

Tax Law

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This chapter covers in varying detail the principal 2010 court decisions and legislative changes affecting Wisconsin taxpayers and tax attorneys. Although most 2010 income tax, franchise tax, sales and use tax, property tax, and estate tax developments are discussed, this chapter is not all-inclusive.¹

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 2009–10 Wisconsin Statutes.

CASE LAW

Individual and Fiduciary Income Tax

Change of Domicile Not Established. In *Lizalek v. Wisconsin Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-306 (Tax App. Comm'n Apr. 19, 2010), *petition for reh'g denied* (May 18, 2010), the Wisconsin Tax Appeals Commission upheld the assessment of Wisconsin income tax against a taxpayer who claimed that, during the years at issue, he had changed his domicile from Wisconsin to Illinois and was exempt from Wisconsin income tax. The commission ruled that the taxpayer failed to establish that he had changed his domicile from Wisconsin to Illinois. Although the taxpayer submitted a photocopy of an Illinois driver's license, a standby jury summons, and an affidavit in which he stated that he lived in a condominium in Illinois during the years at issue, the commission held that those documents were insufficient to raise a factual question regarding whether the taxpayer had changed his domicile. Additionally, although the taxpayer claimed that he had changed his domicile to Illinois, the commission determined that the record conclusively demonstrated that the taxpayer did not change his domicile. For example, the taxpayer continued to work in Wisconsin, continued to have and to use mailing addresses in Wisconsin, and continued to own a home in Wisconsin.

Corporate Franchise and Income Tax

Apportionment. In *Ameritech Publishing, Inc. v. Department of Revenue*, [2007–2009 Transfer Binder 1] [Wis.] St. Tax Rep. (CCH) ¶ 401-075 (Tax App. Comm'n Jan. 22, 2008), *aff'd*, No. 01-I-227(F), 2008 Wisc. Tax LEXIS 18 (Tax App. Comm'n Feb. 28, 2008), *aff'd*, [2009–2010 Transfer Binder] [Wis.] St. Tax Rep. (CCH) ¶ 401-337 (Wis. Cir. Ct. Dane County Jan. 6, 2009), *aff'd*, No. 2009AP445, 2010 WL 2519583 (Wis. Ct. App. June 24, 2010) (unpublished opinion citable for persuasive value per section 809.23(3)(b)) (review dismissed), the commission ruled that the taxpayer's relevant income-producing activity,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 (in contrast to the taxpayer's 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 and the Wisconsin Court of Appeals, both of which applied the due-weight-deference standard, affirmed. The taxpayer filed a petition for review with the Wisconsin Supreme Court but later withdrew it after reaching a settlement with the Wisconsin Department of Revenue (DOR).

Income and Deductions. In *Hormel Foods Corp. v. Department of Revenue*, [2009–2010 Transfer Binder] [Wis.] St. Tax Rep. (CCH) ¶ 401-302 (Tax App. Comm'n Mar. 29, 2010), the commission disallowed a deduction for royalties paid by a corporation to its newly formed wholly owned subsidiary for the use of intellectual property transferred to (and now owned by) the subsidiary, stating that the "underlying transactions lacked economic substance and a valid business purpose and were entered into primarily for the purpose of tax avoidance." The taxpayer has appealed this decision to the Dane County Circuit Court.

Procedure. In *USF Holland, Inc. v. Department of Revenue*, [2009–2010 Transfer Binder] [Wis.] St. Tax Rep. (CCH) ¶ 401-301 (Tax App. Comm'n Mar. 22, 2010), 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 August 20, 2009, and so the 60-day deadline expired on October 19, 2009. The commission received the taxpayer's petition for review on October 21, 2009, via UPS next-day air service.

Sales and Use Tax

Taxable Admissions. In *Milwaukee Symphony Orchestra, Inc. v. Wisconsin Department of Revenue*, 2010 WI 33, 324 Wis. 2d 68, 781 N.W.2d 674, *rev'g* 2009 WI App 69, 318 Wis. 2d 261, 767 N.W.2d 360, *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 Wisconsin Supreme Court upheld the commission's conclusion that the taxpayer's sales of tickets to symphony concerts were for entertainment events and therefore were taxable admissions. Section 77.52(2)(a)2. provides for taxation of the sale of admissions to amusement, athletic, entertainment, or recreational events, with certain listed exceptions. The court applied due-weight deference to the commission's determination.

Real Estate Transfer Tax

Like-Kind Exchange. The circuit court affirmed the commission's determination that the transfer of real estate pursuant to a so-called parking transaction like-kind exchange did not qualify as an exempt transfer from agent to principal pursuant to section 77.25(9). Accordingly, such transfer was subject to real estate transfer tax under section 77.25(9). *Central Dodge Title v. Wisconsin Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-257 (Wis. Cir. Ct. Dane County Apr. 5, 2010), *aff'g* [2 Wis.] St. Tax Rep. (CCH) ¶ 401-257 (Tax App. Comm'n Oct. 6, 2009).

