Wis. Stat. § 71.22(4) (o), (p), (q), (r), (s), (t)). Similar rules apply to nonprofit corporations, 2009 Wis. Act 28, § 1609 (repealing Wis. Stat. § 71.22(4m)(L)); *id.* §§ 1610, 1611, 1612, 1613, 1614, 1615 (amending Wis. Stat. § 71.22(4m) (m), (n), (o), (p), (q), (r)); *id.* §§ 1616, 1617 (creating Wis. Stat. § 71.22(4m)(s), (sm)); S corporations, *id.* § 1679 (repealing Wis. Stat. § 71.34(1g)(n)); *id.* §§ 1680, 1681, 1682, 1683, 1684, 1685 (amending Wis. Stat. § 71.34(1g)(o), (p), (q), (r), (s), (t)); *id.* §§ 1686, 1687 (creating Wis. Stat. § 71.34(1g)(u), (um)); insurance companies, *id.* § 1691 (repealing Wis. Stat. § 71.42(2)(m)); *id.* §§ 1692, 1693, 1694, 1695, 1696, 1697 (amending Wis. Stat. § 71.42(2) (n), (o), (p), (q), (r), (s)); *id.* §§ 1698, 1699 (creating Wis. Stat. § 71.42(2)(t), (tm)); and regulated investment companies (RICs), real estate investment trusts (REITs), real estate mortgage investment conduits (REMICs), and financial asset securitization investment trusts (FASITs), *id.* § 1626 (repealing Wis. Stat. § 71.26(2)(b)14.); *id.* §§ 1627, 1628, 1629, 1630, 1631, 1632 (amending Wis. Stat. § 71.26(2)(b)15., 16., 17., 18., 19., 20.); *id.* §§ 1633, 1634 (creating Wis. Stat. § 71.26(2)(b)21., 22.).

Combined Reporting. In what is perhaps the most significant statutory change to the taxation of corporations since the corporate franchise/income tax was instituted, commonly controlled corporations operating as a unitary business in Wisconsin are now required to use combined reporting for computing their Wisconsin taxable income. The enabling legislation, 2009 Wisconsin Act 2, is retroactive to January 1, 2009 and was drafted without public notice or the ability for the public to provide input; introduced on February 17, 2009; passed by both houses of the Wisconsin Legislature without a public hearing on February 18, 2009 on strict party lines (no Republican in either house voted for the legislation); and sent to Governor Jim Doyle, a Democrat, who signed it into law on February 19, 2009.

Who Must File a Combined Report? Before the combined-reporting law was passed, corporations were taxed as separate entities and were not subject to state corporate franchise tax unless they were "doing business" in Wisconsin. For tax years beginning on or after January 1, 2009, corporations that are not exempt by statute and are engaged in a unitary business with at least one other commonly controlled corporation must use combined reporting unless a statutory exception applies. Corporations excluded from combined reporting include (1) tax-option corporations, such as S corporations, (2) foreign corporations if 80% or more if their income is "active foreign business income," and (3) corporations that only have exempt income under state law (for example, certain insurance companies). 2009 Wis. Act 2, § 131 (creating Wis. Stat. § 71.255(1)(e)); *id.* § 131 (creating Wis. Stat. § 71.255(2)); 2009 Wis. Act 28, § 1621e (amending newly created Wis. Stat. § 71.255(2)(a)). However, the DOR has the authority to require a combined report to include "persons" not otherwise includable in a combined group (or exclude those that are) if the unitary business income is not otherwise properly apportioned or the inclusion (or exclusion) represents an avoidance or evasion of tax. This authority includes requiring combined reporting for "persons that are not corporations." 2009 Wis. Act 2, § 131 (creating Wis. Stat. § 71.255(2)(f)).

Taxpayers may also elect to include every member of a commonly controlled group in the combined return. Once made, the election is binding on the taxpayer for 10 years. The DOR can, however, disregard the tax effect of the election, or the election itself, with respect to any of the members if it determines that the election has the effect of tax avoidance. 2009 Wis. Act 28, § 1621eb (creating Wis. Stat. § 71.255(2m)).

