

Tax Law

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This chapter covers in varying detail the principal 2011 court decisions and legislative changes affecting Wisconsin taxpayers and tax attorneys. Although most 2011 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

Pass-Through Entity Withholding. In *United Wisconsin Grain Producers, LLC v. Wisconsin Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-468 (Tax App. Comm'n Aug. 24, 2011), the Wisconsin Tax Appeals Commission (the commission) upheld the Wisconsin income tax assessment (including tax, interest, and penalty) against a Wisconsin limited liability company (LLC) that failed to properly withhold Wisconsin income tax from income distributable to its nonresident members. The LLC did not dispute its liability for the tax that it failed to withhold but contested the interest and penalty. The commission held that (1) the imposition of underpayment

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, as affected by acts through 2011 Wisconsin Act 113.

interest was appropriate and mandatory, and (2) the imposition of a civil negligence penalty was appropriate because the LLC did not establish that the failure resulted from good cause rather than neglect.

No Time Limit If Fraud Has Occurred. In *George v. Wisconsin Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-480 (Tax App. Comm'n Sept. 23, 2011), the Wisconsin Department of Revenue (DOR) completed its investigation of the taxpayer's income tax returns for the years 1989 to 1993 in 1999. However, the DOR did not assess the taxpayer until 2005, more than six years after the DOR concluded its special investigation. The taxpayer argued that the assessment was not timely. The commission rejected the taxpayer's argument and agreed with the DOR's reading of section 71.77(3): the DOR may issue an assessment of income tax anytime after fraud is discovered. The commission concluded the legislature intended to place no time limit on the DOR's ability to assess in situations in which fraud is discovered.

Sales and Use Tax

Waterslide Supports Are Accessions to Real Property. In *Chula Vista, Inc. v. Wisconsin Department of Revenue*, Nos. 09-S-247, 09-P-248, 2011 WL 3581194 (Wis. Tax App. Comm'n Aug. 5, 2011), the commission determined that steel beams supporting fiberglass waterslides and the related engineering services had been made a part of the taxpayer's real estate and therefore are not subject to sales and use taxes. The commission agreed with the taxpayer that the three-factor *Harvestore* test (*A.O. Smith Harvestore Prods., Inc. v. Department of Revenue*, 72 Wis. 2d 60, 240 N.W.2d 357 (1976)), not section 77.52(2)(ag)38., controlled. In applying the *Harvestore* three-factor test, the commission found that the taxpayer had a clear intent to make a permanent annexation, citing the height of the steel beams, the substantial investment, and the fastening mechanism by which the beams were secured to a foundation particularly prepared for the beams. Just as in *Harvestore*, the commission disregarded the income treatment and the financing arrangements of the property.

Barge Fleeting Services Exempt. In *Brennan Marine, Inc. v. Wisconsin Department of Revenue*, No. 10-S-35, 2011 WL 4367065 (Wis. Tax App. Comm'n Sept. 7, 2011), the commission determined that payments made for assembling, marshaling, or loading and unloading barges and other ancillary services are not subject to sales tax under section 77.52(2)(a)9., which deals with "docking or providing storage space for boats for a consideration," because the taxpayer's activities were not clearly taxable under the statute.

Responsible Party for Sales Tax. An owner and manager who took part in decisions to make disbursements of funds and who had sole signing authority on the company's checking account had a duty to remit sales tax collections and was liable for the sales tax under section 77.60(9). *Marxer v. Wisconsin Dep't of Revenue*, 2 Wis. St. Tax Rep. (CCH) ¶ 401-456 (Tax App. Comm'n July 15, 2011).

Equitable Estoppel Not Applicable. The commission held that the DOR is not barred from making an assessment because the proposed assessment would violate an internally imposed policy to limit assessments to the past four years. Equitable estoppel did not apply. *Rashaed v. Wisconsin Dep't of Revenue*, 2 Wis. St. Tax Rep. (CCH) ¶ 401-455 (Tax App. Comm'n July 13, 2011).

Taxpayer Must Have Grounds for Redetermination. Inability or reluctance to pay a redetermination is not grounds for a reduction in assessment under section 73.01(4)(a) or (5)(a) (which allows a taxpayer to petition if the "taxpayer [is] aggrieved by an action or determination of the Department"). *Gegare Tile, Inc. v. Wisconsin Dep't of Revenue*, 2 Wis. St. Tax Rep (CCH) 401-442 (Tax App. Comm'n May 19, 2011).

Late Filing Denied. The commission does not have jurisdiction to consider a petition that is filed after the due date specified in section 73.01(5)(a). *Langjahr v. Wisconsin Dep't of Revenue*, Wis. St. Tax Rep. (CCH) ¶ 401-406 (Tax App. Comm'n Feb. 24, 2011).

Property Tax

Appeal Procedures: Limitation of Appeal Rights Unconstitutional; No Right to Jury Trial. In *Metropolitan Associates v. City of Milwaukee*, 2011 WI 20, 332 Wis. 2d 85, 796 N.W.2d 717, the Wisconsin Supreme Court invalidated 2007 Wisconsin Act 86 (Act 86) on equal protection grounds. Act 86 permitted municipalities to curtail nonmanufacturing property owners' options for challenging property tax assessments by adopting ordinances

allowing taxpayers to obtain a 60-day postponement of board of review hearings. Under Act 86, taxpayers in municipalities that adopted such ordinances (opt-out municipalities) no longer had the right to file de novo refund actions in court under section 74.37. Instead, such taxpayers were limited to seeking more restricted certiorari review under section 70.47. Reversing the court of appeals, the supreme court held that the “enhanced” rights and procedures under Act 86 were insufficient to provide taxpayers in opt-out communities an equivalent opportunity to fully contest their cases in court. The supreme court also held there is no right to a jury trial in refund cases challenging excessive assessments.