Property Tax

Exemptions: Outpatient Clinic. In *Covenant Healthcare System, Inc. v. City of Wauwatosa*, 2010 WI App 125, 329 Wis. 2d 393, 791 N.W.2d 205 (review granted), the court of appeals reversed the circuit court's holding that the portion of a building occupied by an outpatient clinic owned and operated by an exempt hospital is exempt from property tax pursuant to section 70.11(4m)(a), which exempts real and personal property owned by nonprofit hospitals. The circuit court analyzed several legal issues after making detailed factual findings based on the nine-day trial. The court of appeals, on de novo review, addressed the single issue of whether the outpatient clinic was a doctor's office, which the statute expressly excludes from the exemption. Citing *St. Clare Hospital of Monroe, Wisconsin, Inc. v. City of Monroe*, 209 Wis. 2d 364, 563 N.W.2d 170 (Ct. App. 1997), the court held that Covenant's outpatient clinic is a taxable doctor's office because the clinic does not provide inpatient services and provides a space for doctors to do paperwork and most patients are seen by appointment during business hours. The court was not persuaded by the fact the clinic provides 24-hour urgent care, reasoning that the type of conditions treated in the urgent care area and the recovery time for those conditions are comparable to treatment in a doctor's office. The supreme court has granted Covenant's petition for review.

Exemptions: Prospective Relief. In *Northwest Wisconsin Community Services Agency, Inc. v. City of Montreal*, 2010 WI App 119, 328 Wis. 2d 760, 789 N.W.2d 392, the plaintiff, a benevolent association, sued the city under section 74.35 to recover property taxes assessed on property it rented to low-income individuals. It also sought a declaration it was exempt from property taxes. The city failed to file a timely answer. The circuit court entered default judgment, ordering the refund and declaring the plaintiff was exempt from future property taxes for the property. The court of appeals reversed the judgment in part, holding the circuit court exceeded its authority to the extent it granted prospective relief. The court reasoned that tax-exempt status is not automatic but is subject to continuing review under section 70.337. Because the legislature is empowered to change the criteria for tax exemptions, the court of appeals concluded that the circuit court erred by declaring the plaintiff's property exempt from property taxes in future years.

Assessability: Ownership of Condominium Development. In *Saddle Ridge Corp. v. Board of Review*, 2010 WI 47, 325 Wis. 2d 29, 784 N.W.2d 527, the supreme court reversed the court of appeals and upheld the board of review's determination that a condominium developer was liable for property taxes assessed for declared but unbuilt condominium units. The court rejected the characterization of the assessed property as vacant land held for development, which would be a common element taxable to the owners of constructed units rather than to the developer. The court said that the assessed property was the *unit*, which the condominium statutes define to include "a part of a condominium intended for any type of independent use, including one or more cubicles of air at one or more levels of space." Wis. Stat. § 703.02(15). In other words, a unit may exist without a building. *Saddle Ridge*, 2010 WI 47, ¶ 63, 325 Wis. 2d 29. By statute, "[e]very unit and its percentage of undivided interest in the common elements" are deemed to constitute a parcel subject to separate assessment. Wis. Stat. § 703.21. Accordingly, the developer was responsible for paying property taxes on its unbuilt units, i.e., its share of the vacant land held in common.

Valuation: Uniformity. In *U.S. Oil Co. v. City of Milwaukee*, 2011 WI App 4, ___ Wis. 2d ___, 794 N.W.2d 904, decided in late 2010, the circuit court vacated the city's assessments of three oil terminals on the ground that the city violated the uniformity clause of the Wisconsin Constitution. The city initially assessed the property at \$6 million based on a recent sale of the subject property and similarly assessed comparable properties based on the same sale. After the plaintiff filed an objection with the board of review, the assessor subpoenaed financial records and, applying an income method, reassessed the plaintiff's property at \$14 million but did not reassess the comparable properties under an income method. Following trial of the plaintiff's section 74.37 refund claim, the circuit court

vacated the assessments, reinstated the original \$6 million assessments, and ordered the city to refund the excessive taxes. In affirming, the court of appeals first rejected the city's contention that the plaintiff's uniformity claim should have been dismissed for failure to exhaust administrative remedies because the plaintiff did not fully argue that claim to the board of review. The court explained that *Hermann v. Town of Delavan*, 215 Wis. 2d 370, 572 N.W.2d 855 (1998), merely requires that a taxpayer who wishes to challenge uniformity must first file an objection with the board of review; it does not affect a taxpayer's right to raise new issues with the circuit court in a section 74.37 de novo refund action. The court held that the city violated uniformity by singling out the plaintiff's property for assessment under a different methodology that resulted in a valuation higher than that imposed on comparable properties. The court also held the circuit court's order to reinstate the initial assessment was proper because that approach harmonized the plaintiff's assessment with the assessments of the comparable properties.