States that require combined reporting typically have adopted either the *Joyce* or the *Finnigan* approach for determining whether to include the income and apportionment factors of a member that lacks nexus in that state. Wisconsin generally uses a 100%-sales-apportionment factor (see below). States that follow the *Joyce* approach, which is based on a California State Board of Equalization (CSBE) decision, include the income and apportionment factors of all members of the combined group, including members who lack nexus in the state, but determine nexus separately for each member and, thus, do not tax those members who lack nexus. *In re Appeal of Joyce, Inc.*, No. 66-SBE-070 (Cal. State Bd. of Equal. Nov. 23, 1966). States that follow the *Finnigan* approach, which also is based on a CSBE decision, also include the income and apportionment factors of all members of the combined group, including members who lack nexus in the state, but provide that if any member of the combined group is doing business in the state, then all members of the combined group are considered to be doing business in the state, effectively taxing those members who lack nexus in the state. *In re Appeal of Finnigan Corp.*, No. 88-SBE-022 (Cal. State Bd. of Equal. Aug. 25, 1988), *reh'g denied*, No. 88-SBE-022A (Cal. State Bd. of Equal. Jan. 24, 1990). Wisconsin uses the *Finnigan* approach, which theoretically expands the members of the combined group, but this approach may raise federal constitutional concerns. 2009 Wis. Act 2, § 131 (creating Wis. Stat. § 71.255(5)).

Unitary Business. Corporations in the same commonly controlled group engaged in a unitary business in Wisconsin are required to file a combined report. 2009 Wis. Act 2, § 131 (creating Wis. Stat. § 71.255(2)(a)); 2009 Wis. Act 28, § 1621e (amending Wis. Stat. § 71.255(2)(a)). In general, a *unitary business* means two or more corporations that are (1) related to one another, as a single economic enterprise that is made up either of separate parts of a single business entity, multiple related entities (under I.R.C. §§ 267 or 1563), or a commonly controlled group of entities, and (2) sufficiently interdependent, integrated, and interrelated through their activities so as to provide a synergy and mutual benefit that produces a sharing or exchange of value among them and a significant flow of value to the separate parts. Two or more entities are presumed unitary if the businesses have unity of ownership, operation, and use as indicated by the presence of one or more noninclusive enumerated factors, including (1) centralized management or executive force, purchasing, advertising, or accounting; (2) intercorporate sales or leases, services, debts, or use of proprietary materials; or (3) interlocking directorates or corporate officers. In addition, the term unitary business is to be broadly construed to the extent permitted by the U.S. Constitution. *See* Tax Emergency Rule 1001, Wis. Admin. Reg. No. 649 (Jan. 31, 2010) (revising Wis. Admin. Code ch. Tax 2) (eff. Jan. 15, 2010; expires June 13, 2010).

In general, a commonly controlled group is a parent corporation and any one or more corporations or chains of corporations that are connected to the parent corporation by direct or indirect ownership, if the parent corporation directly or cumulatively owns stock representing more than 50% of the voting power of at least one of the connected corporations. In addition, a commonly controlled group includes two or more corporations if a common owner, regardless of whether the owner is a corporate entity, directly or indirectly owns stock representing more than 50% of the voting power of the corporations or connected corporations. 2009 Wis. Act 2, § 131 (creating Wis. Stat. § 71.255(1)(c)). Taxpayers can elect to include in their combined group every corporation in the commonly controlled group without regard to whether such corporations are engaged in the same unitary business. 2009 Wis. Act 28, § 1621eb (creating Wis. Stat. § 71.255(2m)).

Computing Taxable Income. The starting point and general rule for computing combined taxable income is the sum of the income, as computed for federal income-tax purposes, subject to various provisions of the I.R.C. that Wisconsin does not follow as well as special rules specific to Wisconsin, of all members of the combined group, regardless of whether a member has nexus with Wisconsin (i.e., using the *Finnigan* approach discussed above), provided that at least one member of the combined group is doing business in Wisconsin. If a unitary business includes income from a pass-through entity, the applicable member includes its allocable share from the pass-through entities that it owns.

Wisconsin modifies the general rules to (1) expand the already existing dividends-received deduction; (2) render unnecessary the need to add back certain related-party expenses incurred between members included in the same combined group (see below under "Disallowable Deductions (or "Add Backs")"), because income and expenses between such members generally cancel out when combined together; (3) defer intercompany gains or losses generally as provided under Treasury Regulation § 1.1502-13; and (4) recompute charitable-contribution and capital-loss limitations on a combined reporting basis. 2009 Wis. Act 2, § 131 (creating Wis. Stat. § 71.255(4)); *id.* § 120 (amending Wis. Stat. § 71.22(3m)); 2009 Wis. Act 28, § 1621h (amending Wis. Stat. § 71.255(4)(f)); *id.*

§§ 1621j, 1621k (repealing and recreating Wis. Stat. § 71.255(4)(h), (i)); *id.* § 1621r (creating Wis. Stat. § 71.255(11)).