Appeal Procedures: Metropolitan Associates Applies Retroactively. In *CNL Income GW WI-DEL, LP v. Village of Lake Delton Board of Review*, No. 2011AP116, 2011 WL 6413818, 2 Wis. St. Tax Rep. (CCH) ¶ 401-509 (Ct. App. Dec. 22, 2011) (unpublished opinion citable for persuasive value per section 809.23(3)(b)), the taxpayer received an adverse ruling from the board of review in an opt-out municipality before the supreme court issued its ruling in *Metropolitan Associates* invalidating Act 86. Consistent with Act 86, the taxpayer sought certiorari review rather than filing a de novo refund action. The circuit court affirmed the board of review’s determination, and the taxpayer appealed. While the appeal was being briefed, the supreme court issued its decision in *Metropolitan Associates*. The court of appeals held that *Metropolitan Associates* applies retroactively and remanded the case to the circuit court for de novo review.

Valuation: Special Purpose Facility. In *Nestlé USA, Inc. v. Wisconsin Department of Revenue*, 2011 WI 4, 331 Wis. 2d 256, 795 N.W.2d 46, the Wisconsin Supreme Court upheld the DOR’s method of valuing an infant formula plant that had spent substantial sums to comply with federal Food and Drug Administration (FDA) requirements. The DOR concluded the plant was a special purpose facility whose highest and best use was as an infant formula plant. There was no available evidence of sales of comparable infant formula plants, and so the DOR assessor used the cost of replacement approach. The DOR did not apply any discount for functional obsolescence to account for the plant having specialized equipment that would not be valuable to many other potential purchasers. In contrast, Nestlé’s appraiser concluded that because there was not any evidence of sales of other infant formula plants, the highest and best use was as a general food processing plant. He then used the comparable sales approach and arrived at a much lower value. In upholding the DOR’s replacement cost approach, the supreme court reasoned that the fact there had not been any sales of infant formula plants did not mean Nestlé’s plant was not marketable as an infant formula plant; rather, it just reflected that plants designed to meet FDA guidelines had not been in existence very long and none had changed hands. Because Nestlé did have other competitors in the market, the infant food industry was strong and expanding, and there was no evidence of infant formula plants being converted to other uses, the court concluded the DOR assessor’s methodology was appropriate.

Valuation: Relevance of Subsequent Year Reduction. In *State ex rel. Stupar River LLC v. Town of Linwood*, 2011 WI 82, 336 Wis. 2d 562, 800 N.W.2d 468, the taxpayer challenged its property assessment for the year 2005. While its appeal was pending, the town issued the 2006 assessment at a reduced value. The assessor testified that the 2006 reduction was not the result of any change in the property’s fair market value but was done as part of an overall downward adjustment in commercial property assessments to bring them in line with other classes of property. The taxpayer argued that the 2006 assessment proved the 2005 assessment was too high. The supreme court rejected this argument and upheld the 2005 assessment. According to the court, Wisconsin assessments are to be based on fair market value, but they do not necessarily equate with fair market value. The court held that the comparison of the 2005 and 2006 assessments was insufficient to overcome the presumption of correctness of the 2005 assessment.

Valuation: Necessity of Appraiser Testimony at Board of Review. The limitations of certiorari review under section 70.47(13) are illustrated in *Suchla v. Board of Review*, No. 2010AP2005, 2011 WL 2228554, 2 Wis. St. Tax Rep. (CCH) ¶ 401-406 (Ct. App. June 9, 2011) (unpublished opinion not citable per section 809.23(3)). In *Suchla*, the taxpayers challenged their residential assessments and presented to the board of review recent appraisals indicating substantially lower valuations than the assessments. Each appraisal relied on three comparable sales. The assessor had never been inside the taxpayers’ homes, and he used a cost approach to valuation. The board of review adopted the assessor’s valuations. The circuit court reversed on certiorari review, holding the taxpayers’ appraisals followed the statutory method for valuing properties using comparable sales and there was no basis for the board to disregard those appraisals. The court of appeals reversed. According to the court, because the taxpayers’ appraiser did not appear and testify at the board of review hearing to establish the comparability of the sales she used, the taxpayers failed to overcome the presumption of correctness of the assessments.

Manufacturing Property: Late-Filed Manufacturing Property Report. Section 70.995(12)(a) requires manufacturers to file real property and personal property reports by March 1 of each year. In *LCM Funds Five North LLC v. Wisconsin Department of Revenue*, No. 10-M-51, 2011 WL 7005722, 2 Wis. St. Tax Rep. (CCH) ¶¶ 401-513 (Wis. Tax App. Comm'n Dec. 29, 2011), the tax appeals commission dismissed a manufacturer's petition for review based on lack of jurisdiction because the manufacturing report was filed 10 months late. The case turned on the commission's interpretation of a statement in section 70.995(12)(a) that failure to submit the required manufacturing reports results in the denial of any right of redetermination by the state board of assessors or the tax appeals commission. The commission rejected the taxpayer's argument that the statute does not deny jurisdiction for failing to file a *timely* report but only denies jurisdiction if no report was filed at all. According to the commission, the taxpayer's construction was incongruous with the requirement that reports be filed by March 1.

Manufacturing Property: Summary Judgment. In *WR Cold Storage LLC v. Wisconsin Department of Revenue*, 2011 WL 825108, 2 Wis. St. Tax Rep. (CCH) ¶¶ 401-408 (Wis. Tax App. Comm'n Feb. 28, 2011), the commission denied the parties' cross-motions for partial summary judgment on the issue whether certain equipment used in the processing of cranberries constitutes exempt manufacturing machinery and equipment under section 70.11(27). The commission held there were genuine issues of material fact as evidenced by the parties' competing expert affidavits and objections to each other's factual statements. Further, after filing its summary judgment motion, the petitioner had filed a motion to compel the DOR to produce its expert for deposition, suggesting the case was not ready for summary judgment. Additionally, the parties' submittals did not address all the elements necessary for the commission to determine whether the equipment was manufacturing property.