Valuation: Enforcement of Settlement Agreement. In *Bucyrus International, Inc. v. Department of Revenue*, [2 Wis.] St. Rep. (CCH) ¶ 401-300 (Tax App. Comm'n Mar. 18, 2010), the taxpayer and the DOR entered into a settlement agreement to resolve the 2005 assessment of the taxpayer's manufacturing property. The agreement provided that the agreed assessments of land and improvements would continue through 2009, absent a sale or expansion of the property. The taxpayer subsequently demolished some of its buildings and constructed new buildings. The DOR then assessed the new buildings as personal property. The personal property assessment amounts, in combination with the real property assessments, exceeded the amount in the settlement agreement. On cross-motions for summary judgment, the commission held that the DOR's construction of the settlement agreement, as permitting assessment of the newly constructed buildings as personal property, was unreasonable and granted the taxpayer partial summary judgment regarding the construction of the agreement. The commission held there were issues of fact as to whether the new construction created an expansion, however, and therefore denied summary judgment as to the assessment amounts.

Valuation: Admissions in Sale and Lease Agreements; Uniformity. In *Great Lakes Quick Lube, LP v. City of Milwaukee*, 2011 WI App 7, ___ Wis. 2d ___, 794 N.W.2d 510, decided in late 2010, a de novo refund action under section 74.37, the court of appeals upheld the circuit court's judgment sustaining the assessments of three automotive-service facilities. The facilities had been sold pursuant to an asset-purchase agreement covering 47 businesses, an agreement that allocated the purchase prices and barred the parties from taking a position in any judicial proceeding contrary to the allocation. Separate lease agreements stated they were true leases and not financing arrangements. The plaintiff argued that the sale prices were inflated by creative financing in the form of a sale-leaseback transaction. The court agreed with the circuit court that such a characterization was contrary to the admissions in the parties' agreements. Further, because there was evidence of recent sales of comparable service facilities, the assessor properly relied on the comparable sales method. The court also rejected the plaintiff's uniformity challenge, reasoning that the fact other properties may have been assessed at lower values did not in and of itself establish a constitutional violation.

Valuation: "Inextricably Intertwined" Doctrine. In *Adams Outdoor Advertising, Ltd. v. City of Madison*, No. 2009AP1373, 2010 WL 2680015 (Wis. Ct. App July 8, 2010) (unpublished opinion citable for persuasive value per section 809.23(3)(b)) (*Adams II*) (review denied), the court of appeals rejected the city's reassessment of the plaintiff's billboards, which occurred after the supreme court rejected the city's prior methodology. The plaintiff erected and operated billboards on leased land. The city initially included the full value of permits in assessing the billboards. The supreme court held that was erroneous because the permits added value to the land rather than to the billboards; the supreme court therefore reversed and remanded for reassessment. *Adams Outdoor Advertising, Ltd. v. City of Madison*, 2006 WI 104, 294 Wis. 2d 441, 717 N.W.2d 803 (*Adams I*). On remand, the city included a portion of the permit value in assessing the billboards. The court of appeals held that also was erroneous because *Adams I* barred the inclusion of the permit value in the valuation of the billboards. Although *Adams I* recognized permits as taxable interests in real property that are not necessarily fully assessable to the land owner, the court of appeals said in *Adams II* that this did not mean the city could include a portion of the permit value in the billboard assessments. The court declined to consider the city's argument that a portion of the permit value was taxable to the plaintiff as stand-alone real property because that is not how the city assessed the permits.

Valuation: Comparable Sales Methodology; Highest and Best Use; Right to Jury Trial. In *Lands' End, Inc. v. City of Dodgeville*, No. 2009AP2627, 2010 WL 2103968 (Wis. Ct. App. May 27, 2010) (unpublished opinion not citable per section 809.23(3)) (petition for review filed), the city assessed the plaintiff's property for 2005 and 2006 by updating a 1995 appraisal to assess later expansions based on square-foot estimates. On de novo review under