The next step is to divide the unitary-business income among the members of the combined group according to each member's share of the combined group's apportionment factors. 2009 Wis. Act 2, § 123 (amending Wis. Stat. § 71.25 (intro.)). Wisconsin generally uses single-factor-sales apportionment. This means that a member's share of unitary-business income will generally be the product of the group's unitary-business income multiplied by the "modified sales factor," which is a fraction, the numerator of which is the member's Wisconsin sales and the denominator of which is total sales of the combined group. Each member's share is then subject to taxation, and each member is responsible for its tax, although only one tax return is filed by the combined group. 2009 Wis. Act 2, § 131 (creating Wis. Stat. § 71.255(3)).

Joint and Several Tax Liability. Not only is each member responsible for its own tax (based on its share of unitary-business income), but the members of a combined group are jointly and severally liable for taxes, costs, penalties, and interest associated with the combined report, that is, each member is responsible for every other member's taxes and related costs, as well as its own. 2009 Wis. Act 2, § 131 (creating Wis. Stat. §§ 71.255(3), (1)(n)). This means that a corporation with no constitutional nexus in Wisconsin may be liable for Wisconsin taxes for other members in the group, and other members in the group with constitutional nexus in Wisconsin may be liable for Wisconsin taxes of those members who do not have constitutional nexus in Wisconsin.

Loss Carry-forwards and Credits. Net business losses of a member of the group, generated pre-combined reporting, can only be carried forward and used to offset taxable income of that member. However, members can generally carried forward combined-reporting net business losses and use them to offset the aggregate taxable income of the combined group. Similar rules apply to credits. In addition, a carry-forward of research and research-facilities credits can be used to offset tax liability of other members of a combined group to the extent such tax liability is attributable to the unitary business. 2009 Wis. Act 2, § 131 (creating Wis. Stat. § 71.255(6)); 2009 Wis. Act 28, §§ 1621km, 1621L, 1621Ld (amending, repealing and recreating, and creating Wis. Stat. § 71.255(6)(a), (b), (c)).

Designated Agent. Each combined group has one designated agent. The designated agent is typically the parent corporation of the combined group, although it is not required to be. 2009 Wis. Act 28, § 1621m (repealing and recreating Wis. Stat. § 71.255(7)(a)). If there is no parent corporation, the members can appoint the designated agent. If there is not a parent corporation and no member is appointed, the designated agent is the member that has the most significant operations in Wisconsin on a recurring basis, as determined by the DOR. One of the responsibilities of the designated agent is the payment of estimated taxes, that is, only the designated agent remits the estimated tax payment on behalf of the combined group based on the share of combined-group income attributable to activities in Wisconsin. Only the designated agent may act for the combined group except as prescribed by the DOR. 2009 Wis. Act 28, § 1621n (amending Wis. Stat. § 71.255(7)(b)(intro.)).

Economic Substance. In addition, as a result of 2009 Wisconsin Act 2, the DOR now has specific statutory authority to disregard transactions lacking economic substance. A rebuttable presumption exists that transactions between members of a commonly controlled group lack economic substance. A transaction has economic substance *only if* the taxpayer demonstrates both that the transaction changes the taxpayer's economic position in a meaningful way, apart from tax effects, and that the taxpayer has a substantial nontax purpose for entering into the transaction and the transaction is a reasonable means of accomplishing that purpose. A transaction has a substantial nontax purpose if it has substantial potential for profit, disregarding any tax effects. 2009 Wis. Act 2, §§ 158, 209 (creating Wis. Stat. §§ 71.30(2m), .80(1m)).

Deductions. The domestic-production-activities deduction allowed under I.R.C. § 199 is no longer allowed for tax years beginning on or after January 1, 2009. 2009 Wis. Act 28, §§ 1608, 1617, 1634, 1687, 1699 (creating Wis. Stat. §§ 71.22(4)(um), (4m)(sm), .26(2)(b)22., .34 (1g)(um), .42(2)(tm)).