Exemptions: Outpatient Clinic. In *Covenant Healthcare System, Inc. v. City of Wauwatosa*, 2011 WI 80, 336 Wis. 2d 522, 800 N.W.2d 906, the supreme court reversed the court of appeals, agreeing with the circuit court 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 court rejected the city's argument that the exception to the exemption for doctor's offices applied.

Exemptions: Cranes As Stock-in-Trade. Section 70.111(17) exempts merchants' stock-in-trade from property tax. In *Giuffre Bros. Cranes, Inc. v. City of Milwaukee*, No. 2010AP1211, 2011 WL 1795239, 2 Wis. St. Tax Rep. (CCH) ¶¶ 401-432 (Ct. App. May 12, 2011) (unpublished opinion citable for persuasive value per section 809.23(3)(b)), the court of appeals affirmed the circuit court's holding that this exemption applies to certain truck-mounted cranes that were simultaneously held out for sale and for rent. The cranes were available for rental for demonstration purposes and were at all times available for sale. The court rejected the city's argument that the exemption included an implicit requirement that the property be exclusively held out for sale.

Exemptions: Personal Property Kept for Personal Use. Section 70.111(1) exempts household furnishings and other personal property if such items are kept for personal use by the owner. In *Faydash v. City of Sheboygan*, 2011 WI App 57, 332 Wis. 2d 397, 797 N.W.2d 540, for the year at issue the plaintiff advertised her home for rent over the internet and actually rented it out on 16 overnights; she and her family used the home for at least three months. The city levied a tax on the plaintiff's home furnishings on grounds that the property had a commercial use. The plaintiff brought an action for unlawful assessment under section 74.35, claiming the property was exempt under section 70.111(1). The circuit court granted summary judgment to the city, and the court of appeals affirmed. The court held that section 70.111(1) does not explicitly limit the use of personal property solely to personal use, and inconsequential or de minimis commercial use therefore would not obviate the exemption. Here, however, the plaintiff failed to establish de minimis commercial use because the record did not establish that she limited her rental but that she was able to find renters for only a limited number of days.

Procedure: Final Order. In *City of La Crosse v. Wisconsin Department of Revenue*, 2 Wis. St. Tax Rep. (CCH) ¶¶ 401-470 (Cir. Ct. Dane Cnty. Aug. 16, 2011), the court dismissed the city's petition to review the commission's ruling that various medical devices are exempt computer equipment pursuant to section 70.11(39). Because the commission had not yet determined the taxability of other property at issue in the case, its ruling on the medical devices was not final and could not be appealed.

Procedure: Exhaustion of Administrative Remedies. In *Clear Channel Outdoor, Inc. v. City of Milwaukee*, 2011 WI App 117, 336 Wis. 2d 707, 805 N.W.2d 582 (review denied), billboard owners filed a declaratory judgment action challenging the city's assessments of their advertising billboards. The owners' complaint was that, whereas the city

previously had assessed the billboards as personal property, for the year at issue the city reduced the personal property assessments to zero and assessed the permit value of the billboards as real property even though the owners did not own the land on which the billboards were located. The circuit court dismissed the complaints without prejudice for failure to exhaust administrative remedies because the owners had not complied with the board of review's objection procedures. The court of appeals affirmed. In so doing, the court rejected the owners' argument that they were not required to file board of review objections because they were not challenging valuation. The court observed that, pursuant to section 70.47(7)(a) and (16)(a), objections to "amount or valuation" of real or personal property are subject to board of review procedures. The court concluded that the question of how taxes should be apportioned among the billboards' physical structure, the underlying land, and the permits goes to the heart of property amount or valuation.

Procedure: Untimely Certiorari Petition. The court of appeals upheld the dismissal of the plaintiffs' certiorari complaint as untimely in *Slocum v. Town of Star Prairie Board of Review*, No. 2010AP3021, 2011 WL 6157003, 2 Wis. St. Tax Rep. (CCH) ¶ 401-508 (Ct. App. Dec. 13, 2011) (unpublished opinion not citable per section 809.23(3)). The complaint referred to certiorari review but was filed more than 90 days after the plaintiff received the board of review's determination, which is the time limit under section 70.47(13). Although the plaintiff argued that the delay was caused by his attempt to appeal directly to the board of review, the court observed that any such procedure does not toll the statute of limitation. The court rejected the plaintiff's argument that the complaint was timely under section 74.37 because the complaint could not be construed as an action under that statute.

Procedure: Sham Affidavit. The circuit court dismissed a trust's refund action on summary judgment in *Allen S. Musikantow Trust v. Town of Liberty Grove*, No. 2010AP2322, 2011 WL 1845045, 2 Wis. St. Tax Rep. (CCH) ¶ 401-434 (Ct. App. May 17, 2011) (unpublished opinion not citable per section 809.23(3)). The city argued that the trust had failed to challenge the assessment before the board of review, and the trust argued that it had not received notice of the reassessment before the board of review hearing. The court initially denied the city's summary judgment motion, concluding that an affidavit from the trustee raised a genuine issue of material fact as to when the notice of reassessment was delivered. The court later entered summary judgment for the city based on subsequent deposition testimony demonstrating that the affidavit was a sham and that the trustee had no personal knowledge of when the notice was delivered. The court of appeals affirmed.