section 74.37, the circuit court reduced the assessment, faulting the assessor for failing to consider evidence of more recent comparable sales. The court of appeals affirmed. The court rejected the city's argument that the assessments actually were premised on comparable sales because comparable sales were the basis for the 1995 appraisal, agreeing with the circuit court it was improper to base an assessment solely on 10-year-old sales when more recent comparable sales were available. The court also rejected the city's argument that the circuit court erred in relying on a recent comparable sale for a property for which the highest and best use was unknown. Explaining its reasoning in *Nestlé USA, Inc. v. Wisconsin Department of Revenue*, 2009 WI App 159, ¶ 37, 322 Wis. 2d 156, 776 N.W.2d 589, *aff'd*, 2011 WI 4, ___ Wis. 2d ___, ___ N.W.2d ___, the court distinguished between relying on a comparable sale for a property for which the highest and best use is known to differ from that of the subject property and relying on a comparable sale for a property for which the highest and best use is unknown. The court also held the circuit court did not erroneously exercise its discretion in vacating a stipulation and order for a jury trial, reasoning there is no constitutional right to a jury trial, and the reasons given by the circuit court for denying a jury trial were reasonable at the time given.

Valuation: Comparable Sales. In *Reigel Real Estate LLC v. Department of Revenue*, [2 Wis.] St. Rep. (CCH) ¶ 401-330 (Tax App. Comm'n July 8, 2010), the commission upheld the assessment of a paper-processing plant based on the comparable sales method. The commission rejected the argument of the plaintiff, who proceeded pro se, that the assessor failed to consider alternative valuation methodologies, observing that under section 70.32, such consideration would have been inappropriate given the availability of reasonably comparable sales. The commission also held the appraisal of the plaintiff's plant in another state did not overcome the presumption of correctness.

Procedure: Tax Equity Considerations. In *Elbert v. Town of Erin Prairie Board of Review*, No. 2009AP1343, 2010 WL 532970 (Wis. Ct. App. Feb. 17, 2010) (unpublished opinion not citable per section 809.23(3)), the taxpayer prevailed in a certiorari review action under section 70.47(13), and the court of appeals affirmed. The taxpayer had presented evidence of comparable sales to the board of review, whereas the assessor did not explain how he valued the property. The board of review acknowledged property values were declining but decided not to reduce the plaintiff's assessment after some board members stated that this would be unfair to other taxpayers. The court of appeals held it was erroneous for the board to base its determination on tax-equity considerations.

Procedure: Presumption of Correctness. In *Bonstores Realty Two, LLC v. City of Racine Board of Review*, No. 2009AP3122, 2009AP3133, 2010 WL 3989100 (Wis. Ct. App. Oct. 13, 2010) (unpublished opinion not citable per section 809.23(3)) (review denied), the court of appeals upheld the board of review's determination on certiorari review under section 70.47. Although the plaintiff's appraiser testified that the correct values were lower than the assessments, the plaintiff did not establish that the assessor's methodology was not supported by substantial evidence. Given the deferential standard of review under section 70.47, there was no basis to overturn the board's determination.

Procedure: Scope of Certiorari Review. The court of appeals reversed the circuit court's judgment 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)) (petition for review filed and held in abeyance). The court of appeals held that the circuit court exceeded its authority by going beyond the board of review record, conducting independent research, and directing the board of review to assess the property at the value determined by the court. On certiorari review under section 70.47(13), the circuit court's review is limited to the board of review record, and the court may consider only whether the board's action was within its jurisdiction, according to law, arbitrary or unreasonable, and reasonably supported by the evidence. Here, the evidence in the board of review record supported the board's determination. The court of appeals therefore reversed and remanded with directions to affirm the board's determination.

Procedure: Agent Authorizations. In *Thermo Electron, LLC v. Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-298 (Tax App. Comm'n Mar. 4, 2010), the commission held that it lacked jurisdiction to consider the taxpayer's manufacturing-property appeals because the agent-authorization forms that the taxpayer filed with its objection to the board of assessors could not be verified. The agent authorizations contained incorrect phone numbers and proxy officer signatures. The board of assessors gave the taxpayer time to file corrected authorizations, but the taxpayer's representative failed to comply with the deadline. The board therefore dismissed the objection without reviewing the merits. The commission entered summary judgment dismissing the taxpayer's appeal. The commission determined that the taxpayer's objection was not timely filed with the board of assessors

because its objection form was invalid. This deprived the board of assessors of jurisdiction. Because the board made no determination, and the commission may only review the board's determinations, the commission similarly lacked jurisdiction to consider the taxpayer's appeal.

Procedure: Frivolous Claim. The plaintiff in *Knuth v. Town of Cedarburg*, No. 2009AP1485, 2010 WL 174141 (Wis. Ct. App. Jan. 20, 2010) (unpublished opinion citable for persuasive value per section 809.23(3)(b)), was held liable for attorney fees the town incurred in defending a small claims action contesting the equalized tax rate used to compute the taxes for a school district. The court of appeals affirmed the circuit court's determination that the claim was frivolous, holding that the fact the plaintiff confused the lottery tax credit amount with the equalized tax rate did not provide a good-faith basis for his claim. The court reversed the award of actual attorney fees, however, holding the circuit court erroneously exercised its discretion because it failed to explain its reasoning for awarding attorney fees as opposed to other, lesser sanctions. It therefore remanded the case to the circuit court to reconsider appropriate sanctions.