Disallowable Deductions (or "Add Backs"). The legislature expanded the disallowance of expenses paid or accrued to related parties, except in certain limited circumstances, to include intangible expenses and management fees. 2009 Wis. Act 2, §§ 133, 134 (amending Wis. Stat. § 71.26(2)(a)7., 9.). Intangible expenses include, among other items, royalty, patent, technical, copyright, and licensing fees, as well as similar expenses and costs. 2009 Wis. Act 2, §§ 118, 119 (creating Wis. Stat. § 71.22(3g), (3h)). Management fees include, among other items, expenses and

costs (not including interest expenses) pertaining to accounts receivable, accounts payable, employee-benefit plans, insurance, legal matters, payroll, taxation, financial matters, securities, and accounting, to the extent that such amounts would otherwise be deductible in determining net income under the I.R.C. as modified by Wisconsin law. 2009 Wis. Act 2, § 121 (creating Wis. Stat. § 71.22(6d)); *id.* §§ 210–214 (amending Wis. Stat. § 71.80(23)). Similar rules apply to S corporations, 2009 Wis. Act 2, §§ 166–168 (creating Wis. Stat. § 71.34(1c), (d), (h)); *id.* §§ 170–171 (amending Wis. Stat. § 71.34(1k)(j), (L)), and insurance companies, 2009 Wis. Act 2, §§ 172, 173, 175 (creating Wis. Stat. § 71.42(1sg), (1sh) (3c)); *id.* §§ 178–179 (amending Wis. Stat. § 71.45(2)(a)16., 18.).

Exemptions. The Southeastern Regional Transit Authority (SRTA), certain other transit authorities, and the Wisconsin Quality Home Care Authority are exempt from Wisconsin income and franchise tax. 2009 Wis. Act 28, §§ 1622, 1623 (amending Wis. Stat. § 71.26(1)(b), (be)) (effective for tax years beginning in or after 2009). Interest income from bonds issued by the SRTA is exempt from Wisconsin income tax but is not exempt from the franchise tax. 2009 Wis. Act 28, §§ 1623m, 1701m (creating Wis. Stat. §§ 71.26(1m)(j), .45(1t)(j)) (effective July 1, 2009).

Nexus, Allocation, and Apportionment—Intangible Property. For apportionment purposes, royalties for use or license of intangible property are sourced to the state where the property is used, and in proportion to the property's use (with a 100% throwback). 2009 Wis. Act 2, §§ 117, 122 (amending Wis. Stat. § 71.22(1t), (9g)); *id.* § 126 (repealing Wis. Stat. § 71.25(9)(d)); *id.* § 127 (creating § 71.25(9)(dj)1.). Sales of intangible property are sourced to the state(s) in which the purchaser (proportionately) uses the intangible property or where the purchaser's billing address or commercial domicile is located (again, with a 100% throwback rule). 2009 Wis. Act 2, § 128 (creating Wis. Stat. § 71.25(9)(dk)); 2009 Wis. Act 28, § 1621d (repealing Wis. Stat. § 71.25(9)(dk)2.).

Throwback Sales. Throwback sales present an interesting (and quite possibly helpful) aspect of Wisconsin combined reporting. Such sales occur when (1) a taxpayer delivers or ships a product from Wisconsin to a destination outside of Wisconsin, and (2) the taxpayer lacks nexus with the destination state and correspondingly is not subject to income tax in such state. Although 2009 Wisconsin Act 2 did not change the long-standing rule that provides for inclusion of 50% of such sales in the numerator and 100% in the denominator of the modified sales factor, 2009 Wisconsin Act 28 changed the throwback rule to 100%. 2009 Wis. Act 2, § 131 (creating Wis. Stat. § 71.255(5)(a)1.); 2009 Wis. Act 28, § 1619 (amending Wis. Stat. § 71.25(9)(a)); *id.* §§ 1620b, 1621b, 1621c, 1621d (repealing Wis. Stat. § 71.25(9)(df)3., (dh)4., (dj)2., (dk)2.). However, because Wisconsin uses economic nexus for combined reporting and because one member's nexus in a state creates nexus for all members of the combined group in that state, sales to a destination state (other than activities protected by Public Law Number 86-272) appear to nearly always create nexus in such state. Thus, by implementing economic nexus, the statute seemingly obliterates any possibility of throwback sales occurring for many taxpayers.

Apportionment. Industries that still use multiple-factor apportionment formulas, such as interstate air carriers (one-third arrivals/departures, one-third revenue tons, and one-third originating revenue) and telecommunication companies (one-third property, one-third payroll, and one-third sales) must convert to a single sales factor. 2009 Wis. Act 2, § 131 (creating Wis. Stat. § 71.255(5)(a)5.). The definition of *financial organization* was expanded to include subsidiaries holding investments for purposes of allocation and apportionment. 2009 Wis. Act 2, § 130 (creating Wis. Stat. § 71.25(10)(a)2.).

