

charge against the assessment district is valid. *State ex rel. Attorney General v. Hammerlund*, 159 W 315, 150 NW 512.

**70.83 History:** 1905 c. 259 s. 12; Supl. 1906 s. 1087—56; 1911 c. 663 s. 144; 1913 c. 769 s. 33; 1913 c. 773 s. 116; 1919 c. 384; 1921 c. 11 s. 25; Stats. 1921 s. 73.13; 1929 c. 263 s. 4; Stats. 1929 s. 70.83; 1943 c. 20; 1969 c. 276 s. 590 (1).

**70.84 History:** 1911 c. 263; Stats. 1911 s. 1087—57; 1921 c. 11 s. 26; Stats. 1921 s. 73.14; 1929 c. 263 s. 4; Stats. 1929 s. 70.84; 1943 c. 20; 1969 c. 276 s. 590 (1).

See note to 70.75, citing *State ex rel. South Range v. Tax Comm.* 168 W 253, 169 NW 555.

**70.85 History:** 1919 c. 384; Stats. 1919 s. 1087—50 sub. (2); 1921 c. 11 s. 19; Stats. 1921 s. 73.07 (2); 1929 c. 263 s. 5; Stats. 1929 s. 70.85; 1933 c. 313 s. 1; 1935 c. 414; 1943 c. 20; 1969 c. 154; 1969 c. 276 s. 590 (1); 1969 c. 279; 1969 c. 392 s. 34.

On appeal from a judgment for a taxpayer in an action against a municipality under 74.73 (1) and (2), Stats. 1943, not maintainable because of the conclusiveness of the valuation fixed by the department of taxation, the proceedings cannot be treated as amended so as to challenge the action of the department under 70.85. *Burling v. Green Lake*, 248 W 103, 20 NW (2d) 717.

The appearance of the taxpayer before the board of review in objection to the assessment did not commit him to a proceeding by appeal to the department of taxation and did not foreclose him from proceeding, instead, to pay the tax and bring an action to recover under 74.73. (*Burling v. Green Lake*, 248 W 103, distinguished.) *Highlander Co. v. Dodgeville*, 249 W 502, 25 NW (2d) 76.

70.85, Stats. 1947, does not authorize revaluation of separate items, articles or classes of personal property but only the entire aggregate personal property assessment against a taxpayer. 37 Atty. Gen. 579.

**70.86 History:** 1927 c. 137; Stats. 1927 s. 70.76; 1929 c. 263 s. 3; Stats. 1929 s. 70.86.

A system of describing real estate in assessment and tax rolls whereby numbers only are entered as descriptions in rolls is of doubtful validity. 21 Atty. Gen. 92.

**70.91 History:** 1953 c. 110; Stats. 1953 s. 79.02; 1961 c. 620; Stats. 1961 s. 70.91; 1965 c. 477.

**70.92 History:** 1953 c. 110; Stats. 1953 s. 79.03; 1961 c. 620; Stats. 1961 s. 70.92; 1969 c. 276 s. 590 (1), (2).

**70.93 History:** 1953 c. 110; Stats. 1953 s. 79.01; 1957 c. 485, 595; 1959 c. 231; 1961 c. 553, 620; Stats. 1961 s. 70.93.

**70.94 History:** 1953 c. 110; Stats. 1953 s. 79.04; 1961 c. 620; Stats. 1961 s. 70.94; 1969 c. 276 ss. 582 (12), (15), 590 (1), (2), (7).

**70.95 History:** 1953 c. 110; Stats. 1953 s. 79.05; 1961 c. 620; Stats. 1961 s. 70.95; 1969 c. 276 s. 590 (1).

**70.96 History:** 1953 c. 110; Stats. 1953 s.

79.06; 1959 c. 659 s. 79; 1961 c. 620; Stats. 1961 s. 70.96; 1969 c. 276 ss. 582 (15), 590 (1), (2).

**70.97 History:** 1953 c. 110; Stats. 1953 s. 79.07; 1959 c. 228 s. 66; 1961 c. 620; Stats. 1961 s. 70.97; 1965 c. 249; 1969 c. 276 s. 590 (1), (2).