Inheritance, Estate, and Gift Taxes

Responsibility for Estate Tax. In *Estate of Sheppard v. Schleis*, 2010 WI 32, 324 Wis. 2d 41, 782 N.W.2d 85, cert. denied, 131 S. Ct. 506 (2010), the Wisconsin Supreme Court ruled that, in the absence of tax-apportionment directions from the decedent, (1) an estate must pay the estate tax due on all nonprobate assets and (2) payable-on-death (P.O.D.) accounts do not fall under any exception to the general rule that an estate must pay the estate tax due on nonprobate assets. As a result, the estate had to pay the Wisconsin estate taxes resulting from P.O.D. account distributions that passed outside the estate. The court confirmed that the *burden-on-the-residue* rule for estate taxes applies in Wisconsin unless the decedent directs otherwise in a will or trust agreement. Finally, the court specifically declined to establish a common-law equitable-apportionment rule for Wisconsin estate taxes.

STATUTORY DEVELOPMENTS

Individual and Fiduciary Income Tax

Wisconsin Has Not Adopted Federal Income Tax Exclusion with Respect to Health-Care Benefits for Children Under Age 27. Effective March 30, 2010, the Patient Protection and Affordable Care Act, Public Law Number 111-148, 124 Stat. 119, and the Health Care and Education Reconciliation Act of 2010, Public Law Number 111-152, 124 Stat. 1029, provide that the exclusion from an employee's gross income for employer-provided accident or health insurance benefits for the employee, the employee's spouse, or the employee's dependents is extended to apply to any child of the employee who, as of the end of the tax year, has not attained age 27.

The Wisconsin Legislature has not adopted these provisions, and thus for Wisconsin income tax purposes, for the benefits to qualify for the exclusion from gross income, the child under age 27 must qualify as a dependent for income tax purposes. To qualify as a dependent, the adult child must be either the taxpayer's qualifying child or the taxpayer's qualifying relative. Generally, to be a *qualifying child*, the child (1) must be under age 24 at the end of the year and a full-time student, (2) must have lived with the employee for more than half the year, and (3) must not have provided more than half of his or her own support for the year. To be a *qualifying relative*, an individual must (1) have the same principal place of abode as the taxpayer and be a member of the taxpayer's household, and (2) be an individual for whom the taxpayer provides more than half the individual's support for the calendar year.

If the adult child does not qualify as a dependent, the fair market value of the adult child's health insurance coverage is treated as income and taxable wages to the employee for Wisconsin income tax purposes.

Corporate Franchise and Income Tax

Definition of Internal Revenue Code. The legislature failed to update the definition of the Internal Revenue Code (I.R.C.). 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 2007, 2008, and 2009 were retroactively amended to exclude changes made by the Food, Conservation, and Energy Act of 2008, Public Law Number 110-246, 122 Stat. 1651, and to adopt certain changes made by the Heroes

Earnings Assistance and Relief Tax Act of 2008, Public Law Number 110-245, 122 Stat. 1624. 2009 Wis. Act 183, § 2 (amending Wis. Stat. § 71.22(4)(um)); 2009 Wis. Act 161, §§ 4, 5, 6 (amending Wis. Stat. § 71.22(4)(t), (u), (um)). Similar rules apply to nonprofit corporations, 2009 Wis. Act 183, § 3 (amending Wis. Stat. § 71.22(4m)(sm)); 2009 Wis. Act 161, §§ 7, 8, 9 (amending Wis. Stat. § 71.22(4m)(r), (s), (sm)); S corporations, 2009 Wis. Act 183, § 5 (amending Wis. Stat. § 71.34(1g)(um)); 2009 Wis. Act 161, §§ 13, 14, 15 (amending Wis. Stat. § 71.34(1g)(t), (u), (um)); insurance companies, 2009 Wis. Act 183, § 6 (amending Wis. Stat. § 71.42(2)(tm)); 2009 Wis. Act 161, §§ 16, 17, 18 (amending Wis. Stat. § 71.42(2)(s), (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), 2009 Wis. Act 183, § 4 (amending Wis. Stat. § 71.26(2)(b)22.); 2009 Wis. Act 161, §§ 10, 11, 12 (amending Wis. Stat. § 71.26(2)(b)20., 21., 22.).