Personal Holding Companies. The long-standing personal-holding-company allocation statute was repealed. 2009 Wis. Act 2, § 125 (repealing Wis. Stat. § 71.25(5)(b)2.) (effective retroactively to tax years beginning January 1, 2009). The statute provided that income, gain, or loss from intangible property earned by a personal holding company was allocated to the personal holding company's state of residence (i.e., state of incorporation). (See the *OSB* decision discussed in the "Case Law" section above.)

Reallocation. The DOR's ability to reallocate income, deductions, and credits between two or more commonly owned or controlled taxpayers no longer depends on whether such taxpayers are unitary. 2009 Wis. Act 2, §§ 157, 208 (amending Wis. Stat. §§ 71.30(2), .80(1)(b)).

Doing Business. Historically, Wisconsin used physical presence for determining whether an organization was doing business in the state. However, over time, doing business in Wisconsin was expanded by statute to include (1) issuing credit, debit, or travel and entertainment cards to customers in Wisconsin; (2) owning, directly or indirectly, a general or limited partnership interest in a partnership that does business in Wisconsin, regardless of the

percentage of ownership; and (3) owning, directly or indirectly, an interest in an LLC that does business in Wisconsin, regardless of the percentage of ownership.

The statutory definition has now been significantly expanded to include several forms of "economic nexus," including (1) regularly selling products or services of any kind or nature to customers in Wisconsin that receive the product or service in Wisconsin; (2) regularly soliciting business from potential customers in Wisconsin; (3) regularly performing services outside Wisconsin if benefits are received in Wisconsin; (4) regularly engaging in transactions with customers in Wisconsin that involve intangible property and result in receipts flowing to the taxpayer from within Wisconsin; and (5) holding loans secured by real or tangible personal property located in Wisconsin. 2009 Wis. Act 2, § 116 (amending Wis. Stat. § 71.22(1r)); 2009 Wis. Act 28, § 1599d (amending Wis. Stat. § 71.22(1r) (effective Jan. 1, 2009)). Moreover, taxpayers doing business in Wisconsin for any part of the tax year are considered to be doing business in Wisconsin for the entire tax year. 2009 Wis. Act 28, § 1599d (amending Wis. Stat. § 71.22(1r) (applies retroactively to any period for which the statute of limitation has not expired). This rule also applies for purposes of the throwback rule. 2009 Wis. Act 28, § 1619 (amending Wis. Stat. § 71.25(9)(a)).

Credits. Effective in 2009 are new tax credits for economic development, 2009 Wis. Act 2, § 136 (creating Wis. Stat. § 71.28(1dy)); *id.* § 132 (amending Wis. Stat. § 71.26(2)(a)4.); dairy cooperatives, *id.* §§ 137–146 (amending in part, and creating in part Wis. Stat. § 71.28(3p)); and investments in meat-processing facilities, *id.* § 147 (creating Wis. Stat. § 71.28(3r)). A new jobs tax credit is available in 2010, 2009 Wis. Act 28, §§ 1654, 1720 (creating Wis. Stat. § 71.28(3q), .47(3q)), a new super research and development credit is effective in 2011, *id.* §§ 1656, 1722 (creating Wis. Stat. §§ 71.28(4m), .47(4m)), and a beginning farmer and farm-asset owner tax credit is available in 2011, *id.* §§ 1667, 1733 (creating Wis. Stat. §§ 71.28(8r), .47(8r)).

Several amendments were made to the enterprise-zone jobs-credit provisions, 2009 Wis. Act 11, §§ 23–42, 2009 Wis. Act 28, §§ 1655m, 1655n, 1655p, 1655r, 1721m, 1721n, 1721p (amending Wis. Stat. §§ 71.28(3w), .47(3w)); the farmland-tax-relief credit, 2009 Wis. Act 28, §§ 1639–1642, 1705–1708 (amending Wis. Stat. §§ 71.28(2m), .47(2m)) (the credit is no longer available after 2009); the early-stage seed credit, *id.* §§ 1659, 1725 (creating Wis. Stat. §§ 71.28(5b)(d)3., .47(5b)(d)3.); the historic rehabilitation credit, *id.* §§ 1663, 1664, 1665, 1666, 1729–1732 (amending Wis. Stat. §§ 71.28(6)), .47(6)); and the film-production-services and film-production-company investment credits, *id.* §§ 1659y, 1725w (repealing and recreating Wis. Stat. §§ 71.28(5f), .47(5f)); *id.* §§ 1660bd–1660k, 1726x–1726yL (amending Wis. Stat. §§ 71.28(5h), .47(5h)).