STATUTORY DEVELOPMENTS

Individual and Fiduciary Income Tax

Capital Gains Exclusion for Wisconsin-Source Assets. A new provision allows a capital-gains exclusion for Wisconsin capital assets purchased on or after January 1, 2011, and held for at least five years. The exclusion is generally the amount of qualifying gain under the statute. To be a qualifying asset, the asset must be used in a business that the Wisconsin Economic Development Corporation (WEDC) has certified is a *Wisconsin business*. The statute provides guidance to the WEDC for implementing a certification program. 2011 Wis. Act 32 (amending Wis. Stat. §§ 71.01(13), 71.05(8)(b), and creating Wis. Stat. §§ 71.05(25), 238.145) (effective for taxable years beginning on or after January 1, 2016).

Gain Deferred on Sale of Capital Assets. A newly created statute allows, for state income tax purposes, a subtraction from federal adjusted gross income of any amount of a long-term capital gain if the claimant invests all proceeds of the capital-gain event into a qualified Wisconsin business. The basis of the new investment is reduced by the amount of the subtraction. The claimant must notify the DOR on a separate form. The WEDC must certify the new business investment. 2011 Wis. Act 32 (amending Wis. Stat. § 71.01(13) and creating Wis. Stat. §§ 71.05(26) and 238.146) (effective for taxable years beginning on or after January 1, 2011).

State Deduction for Health Savings Accounts Enacted. Effective for taxable years beginning on or after January 1, 2011, I.R.C. § 106(d), I.R.C. § 220(f)(5)(A), I.R.C. § 223, and I.R.C. § 408(d)(9) (all of the Internal Revenue Code as amended to December 31, 2010), relating to health savings accounts, have been adopted for Wisconsin tax purposes. The federal law treatment of health savings accounts now applies for Wisconsin. For distributions after December 31, 2010, for federal tax purposes the additional tax on distributions from a health savings account that are not used for qualified medical expenses is 20% of the amount of distribution that is includible in gross income.

For Wisconsin tax purposes, the penalty for distributions not used for qualified medical expenses is 33% of the federal penalty. 2011 Wis. Act 1 (creating Wis. Stat. ch. 71, subch. XVI, § 71.83(1)(ce), and nonstatutory provision) (effective for taxable years beginning on or after January 1, 2011).

Deduction for Contributions to a College Savings Account and Tuition and Expenses Program Allowed for Certain Relatives. The owner of a college savings account or tuition and expenses program (e.g., EdVest, the “tomorrow’s scholar” college savings plan) may authorize a parent, grandparent, great-grandparent, aunt, or uncle of the beneficiary to purchase tuition units or contribute to the college savings account. A deduction of up to \$3,000 of contributions to the account may be claimed by the owner of the account or by a parent, grandparent, great-grandparent, aunt, or uncle of the beneficiary if the beneficiary is one of the following: the claimant, the claimant’s child, the claimant’s grandchild, the claimant’s great-grandchild, or the claimant’s niece or nephew. The deduction for the amount of tuition and mandatory student fees paid is decreased to the extent the funds are used to pay for such tuition and fees. 2011 Wis. Act 32 (renumbering Wis. Stat. § 14.63(4) as Wis. Stat. § 16.64(4) and Wis. Stat. § 14.64(3)(a)1. as Wis. Stat. § 16.641(3)(a)1. and amending as renumbered; amending Wis. Stat. § 71.05(6)(b)23., 28h., 31., 32.(intro.), and 33.(intro.)) (various effective dates).

Tax Exemption Repealed. The tax exemption for Southeastern Regional Transit Authority bonds, formerly contained in section 71.05(1)(c)9., was repealed, effective September 28, 2011, by 2011 Wisconsin Act 32.

Tax Exemption for Certain Loans to Public Affairs Networks. A tax exemption is allowed for interest received on bonds or notes issued by the Wisconsin Housing and Economic Development Authority if the bonds or notes are issued to provide loans under section 234.75(4) to a *public affairs network*, defined as a nonprofit corporation the primary purpose of which is to broadcast proceedings of the Wisconsin Legislature and report on Wisconsin-related politics and events, and meet certain other requirements. 2011 Wis. Act 32 (creating Wis. Stat. § 71.05(1)(c)12.).

Capital-Gain Exclusion for Farm Assets. A Wisconsin net operating loss may be carried forward and offset against Wisconsin taxable incomes of the next 15 taxable years to the extent not offset against Wisconsin modified taxable income of any year between the loss year and the taxable year for which the loss carry-forward is claimed. The Wisconsin capital-gain exclusion is not allowed when determining modified taxable income. This provision clarifies that both the 30% capital-gain exclusion and the 60% capital-gain exclusion for farm assets are not allowed when determining modified taxable income. 2011 Wis. Act 32 (amending Wis. Stat. § 71.05(8)(b)) (effective July 1, 2011).

Corporate Franchise and Income Tax

Definition of Internal Revenue Code. The definition of *Internal Revenue Code* (I.R.C.) has been updated and now generally means the I.R.C. as amended to December 31, 2010 (effective for tax years beginning after December 31, 2010). 2011 Wis. Act 32, § 1890d (creating Wis. Stat. § 71.22(4)(un)). Thus, federal laws enacted after December 31, 2010, do not apply. In addition, the list of federal I.R.C. provisions not adopted by Wisconsin continues to grow. Similar definitional and application rules apply for taxation of nonprofit corporations, *see* 2011 Wis. Act 32, § 1891d (creating Wis. Stat. § 71.22(4m)(sn)); S corporations, *see id.* § 2013d (creating Wis. Stat. § 71.34(1g)(un)); insurance companies, *see id.* § 2014d (creating Wis. Stat. § 71.42(2)(tn)); and regulated investment companies (RICs), real estate investment trusts (REITs), real estate mortgage investment conduits (REMICs), and financial asset securitization investment trusts (FASITs), *see id.* § 1897d (creating Wis. Stat. § 71.26(2)(b)23.).