Income. Interest income from bonds issued under section 66.0304 for certain multifamily affordable or elderly housing projects, health facilities information technology, and redevelopment or housing projects is exempt from Wisconsin income tax but is not exempt from the franchise tax. 2009 Wis. Act 205, §§ 5, 6d, 7 (creating Wis. Stat. §§ 71.26(1m)(k), 71.36(1m)(b)2., 71.45(1t)(k)); 2009 Wis. Act 205, § 6 (amending and renumbering Wis. Stat. § 71.36(1m)(a)) (effective for tax years beginning on or after Jan. 1, 2010).

Credits. Effective in 2010 are new tax credits for postsecondary education, 2009 Wis. Act 265, §§ 29, 30, 33, 34 (creating Wis. Stat. §§ 71.28(5r), 71.30(3)(cd), 71.47(5r), 71.49(1)(cd)); *id.* §§ 28, 31, 32 (amending Wis. Stat. §§ 71.26(2)(a)4., 71.34(1k)(g), 71.45(2)(a)10.); supply chains, 2009 Wis. Act 267, §§ 5–12 (amending in part and creating in part Wis. Stat. §§ 71.28(3w), 71.47(3w)); woody biomass harvesting and processing, 2009 Wis. Act 269, §§ 8, 12 (creating Wis. Stat. §§ 71.28(3rm), 71.47(3rm)); *id.* §§ 7, 9, 10, 11, 13 (amending Wis. Stat. §§ 71.26(2)(a)4., 71.30(3)(f), 71.34(1k)(g), 71.45(2)(a)10., 71.49(1)(f)); food processing plant and warehouse investment, 2009 Wis. Act 295, §§ 8, 12 (creating Wis. Stat. §§ 71.28(3rm), 71.47(3rm)); *id.* §§ 7, 9, 10, 11, 13 (amending Wis. Stat. §§ 71.26(2)(a)4., 71.30(3)(f), 71.34(1k)(g), 71.45(2)(a)10., 71.49(1)(f)); and water consumption, 2009 Wis. Act 332, §§ 8g, 8h, 8k, 8L (creating Wis. Stat. §§ 71.28(5rm), 71.30(3)(ce), 71.47(5rm), 71.49(1)(ce)); *id.* §§ 8f, 8i, 8j (amending Wis. Stat. §§ 71.26(2)(a)4., 71.34(1k)(g), 71.45(2)(a)10.).

Several amendments were made to the ethanol and biodiesel fuel pump credit, 2009 Wis. Act 401, §§ 24, 25, 26d, 27, 28, 29d (creating Wis. Stat. §§ 71.28(5j)(a)2d., 2m., (c)3., 71.47(5j)(a)2d., (a)2m., (c)3.); *id.* §§ 26, 29 (amending Wis. Stat. §§ 71.28(5j)(b), 71.47(5j)(b)).

The credit for dairy and livestock investments was extended for two years. 2009 Wis. Act 294, §§ 8–20 (amending Wis. Stat. §§ 71.28(3n), 71.47(3n)).

Sales and Use Tax

The Wisconsin Legislature enacted 2009 Wisconsin Act 330, consisting of additions and clarifications related to the streamlined sales and use tax. The modifications under Act 330 generally took effect May 27, 2010.

Act 330 creates a new definition of *advertising and promotional direct mail*. 2009 Wis. Act 330, § 1 (creating Wis. Stat. § 77.51(1ag)). Such mail is sourced to the location from which the advertising and promotional direct mail is shipped if the purchaser does not provide a direct pay permit, an exemption certificate claiming direct mail, or other information to indicate the appropriate taxing jurisdiction. 2009 Wis. Act 330, § 9 (amending and renumbering Wis. Stat. § 77.522(1)(c) as Wis. Stat. § 77.522(1)(c)1.).

Act 330 also creates a new definition of *other direct mail* that excludes advertising or promotion. 2009 Wis. Act 330, § 2 (creating Wis. Stat. § 77.51(9r)). Other direct mail is sourced to the purchaser's address as indicated by the seller's business records if the purchaser does not provide to the seller a direct-pay permit or an exemption certificate claiming direct mail. 2009 Wis. Act 330, § 10 (creating Wis. Stat. § 77.522(1)(c)2.).

Advertising and promotional direct mail and other direct mail included in a single mailing will be sourced as if it were other direct mail. 2009 Wis. Act 330, § 11 (creating Wis. Stat. § 77.522(1)(c)3.).

Transactions that include nonincidental services such as billing or data processing are not treated as direct mail and will be sourced pursuant to the purchaser's address as indicated by the seller's business records. 2009 Wis. Act 330, § 12 (creating Wis. Stat. § 77.522(1)(c)4.).