Credits scheduled to become available in 2009 were delayed for the following activities: biodiesel fuel production, 2009 Wis. Act 28, §§ 1643d, 1709d (amending Wis. Stat. §§ 71.28(3h)(b), .47(3h)) (effective for tax years beginning on or after January 1, 2012); community rehabilitation programs, *id.* §§ 1662d, 1728d (amending Wis. Stat. §§ 71.28(5k)(b), .47(5k)(b)) (effective for tax years beginning after July 1, 2011); and electronic medical records, *id.* §§ 1662, 1728 (amending Wis. Stat. §§ 71.28(5i)(b), .47(5i)) (effective for tax years beginning on or after January 1, 2012).

Penalties. Late filing fees were increased to $150 for corporate income or franchise tax returns and withholding reports and deposits. 2009 Wis. Act 28, § 1802 (amending and renumbering Wis. Stat. § 71.83(3) to Wis. Stat. § 71.83(3)(a)) (effective for tax years beginning on or after January 1, 2010).

Failure to Produce Records. A new penalty may be applied by the DOR for the failure to produce records or documents that support amounts or other information required to be shown on a return. For each violation, taxpayers may be subject to a penalty equal to the greater of $500 or 25% of the additional tax related to any adjustment related to such records. 2009 Wis. Act 28, § 1796 (creating Wis. Stat. § 71.80(9m)).

Sales and Use Tax

A massive rewrite of the sales and use tax statutes was the most significant statutory change in 2009. The biggest driver of these changes is the state's adoption of the multistate compact known as the Streamlined Sales Tax Agreement (the agreement). The streamlined sales tax is intended to achieve two separate and distinct goals. The first is to decrease sales-tax-compliance costs, especially for sellers who make sales in multiple states. The second goal is to overcome the "nexus problem" by enticing sellers to voluntarily collect sales tax from sales to purchasers in states in which the sellers do not have nexus. The streamlined sales tax system attempts to accomplish these goals

by providing standardized definitions and procedures among participating states. Most, but not all, of Wisconsin's sales tax statutes are now in compliance with the agreement.

The framework of the agreement permits each participating state to set tax rates and to decide which goods and services will be subject to tax. The agreement substantially limits the ability of participating states to set definitions of these goods and services. For example, Wisconsin and Minnesota now share a common definition of *candy*, but each state is free to determine whether to impose sales and use tax on candy. Most changes related to the streamlined sales tax took effect October 1, 2009. Most changes included as part of the biannual budget bill, 2009 Wisconsin Act 28, were effective July 1, 2009. The legislative changes made during the year are summarized below, including those required to bring Wisconsin statutes into compliance with the agreement and other nonmandated changes.

Uniform Definitions. More than 60 new definitions of products were created. Accordingly, retailers and consumers should revisit the tax status of the sale of any item of tangible personal property.

Customized software, which the supreme court ruled exempt in *Wisconsin Department of Revenue v. Menasha Corp.*, 2008 WI 88, 311 Wis. 2d 579, 754 N.W.2d 95, will now generally be subject to tax. 2009 Wis. Act 2, § 349 (creating Wis. Stat. § 77.52(1)(d)). Only those programs developed for the needs of a particular user will be considered exempt custom software. An important exception applies to modifications or enhancements to prewritten software if the modifications or enhancements are designed to the specifications of a specific purchaser, and charges for the enhancements are reasonable and separately charged or invoiced. Maintenance contracts will generally follow the sales tax treatment of the underlying software. This revised definition was effective March 6, 2009.

Sales tax now applies to digital goods such as downloaded novels, music, ringtones, and software. Revised definitions now apply for most food products, 2009 Wis. Act 2, § 349 (creating Wis. Stat. § 77.52(1)(d)); medical equipment, *id.* § 443 (creating Wis. Stat. § 77.54(22b)); and various telecommunications products, *id.* § 337 (creating Wis. Stat. § 77.51(21n); *id.* § 256 (creating Wis. Stat. § 77.51(5d)).