The definitions of the I.R.C. for tax years beginning in 2008, 2009, and 2010 were retroactively amended for changes made to the I.R.C. 2011 Wis. Act 32, §§ 1889p, 1890 (amending Wis. Stat. § 71.22(4) (u), (um)). Similar rules apply to nonprofit corporations, *see id.* §§ 1890n, 1891 (amending Wis. Stat. § 71.22(4m)(s), (sm)); S corporations, *see id.* §§ 2012n, 2013 (amending Wis. Stat. § 71.34(1g)(u), (um)); insurance companies, *see id.* §§ 2013n, 2014 (amending Wis. Stat. § 71.42(2)(t), (tm)); and RICs, REITs, REMICs, and FASITs, *see id.* §§ 1896n, 1897 (amending Wis. Stat. § 71.26(2)(b)21., 22.).

Combined Reporting—Controlled Group Election. The DOR cannot disregard the tax effect or disallow the election with respect to any controlled group member for any year of the election period. 2011 Wis. Act 32, § 1892 (amending Wis. Stat. § 71.255(2m)(d)) (effective Jan. 1, 2009).

Combined Reporting—Sharing of Loss Carry-Forwards Incurred Before 2009. Combined groups may use net business loss carry-forwards that were incurred by group members before the enactment of combined reporting (January 1, 2009) against income of the combined group. The loss corporation first uses its loss carry-forward to offset its own income for the tax year. Then, the combined group is able to use up to five percent of the loss corporation's remaining pre-combined reporting business loss carry-forward to proportionally offset the income of all other members of the combined group to the extent of income attributable to the unitary business, starting with the first tax year beginning after December 31, 2011, and for each of the 19 subsequent tax years (20 years in total), provided that the loss corporation remains a member of a combined group. If the combined group cannot completely use the full five percent of such business loss carry-forwards to offset the income of other members of the combined group, it can carry forward the unused amount by adding the unused amount to the subsequent year's five-percent limit. Before the amendment went into effect, pre-combined reporting losses could only offset income of the member of the combined group that generated the loss. 2011 Wis. Act 32, §§ 1897r, 2015f (renumbering Wis. Stat. § 71.26(4) as Wis. Stat. § 71.26(4)(a) and Wis. Stat. § 71.45(4) as Wis. Stat. § 71.45(4)(a) and amending as renumbered); *id.* § 1893 (amending Wis. Stat. § 71.255(6)(a)); *id.* §§ 1894d, 1897s, 2015g (creating Wis. Stat. §§ 71.255(6)(bm), 71.26(4)(b), 71.45(4)(b)) (effective for taxable years beginning after Dec. 31, 2011).

Income. Transit authority bonds are now subject to income and franchise tax. 2011 Wis. Act 32, §§ 1895r, 2014r (repealing Wis. Stat. §§ 71.26(1m)(j) and 71.45(1t)(j)) (effective Sept. 28, 2011).

Deduction for Job Creation. Taxpayers may subtract from federal income \$2,000 per eligible employee (for businesses with gross receipts of more than \$5 million) and \$4,000 per eligible employee (for businesses with gross receipts of \$5 million or less). The number of eligible employees is based on the increase in the number of full-time equivalent employees who are employed in Wisconsin during the taxable year. 2011 Wis. Act 5, §§ 2, 3 (creating Wis. Stat. §§ 71.26(1)(h), 71.45(1)(c)) (effective for taxable years beginning on or after Jan. 1, 2011). The DOR recently published Wisconsin Administrative Code section Tax 3.05, which provides guidance that is arguably more restrictive than the statute.

Exemptions. The WEDC is exempt from corporation franchise and income tax. 2011 Wis. Act 7, § 43 (amending § 71.26(1)(be)) (effective Feb. 24, 2011). Interest income from bonds or notes issued to provide loans to a public affairs network under section 234.75(4) by the Wisconsin Housing and Economic Development Authority is exempt from Wisconsin income tax but is not exempt from the franchise tax. 2011 Wis. Act 32, §§ 1896d, 2015d (creating Wis. Stat. §§ 71.26(1m)(m), 71.45(1t)(m)) (effective July 1, 2011).

Relocated-Business Credit Created. A credit, equal to the taxpayer's income or franchise tax liability after applying all other allowable credits, deductions, and exclusions, applies for two consecutive taxable years beginning with the year in which the taxpayer's business relocates to Wisconsin from another state or country and begins doing business in Wisconsin. 2011 Wis. Act 3, §§ 2, 3, 4, 5, 6, 7, 8 (amending Wis. Stat. §§ 71.26(2)(a)4., 71.45(2)(a)10. and creating Wis. Stat. §§ 71.26(2)(a)10., 71.28(9s), 71.30(3)(ex), 71.47(9s), 71.49(1)(ex)) (effective for taxable years beginning on or after January 1, 2011).

Qualified Production-Activities Credit Created. Taxpayers may claim a credit equal to the following percentages of the eligible qualified production-activities income:

1. For taxable years beginning after December 31, 2012, and before January 1, 2014, 1.875%;
2. For taxable years beginning after December 31, 2013, and before January 1, 2015, 3.75%;
3. For taxable years beginning after December 31, 2014, and before January 1, 2016, 5.526%; and
4. For taxable years beginning after December 31, 2015, 7.5%.

Eligible qualified production-activities income means qualified production-activities income derived from property located in Wisconsin that is assessed as manufacturing property under section 70.995 or as agricultural property under section 70.32(2)(a)4. *Qualified production-activities income* means qualified production-activities income as defined in I.R.C. § 199(c).