The definition of *prepared food* no longer includes soft drinks and alcoholic beverages in determining whether the retailer provides utensils (related to whether the retailer is offering prepared food). 2009 Wis. Act 330, § 3 (amending Wis. Stat. § 77.51(10m)(a)3.a.).

Clarifications have been added to the provisions describing prepaid calling services that are subject to taxation. 2009 Wis. Act 330, § 5 (amending Wis. Stat. § 77.52(2)(a)5.).

The standard for collecting sales tax exemptions after the DOR asks a seller to substantiate an exemption has changed. A seller has 120 days to substantiate an exemption and may, in good faith, obtain a fully completed exemption certificate from the purchaser. The "in good faith" provision now requires that the exemption was authorized by law, could be applicable to the property or service being purchased, and is reasonable for the purchaser's type of business. 2009 Wis. Act 330, §§ 7, 14 (creating Wis. Stat. §§ 77.52(14)(am)2., 77.53(11)(b)2.). If the seller obtains the certificate, the seller is relieved of liability for the tax unless the seller had knowledge, or a reason to know, at the time such information was provided that the information relating to the exemption claimed is materially false or the seller otherwise knowingly participated in activity intended to purposefully evade the tax that is properly due on the transaction. 2009 Wis. Act 330, §§ 8, 15 (creating Wis. Stat. §§ 77.51(14)(am)3., 77.53(11)(b)3.).

Contracts for sales of goods and taxable services entered into before July 1, 2009, the effective date of the streamlined sales tax, *see* 2009 Wisconsin Act 28, that were exempt under prior law will remain exempt until renewed or extended. 2009 Wis. Act 330, § 16 (amending Wis. Stat. § 77.54(18)).

Sellers that register through the streamlined sales tax governing board's central registration system and anticipate making no taxable sales in Wisconsin are not required to file certain sales and use tax returns. 2009 Wis. Act 330, §§ 17, 18 (creating Wis. Stat. § 77.58(2)(d) and amending Wis. Stat. § 77.58(2)(d)).

Sales tax returns must be made to the DOR on the DOR-prescribed form. 2009 Wis. Act 330, § 19 (amending Wis. Stat. § 77.58(4)).

Reductions for bad debt can be claimed only for a transaction that the seller has previously reported as taxable and for which the seller has previously paid sales tax. 2009 Wis. Act 330, §§ 20, 21 (amending Wis. Stat. § 77.585(1)(a), (d)).

The DOR must wait 30 days before making an estimate of the sales tax due under section 77.59(9) by a seller that has registered to file sales tax but failed to file a return when due. 2009 Wis. Act 330, §§ 22, 23 (amending and renumbering Wis. Stat. § 77.59(9) as Wis. Stat. § 77.59(9)(a) and creating Wis. Stat. § 77.59(9)(b)).

A local exposition district may impose food and beverage taxes on alcoholic beverages, candy, prepared food, and soft drinks unless such products qualify for an exemption under section 77.54(1), (4), (7) (a), (7m), (9), (9a), (20n) (b) or (c), or (20r). 2009 Wis. Act 330, § 24 (repealing and recreating Wis. Stat. § 77.98). This change is effective retroactively to October 1, 2009.

In a separate act, the exemption from sales tax for hospitals and retirement homes has been expanded to include all facilities certified or licensed under chapter 48 (the Children's Code). 2009 Wis. Act 204, § 1 (amending Wis. Stat. § 77.54(20n)(b)).

Property Tax

Exemptions: Nonprofit Community Theater. The legislature enacted a specific exemption for property owned or leased by a nonprofit community theater located on a parcel of land between one-quarter acre and two acres in size within 20 miles of the Mississippi River that includes one or more performing arts theaters with a seating capacity of

at least 450 persons. 2009 Wis. Act 152, § 1 (creating Wis. Stat. § 70.11(45)). The theater that meets this description is the La Crosse Community Theater.

Exemptions: Snowmobile and All-Terrain Vehicle Clubs. Trail groomers owned by tax-exempt snowmobile or all-terrain vehicle clubs are exempt retroactive to January 1, 2009, pursuant to 2009 Wisconsin Act 155, § 1 (creating Wis. Stat. § 70.11(45); renumbered as Wis. Stat. § 70.11(45m) by the Legislative Reference Bureau under authority of Wis. Stat. § 13.92(1)(bm)2.).

Assessment of Agricultural Land. The provisions of section 70.32(2r)(a) and (b) expired and then were repealed by the legislature. Former section 70.32(2r)(c) has been renumbered as section 70.32(2r) and amended to provide that agricultural land shall be assessed according to the income that could be generated from its rental for agricultural use. 2009 Wis. Act 235, §§ 1, 2 (repealing Wis. Stat. § 70.32(24)(a), (b) and renumbering and amending Wis. Stat. § 70.32(2r)(c)).