The legislature also redefined *manufacturing* for purposes of applying the manufacturing exemption to provide greater clarity as to when manufacturing starts and ends and what is included in the process. 2009 Wis. Act 28, § 1830f (amending and renumbering Wis. Stat. § 77.524(1)(b) to Wis. Stat. § 77.51(7h)(a)). Goods "used or consumed" in manufacturing must now be used or consumed directly in the manufacturing activity. 2009 Wis. Act 28, § 1851 (amending Wis. Stat. § 77.54(2)).

Leases now explicitly include transfers with future options to purchase. 2009 Wis. Act 2, § 260 (repealing and recreating Wis. Stat. § 77.51(7)). Licenses for services (i.e., telecommunications services) are subject to sales tax regardless of whether the consumer or user has the right of permanent use and whether the service is conditioned on continued payment from the purchaser. 2009 Wis. Act 2, § 349 (creating Wis. Stat. § 77.52(1)(d)).

Fees charged by nonprofits to individuals who participate in youth athletic activities are no longer subject to sales and use tax. 2009 Wis. Act 28, § 1838 (creating Wis. Stat. § 77.52(2)(a)2.c.).

The hauling or towing of motor vehicles by a tow truck will now be taxable, unless an exemption applies. 2009 Wis. Act 28, § 1839 (creating Wis. Stat. § 77.52(2)(a)8m.).

Determinations of Taxation. If taxable and nontaxable goods are bundled together (sold together while maintaining their separate form), the entire transaction will be taxable unless either the taxable goods consist of less than 10% of the total bundle or the retailer can identify, from its books and records, the portion of the price that is attributable to exempt products. 2009 Wis. Act 2, § 229 (creating Wis. Stat. § 77.51(1f) (different rule for exempt food products and medical equipment in paragraph (e)); *id.* § 380 (creating Wis. Stat. § 77.52(20)).

Wisconsin's source rules remain "destination-based" but the wording of the statute has been revised. These sourcing rules are standardized among participating states, which should significantly decrease the compliance burden placed on multistate sellers and purchasers. These standardized sources should decrease the risk that an item will be subject to double taxation. 2009 Wis. Act 2, § 384 (creating Wis. Stat. § 77.522).

Expanding Nexus. The standard for nexus for the obligation of retailers to collect sales tax has been expanded to the broadest permissible standard under federal constitutional law. Now, any seller who makes a Wisconsin sale is liable for collecting sales tax, "unless otherwise limited by federal law." 2009 Wis. Act 2, § 297 (creating Wis. Stat. § 77.52(1)). In practice, this places the burden squarely on the seller to determine whether a U.S. Constitutional nexus (and thus statutory authority to tax) exists.

Administration. The statutes now authorize creation of a certified service providers program, which allows retailers to outsource much of the work for collecting sales tax. 2009 Wis. Act 2, § 389 (amending and renumbering Wis. Stat. § 77.524(1)(b) to Wis. Stat. § 77.524(1g)).

Under revised provisions for exemption certificates, a retailer need only determine if (1) the exemption claimed is available in Wisconsin, and (2) the certificate has been properly completed. 2009 Wis. Act 2, § 373 (repealing Wis. Stat. § 77.52(14)(a)2.).

Sellers that register by October 1, 2010, will receive amnesty for all previous sales tax collections made to Wisconsin purchasers if they collect sales tax for the next three years and meet certain other requirements. 2009 Wis. Act 2, § 520 (creating Wis. Stat. § 77.67).

A new penalty may be applied for the failure to produce records or documents that support amounts or other information required to be shown on a return. 2009 Wis. Act 28, § 1854 (creating Wis. Stat. § 77.61(19)). The penalty includes disallowance of deductions, credits, or exemptions or inclusion of additional taxable sales or purchases related to the records, and for each violation, an amount equal to the greater of $500 or 25% of the additional tax related to any adjustment related to such records.

Disregarded Entities. Effective July 1, 2009, a single-owner entity that is disregarded for Wisconsin income tax purposes also will be disregarded for sales and use tax purposes. 2009 Wis. Act 28, § 1852b (amending Wis. Stat. § 77.58(3)(a)).

Property Tax

Exemptions: Student Housing Facilities. The legislature has enacted a specific exemption for student housing facilities, defined as facilities that (1) are owned by nonprofit organizations; (2) have residents of whom at least 90% are students enrolled at UW-Madison; (3) house no more than 300 such students; and (4) offer support services and outreach programs. If a nonprofit organization owns more than one such facility, the exemption applies to only one facility at one location. Leasing a part of such a facility does not render the property taxable if the lessor uses the leasehold income only for maintenance of the leased property, construction-debt retirement, and the purposes for which the I.R.C. § 501(c)(3) exemption was granted to the lessor. 2009 Wis. Act 28, § 1516c (creating Wis. Stat. § 70.11(3m)).