The general Wisconsin rules for tax credits apply to the new qualified production-activities credit. That is, the amount of the computed credit is added to state income, no credit may be allowed unless it is claimed within 4 years of the unextended due date of the tax return, and the credit can be carried forward for 15 taxable years. Partners

(including members of LLCs taxed as partnerships) and tax-option (Subchapter S) corporation shareholders may claim the credit based on the entity's eligible qualified production-activities income in proportion to their ownership interest in the entity. 2011 Wis. Act 32, §§ 1896f, 2013f, 2015e (amending Wis. Stat. §§ 71.26(2)(a)4., 71.34(1k)(g), and 71.45(2)(a)10); *id.* §§ 2011d, 2012d, 2122d, 2123d (creating Wis. Stat. §§ 71.28(5n), 71.30(3)(dn), 71.47(5n), and 71.49(1)(dn)) (effective for taxable years beginning on or after Jan. 1, 2013).

Other Credits. The credit for dairy and livestock investments has been extended for five years. 2011 Wis. Act 15, §§ 4–9d (amending Wis. Stat. §§ 71.28(3n), 71.47(3n)).

The legislature created a development opportunity zone in Beloit. 2011 Wis. Act 37, §§ 1–6 (amending Wis. Stat. §§ 560.70(7)(b)2. and 560.795(2)(a), (3)(a)4. and creating Wis. Stat. § 560.795(1)(i), (2)(b)9., (e)3.) (effective for 60 months beginning on Aug. 1, 2011).

The application fee for the film-production-services credit was reduced from \$5,000 to \$500. 2011 Wis. Act 67, §§ 2, 3 (amending Wis. Stat. §§ 71.28(5f)(c)6. and 71.47(5f)(c)6.) (effective for applications submitted on or after Dec. 2, 2011).

Sales and Use Tax

Discounts Given Equal to the Amount of Sales Tax. Retailers may now offer and advertise such discounts, equal to the amount of state and local sales tax. 2011 Wis. Act 18 (repealing Wis. Stat. § 77.52(4) and amending Wis. Stat. §§ 66.0615(1m)(f)2., 77.982(2), 77.991(2), 77.9951(2), and 77.9972(2)) (effective June 8, 2011).

Products Provided Free of Charge. Effective September 1, 2011, if a retailer provides an item free of charge with the purchase of a taxable product, the retailer may purchase the item provided free of charge without tax as a sale for resale. Previously, a retailer was considered to be the consumer of items it provided free of charge in conjunction with the purchase of another product and was required to pay Wisconsin sales or use tax on its purchases of these items. 2011 Wis. Act 32 (renumbering, and amending as renumbered, Wis. Stat. § 77.52(21) as Wis. Stat. § 77.52(21)(a), and creating Wis. Stat. § 77.52(21)(b)) (eff. Sept. 1, 2011); *see also* Wis. Tax Bull. No. 174 (Jan. 2012).

Exemption Created for Advertising and Promotional Direct Mail. Sales of and the storage, use, or other consumption of advertising and promotional direct mail is now exempt from sales tax. *Advertising and promotional direct mail* is defined in section 77.51(1ag) to mean direct mail that has the primary purpose of attracting public attention to a product, person, business, or organization or attempting to sell, popularize, or secure financial support for a product, person, business, or organization. *See also* the definition of *direct mail* in section 77.51(3pd). 2011 Wis. Act 32 (creating Wis. Stat. § 77.54(59)) (effective July 1, 2013).

Exemption Created for Modular and Manufactured Homes Used in Real Property Construction Activities Outside Wisconsin. The legislature created an exemption for the sales price from the sale of and the storage, use, or other consumption of modular homes and manufactured homes that are used in real property construction activities outside Wisconsin. 2011 Wis. Act 32 (creating Wis. Stat. § 77.54(5)(am)) (effective Sept. 1, 2011).

Exemption Created for Snowmaking and Snow-Grooming Machines and Equipment. The legislature created an exemption, effective July 1, 2013, for the sales price from the sale of and the storage, use, or other consumption of snowmaking and snow-grooming machines and equipment, including accessories, attachments, and parts for the machines and equipment and the fuel and electricity used to operate such machines and equipment, that are used exclusively and directly for snowmaking and snow grooming at ski hills, slopes, and trails. 2011 Wis. Act 32 (creating Wis. Stat. § 77.54(58)) (effective July 1, 2013).

Wisconsin Act 68 Procedural Changes

The legislature passed 2011 Wisconsin Act 68, generally effective March 1, 2012, which makes numerous changes to the administration of Wisconsin tax law.

Burden of Proof. For the DOR to be able to impose certain penalties, it now must show that the taxpayer's action or inaction was the result of the taxpayer's willful neglect and that the taxpayer did not have reasonable cause. This burden of proof applies to imposition of the following penalties:

1. Penalty interest on underpayment of estimated tax does not apply if the taxpayer retired during the taxable year or during the preceding taxable year after having attained age 62 or becoming disabled, 2011 Wis. Act 68, § 1 (amending Wis. Stat. § 71.09(11)(d));
2. Failure to file, *id.* §§ 3, 4 (amending Wis. Stat. § 71.83 (1)(a), (1)(m));
3. Incomplete or incorrect return, *id.* § 5 (amending Wis. Stat. § 71.83(1)(a)2.);
4. Incomplete or incorrect deposit or withholding report, *id.* § 6 (amending Wis. Stat. § 71.83(1)(a)3.);
5. Late filing of withholding report, *id.* § 7 (amending Wis. Stat. § 71.83(1)(a)4.);
6. Late filing of income, franchise, or withholding tax return, *id.* § 8 (amending Wis. Stat. § 71.83(3)(a));
7. Delinquent sales and use tax returns, *id.* § 18 (amending Wis. Stat. § 77.60(2)(intro.));
8. Incorrect sales and use tax return, *id.* § 19 (amending Wis. Stat. § 77.60(3));
9. Failure to file a sales and use tax return, *id.* § 20 (amending Wis. Stat. § 77.60(4));
10. Nonpayment of taxes, *id.* § 14 (amending Wis. Stat. § 77.14);
11. Failure to file a utility report, *id.* § 15 (amending Wis. Stat. § 76.28(6)(b));
12. Failure to file a railroad report, *id.* § 16 (amending Wis. Stat. § 76.39(3));
13. Failure to file an insurance report, *id.* § 17 (amending Wis. Stat. § 76.645(2));
14. Incorrect fuel tax return, *id.* § 34 (amending Wis. Stat. § 78.68(3)); and
15. Failure to file fuel tax return, *id.* § 35 (amending Wis. Stat. § 78.68(4)).

The provision does not apply to

1. A failure to produce records (Wis. Stat. § 77.61(19));
2. A failure to keep records (Wis. Stat. § 71.83(1)(a)7.); or
3. Refund claims (Wis. Stat. § 77.60(12)).

Award of Attorney Fees. The commission may award a successful party (including taxpayers) the costs and attorney fees that are directly attributable to responding to a frivolous petition, claim, or defense. 2011 Wis. Act 68, § 50 (amending Wis. Stat. § 227.483(1)).

Confidentiality. The confidentiality provisions are extended to information derived from a return or claim. *Id.* §§ 2, 9 (amending Wis. Stat. §§ 71.78(1m)(a), 72.06).

New Exception to Confidentiality in Certain Sales and Use Tax Transactions. A specific exception now allows DOR employees or agents to inform a buyer or seller who has filed a claim for a refund (presumably a sales or use tax refund) that a refund has been paid to a seller or buyer with respect to the same transaction. *Id.* § 21 (amending Wis. Stat. § 77.61(5)(a)).

Anti-Browsing Penalty. If any person views a return or claim or any information derived from a return, he or she may be liable for a fine of not less than \$100 and not more than \$500 or imprisoned for not less than one month nor more than six months or both. The DOR secretary must notify the taxpayer whose return or claim has been improperly examined, and the taxpayer may bring an action for damages. *Id.* § 22 (creating Wis. Stat. § 77.61(6)). This provision also applies to the following:

1. County, transit authority, and special district sales and use taxes, *id.* § 23 (amending Wis. Stat. § 77.76(3));
2. Local professional baseball park district sales and use taxes, *id.* § 24 (amending Wis. Stat. § 77.76(3m));
3. Local professional football stadium district sales and use taxes, *id.* § 25 (amending Wis. Stat. § 77.76(3p));
4. Local exposition district food and beverage tax, *id.* § 27 (amending Wis. Stat. § 77.982(2), as affected by 2011 Wis. Act 18);
5. A local exposition district that receives a report along with a payment, *id.* § 28 (amending Wis. Stat. § 77.982(3));
6. Local rental car tax, *id.* § 29 (amending Wis. Stat. § 77.991(2), as affected by 2011 Wis. Act 18);
7. Premier resort area tax, *id.* § 30 (amending Wis. Stat. § 77.9941(5));
8. State rental vehicle fee, *id.* § 31 (amending Wis. Stat. § 77.9951(2));

9. Dry cleaning fees, *id.* § 32 (Wis. Stat. § 77.9964(2)); and
10. Southeastern regional transit authority fee, *id.* § 33 (amending Wis. Stat. § 77.9972(2), as affected by 2011 Wis. Act 18).

The provisions relating to confidentiality and browsing in section 71.78(1m) also now apply to the estate tax (Wis. Stat. § 72.06), beverage taxes (Wis. Stat. § 139.11(4)(a)), cigarette taxes (Wis. Stat. § 139.38(6)), and tobacco products taxes (Wis. Stat. § 139.82(6)).

Commission Precedent. When the DOR issues a Notice of Nonacquiescence with respect to a decision or order of the commission, the commission's decision may nevertheless be cited by the commission or the courts, eliminating any argument that the commission's decision is of no precedential or persuasive value. 2011 Wis. Act 68, § 10 (amending Wis. Stat. § 73.01(4)(e)2.).

Moreover, a conclusion of law or other holding in any decision or order of the commission may be cited by the commission or the courts as authority unless that conclusion of law or holding has been reversed, overruled, or vacated on the merits on appeal or by a subsequent decision or order of the commission. *Id.* § 11 (creating Wis. Stat. § 73.015(3)).

Reliance on Published Guidance. The DOR is barred from taking a position contrary to any DOR rule that was in effect during the period related to the determination or that is contrary to any written guidance that was provided to a person who is a party to the determination or the appeal of the determination regarding the same facts as in the determination and not subsequently retracted, altered, or amended by the DOR or the legislature or by a final and conclusive decision of the commission or a court. *Id.* § 12 (creating Wis. Stat. § 73.16(1), (2), (5)).

In addition, if the DOR retracts, alters, or amends previously published or previously issued written guidance for any purpose other than to implement a legislative act or final and conclusive decision of the commission or a court, the DOR may only apply the change prospectively. *Id.* (creating Wis. Stat. § 73.16(2)(c)).

Petition for Rules. In Act 68, the legislature created a detailed procedure for submitting a petition claiming that the DOR has established an unpublished or private standard to apply a state tax statute. The DOR must submit a statement of the scope of the proposed rule to the governor no later than 90 days after receiving the petition. No later than 270 days after the governor approves the statement, the DOR must submit the proposed rule in final draft form to the governor for the governor's approval. If the DOR fails to adhere to any of these steps, any of the petitioners may commence an action in circuit court to compel the DOR's compliance. *Id.* § 45 (creating Wis. Stat. § 227.12(4)).