Settlement of Omitted Property Collections. Pursuant to newly created section 70.315, a tax district must report to the DOR taxes on omitted property assessed and collected under section 70.44 if the total of such taxes exceeds \$5,000. The DOR must then determine whether such taxes affect the tax district's equalized value. If they do, the tax district must distribute such collections to the other tax authorities within the jurisdiction according to their proportionate share. 2009 Wis. Act 171, §§ 1–9 (amending Wis. Stat. §§ 74.23, 74.25, 74.30 and creating Wis. Stat. § 74.315) (eff. Jan. 1, 2011).

ADMINISTRATIVE DEVELOPMENTS

Sales and Use Tax: Taxable Sales

Exemption for Drugs and Medicines Before October 1, 2009. In private letter ruling W1009004 (Aug. 13, 2009), reprinted in [2 Wis.] St. Tax Rep. (CCH) ¶ 401-307 (May 2010), the DOR held that a tissue filler implant, an injectable liquid implant, a prescription pharmaceutical used in varicose vein treatment, and surgical adhesives all meet the definition of *medicines* in section 77.54(14g) (2007–08). Accordingly, the sale of such products is not subject to sales and use tax.

Exemption for Drugs and Medicines After October 1, 2009. In private letter ruling W1009008 (Dec. 7, 2009), reprinted in [2 Wis.] St. Tax Rep. (CCH) ¶ 401-308 (May 2010), the DOR held that a tissue filler implant, an injectable liquid implant, and a prescription pharmaceutical used in varicose vein treatment meet the definition of *drug* in section 77.51(3pj) and therefore are exempt from sales and use tax. Surgical adhesive used in conjunction with sutures and staples in open surgical repair meets the definition of a *prosthetic device* contained in section 77.51(11m) and when used in applications in the treatment of a human being is exempt from sales tax under section 77.54(22b).

Exemption for Construction Contracts. In private letter ruling W1008005 (Dec. 1, 2009), reprinted in [2 Wis.] St. Tax Rep. (CCH) ¶ 401-309 (May 2010), the DOR ruled that, with proper documentation, a subsidiary's sales of tangible personal property to customers of its parent corporation are not subject to sales and use tax when the subsidiary is not a disregarded entity for federal income tax purposes and the customer is a tax-exempt entity. The parent may use the material purchased by the customer from the subsidiary to perform construction services for the tax-exempt customer.

Exemption for Construction Contracts. In private letter ruling W1008006 (Dec. 1, 2009), reprinted in [2 Wis.] St. Tax Rep. (CCH) ¶ 401-310 (May 2010), the DOR ruled that with proper documentation, sales by related entities to a tax-exempt customer are not subject to sales and use tax when the parent provides construction services to the tax-exempt customer. Under the facts of the ruling, Company A provides labor-only construction services to a tax-exempt customer. Company B purchases materials and sells the materials to the tax-exempt customer. Company B is treated as a partnership for income tax purposes; it is owned 95% by Company A and 5% by Company D; Company D is owned by the owners of Company A.

Services Subject to Tax. In private letter ruling W1009007 (Dec. 4, 2009), *reprinted in* [2 Wis.] St. Tax Rep. (CCH) ¶ 401-311 (May 2010), the DOR held that sales and use tax does not apply to certain fees charged by an automobile financing company. The financing company charged extra for a provision (similar to separately available gap insurance) in the finance contract that cancels any difference between the amount borrowed and the book value of the automobile financed if the automobile is totaled. The DOR reasoned that this fee is in exchange for something other than tangible personal property, and therefore, should not be subject to sales and use tax.

Admissions Subject to Tax. In private letter ruling W1020001 (Feb. 19, 2010), *reprinted in* [2 Wis.] St. Tax Rep. (CCH) ¶ 401-334 (July 2010), the DOR held that when an amusement park operator makes wholesale sales of admissions to a hotel that will then sell the admissions as part of a package with other goods and services, the hotel is the consumer of the admissions. Accordingly, the sales and use tax applies to the wholesale transaction.

Software Subject to Tax. In private letter ruling W1025002 (Mar. 24, 2010), *reprinted in* [2 Wis.] St. Tax Rep. (CCH) ¶ 401-335 (July 2010), the DOR held that sales and use tax does not apply when a company provides software on a server that permits persons at different locations to access the same software through remote access when (1) the persons or the persons' employees who have access to the software are not located on the premises where the equipment or software is located and do not operate the equipment or control its operation, and (2) software that is downloaded or physically transferred to the customer or customer's computers is incidental to data-processing services. The ruling interprets section Tax 11.71(3)(d) of the Wisconsin Administrative Code, regarding time-sharing services to out-of-state servers.