Exemptions: Residential Housing Facilities. Section 70.11(4) has been amended to redefine exempt residential housing facilities to include "[p]roperty owned and used exclusively … by a nonprofit entity that is operated as a facility that is licensed, certified, or registered under ch. 50, including benevolent nursing homes," as well as property occupied by individuals with permanent disabilities. 2009 Wis. Act 28, § 1516d (amending and renumbering Wis. Stat. § 70.11(4) to Wis. Stat. § 70.11(4)(a)). Leasing a part of such property does not render the property taxable regardless of how the lessor uses the leasehold income. 2009 Wis. Act 28, § 1516e (creating Wis. Stat. § 70.11(4)(b)).

Exemptions: Benevolent Low-income Housing. A specific exemption for benevolent low-income housing has been enacted. To qualify for the exemption, the low-income housing must be (1) a project financed by the Wisconsin Housing and Economic Development Authority, or (2) a unit within a project for which (a) at least 75% of the units are occupied or available for occupancy only by households at or below 80% of area median income (AMI), and (b) at least 20% of the units are occupied or available for occupancy only by households at or below 50% of AMI, or 40% of the units are occupied or available for occupancy only by households at or below 60% of AMI. Units occupied or available for occupancy by households above 80% AMI are taxable. Leasing such exempt property does not render it taxable, regardless of how the leasehold income is used. 2009 Wis. Act 28, §§ 1516f, 1516g (creating Wis. Stat. § 70.11(4a), (4b)).

Exemptions: Benevolent Retirement Homes for the Aged. Newly enacted section 70.11(4d) exempts property owned by a nonprofit entity that is a benevolent association and used as a retirement home for the aged, but not exceeding 30 acres of land necessary for the location and convenience of buildings, provided the fair market value of the individual dwelling unit is less than 130% of the average equalized value of improved residential parcels in the county in the previous year. The common area of a retirement home for the aged is exempt if 50% or more of the individual dwelling units are exempt. Leasing a part of a retirement home for the aged does not render it taxable regardless of how the leasehold income is used. 2009 Wis. Act 28, § 1516h (creating Wis. Stat. § 70.11(4d)).

Exemptions: Wisconsin Quality Home Care Authority. A specific exemption has been enacted for property owned by the Wisconsin Quality Home Care Authority, provided the use of the property is primarily related to the purposes of the authority. 2009 Wis. Act 28, § 1518 (creating Wis. Stat. § 70.11(41s)).

Exemptions: Vending Machines. The exemption for vending machines has been amended to define the scope of the exemption with reference to the new definition of *food and food ingredients* under section 77.51(3t). 2009 Wis. Act 2, § 73 (amending Wis. Stat. § 70.111(23)).

Assessment Procedure: Inspections. Newly enacted section 70.05(4m) prohibits an assessor from entering a person's real property more than once a year for purposes of assessment absent the owner's consent. A property owner may deny entry to an assessor if the owner has given prior notice that the assessor may not enter the property without the owner's permission. Assessors are required to maintain a database identifying all such property owners. 2009 Wis. Act 68, § 1 (creating Wis. Stat. § 70.05(4m)). Further, before an assessor conducts a revaluation, the municipality must publish a notice on its Web site that lists the approximate dates of the revaluation and describes an assessor's authority to enter land. 2009 Wis. Act 68, § 2 (amending Wis. Stat. § 70.05(5)(b)).

ADMINISTRATIVE DEVELOPMENTS

Sales and Use Tax: Taxable Sales

The DOR announced that electronic rebates applied to reduce the purchase price of automobiles under the "Cash for Clunkers" program will be treated as a sale to the U.S. government and will not be subject to sales and use tax. Wis. Dep't of Revenue, CAR Allowance Rebate System—"Cash for Clunkers," http://www.dor.state.wi.us/taxpro/news/090723.html (last visited Mar. 23, 2010).

In Private Letter Ruling W 0921002 (Mar. 6, 2009), *reprinted in* [2 Wis.] St. Tax Rep. (CCH) § 401-220 (Mar. 6, 2009), the DOR ruled that separately stated charges for expense reimbursement follow the taxation of the underlying activity to which they relate. If such expenses were incurred in connection with the sale of taxable property or services, then such reimbursement should be included in the sale price.