Declaratory Rulings. Act 68 also created a detailed declaratory ruling procedure, by which any interested person or group or association of interested persons can apply for a declaratory (and binding) ruling from the DOR. The DOR may issue a declaratory ruling on the facts contained in the petition. If the DOR does not deny the petition or issue a declaratory ruling on the facts contained in the petition, the DOR must hold a hearing, as provided under section 227.44, and must afford all interested parties an opportunity to participate in the hearing. A declaratory ruling binds the DOR and all parties to the proceedings on the statement of facts contained in the ruling, unless the commission or a court alters or sets aside the ruling or the applicable rule or statute is repealed or materially amended. The commission can review any ruling, including denial of the petition. *Id.* § 49 (creating Wis. Stat. § 227.41(5)(a)).

Class Actions. Class-action tax-refund suits against the DOR are prohibited. *Id.* § 51 (amending Wis. Stat. § 803.08).

Reliance on Past Audits. Act 68 contains a nonstatutory provision directing the DOR to submit, as part of the next budget bill process (for 2013–15), a proposal that would allow taxpayers to rely on past audit results. *Id.* § 51d.

Property Tax

Exemptions: Transit Authority. The exemption for property owned by a municipality or certain districts has been amended to eliminate the exemption for transit authorities. 2011 Wis. Act 32, § 1747r (amending Wis. Stat. § 70.11(2)).

Exemptions: Student Housing Facilities. The exemption for real and personal property of certain student housing facilities has been repealed. 2011 Wis. Act 32, §§ 1747n, 1748d (amending Wis. Stat. § 70.11 (intro.) and repealing Wis. Stat. § 70.11(3m)).

Exemptions: WEDC. The legislature has enacted a specific exemption for property owned by the WEDC, available if use of the property is primarily related to the WEDC's purposes. 2011 Wis. Act 7, § 42 (creating Wis. Stat. § 70.11(38r)).

Exemptions: Fox River Navigational System Authority. The exemption for property owned by the Fox River Navigational System Authority has been repealed. 2011 Wis. Act 10, § 175 (repealing Wis. Stat. § 70.11(41s)).

Aids on State Lands Equivalent to Property Taxes. Section 70.114 has been amended to differentiate the definition of *estimated value* depending on whether the land was purchased before or after the effective date of the amendment. 2011 Wis. Act 32, §§ 1748de, 1748e (renumbering Wis. Stat. § 70.114(1)(b) as Wis. Stat. § 70.114(1)(b)1. and creating Wis. Stat. § 70.114(1)(b)2.).

Loan Program for Taxes Imposed As a Result of Equalized Value Errors. The legislature has amended section 70.54(4) to differentiate the procedure for making loans for excessive taxes assessed as a result of equalized value errors depending on whether property tax bills have been distributed to the property owners. 2011 Wis. Act 64 (amending Wis. Stat. §§ 20.566(2)(b), 70.54(4)(a), 70.57(4)(b)(intro.), and (c), and creating Wis. Stat. § 70.57(4)(d)).

ADMINISTRATIVE DEVELOPMENTS

Sales and Use Tax: Taxable Sales

Renewable Energy Equipment Exemption Defined. On June 29, 2011, the DOR published an emergency rule that addressed a sales and use tax exemption for certain energy-producing wind-, solar-, and gas-powered products and the electricity or energy they produce. This exemption was created by section 77.54(56) (2009–10) and became effective July 1, 2011. The emergency rule defined the property eligible for exemption. Tax Emer. Rule, Wis. Admin. Reg. No. 667 (July 14, 2011) (creating Wis. Admin. Code § Tax 11.10 (creation eff. June 29, 2011; expired Nov. 25, 2011)).

Discounts for Hosting In-House Parties. When a retailer offers discounts to purchasers to offer in-home “parties” to show off the retailer's products, the amount of the discount is not included in the sales price subject to the sales tax. Wis. Priv. Ltr. Rul. 1113001 (Mar. 30, 2011), Wis. Tax Bull. No. 172 (July 2011).

Taxability of Crane Services. The DOR released Private Letter Ruling W1113002 to answer several questions with regard to the taxability of providing crane services. A company that performs services using a crane to move items from one location to another is not subject to Wisconsin sales or use tax on the services; moving services are not taxable, and the provision of equipment with an operator is not taxable as a lease or rental. Charges for mobilizing or setting up a crane are not taxable because those actions are part of the moving services. If, however, a company provides a crane that is set up, inspected, and maintained by the crane company's employee and operated by the company's employees, the services are taxable as a lease or rental. Wis. Priv. Ltr. Rul. 1113002 (Apr. 1, 2011), Wis. Tax. Bull. No. 172 (July 2011).

Taxability of Web-Hosting and E-mail Services. Web-hosting services are generally not subject to sales or use tax because they are not enumerated in section 77.52(2)(a). However, a tax is imposed on e-mail services under section 77.52(2)(a)5m. This private letter ruling states that a web-hosting service that includes an e-mail account is not subject to sales tax because under section 77.51(5), the taxability of the primary service is determinative when something ancillary is appertaining to something else that is primary. In this instance, the DOR found that the web hosting was the primary service. Wis. Tax. Bull. No. 172 (July 2011).

Taxability of Mobile Tanks. The DOR determined that a liquid nurse tank and a dry-fertilizer tender unit are mobile units used for mixing and processing and thus are exempt under section 77.54(5)(d). Wis. Tax. Bull. No. 172 (July 2011).