**70.98 History:** 1953 c. 110; Stats. 1953 s. 79.08; 1961 c. 620; Stats. 1961 s. 70.98.

**70.99 History:** 1969 c. 433; Stats. 1969 s. 70.99.

## CHAPTER 71.

### Income and Franchise Taxes for State and Local Revenues.

**Editor's Note:** The following table of old and new section numbers in ch. 71, renumbered by chs. 318 and 557, Laws 1947, is included as an aid in tracing legislative histories.

#### CONVERSION TABLE

Stats. 1945	Stats. 1947
71.01	71.01 (1)
71.02 (1) 1st sent.	71.02 (2)
(1) 2d sent.	(1)
(2) intro.	71.03 (1) intro.
(2) (a)	(1) (b)
(2) (b) intro.	(1) (c), (d)
(b) 1	(1) (d) 1
(b) 2	(2) (d)
(b) 3	(1) (e)
(b) 4	(1) (d) 2
(b) 5 1st part	(2) (e)
(b) 5 last part	(1) (f)
(2) (c)	(1) (a)
(2) (d)	(1) (g)
(2) (df)	(1) (h)
(2) (dm)	(1) (d) 3
(2) (e)	(1) (i)
(2) (f)	71.15 (4)
(2) (g)	71.03 (1) (j)
(2) (h)	(1) (l)
(2) (i) 1	(3) (a)
(2) (i) 2	(3) (b)
(i) 3	(3) (c)
(i) 4	(3) (d)
(i) 5	(3) (e)
(i) 6	(3) (f)
(i) 7	(3) (g)
(i) 8	(3) (h)
(i) 9	(3) (i)
(2) (j) 1	(3) (j)
(j) 2	(3) (k)
(j) 3	(3) (l)
(j) 4	(3) (m)
(3) (a)	71.11 (8)
(3) (b) 1st part	71.02 (3)
(3) (b) last part	71.04 (7)
(3) (c)	71.07 (1)
(3) (d) intro.	(2) intro.
(d) 1	(2) 1
(d) 2 a, b, c	(2) 2 a, b, c
(d) 3	(2) 3
(d) 4	(3)
(d) 5 1st sent.	(4)
(d) 5 last sent.	(5)
(3) (e)	repealed ch. 557
(4)	71.11 (9)
(5) (a) 1st part	71.03 (1) (k)
(5) (a) last sent.	71.10 (3) (c)

Stats. 1945	Stats. 1947	Stats. 1945	Stats. 1947
71.03 (5) (b) intro.	71.04 (3) (b) intro.	71.09 (12) (13) (14)	71.10 (42) (10) (6)
(1)	(1)	71.095 (1) (a) intro.	71.08 (1) intro.
(2)	(2)	(a) 1	(1) (a)
(3) part	(7)	(a) 2	(1) (b)
(3) last sent.	(9)	(a) 3	repealed ch. 557
(4)	(3)	(1) (b)	repealed ch. 557
(4a)	(3a)	(1) (c)	71.08 (3)
(5)	(4)	(1) (d) intro.	(4) intro.
(6)	(10)	(d) 1	(4) (a)
(7)	(5)	(d) 2	(4) (b)
(9)	(11)	(d) 3	(4) (c)
(10)	(6)	(1) (e)	(5)
(11)	(8)	(1) (g)	(6)
71.04 intro.	71.05 intro.	(2)	(7)
(1)	(1)	(3)	(8)
(2)	(2)	(4)	(9)
(3)	(8)	(5)	(10)
(4)	(5)	(6)	(11)
(5)	(3)	(7)	(12)
(6)	(4)	(8)	(13)
(6a)	(4a)	71.10 (1) (b)	71.02 (4)
(7)	(6)	(2)	71.11 (13)
(9)	(11)	(3) intro.	71.10 (9) intro.
(10)	(7)	(3) (a)	(9) (a)
(12)	(10)	(3) (b)	(9) (b)
(13)	(9)	(3) (c)	(9) (c)
71.045	71.06	(3) (d)	(9) (d)
71.047	71.15 (1)	(3) (e)	(9) (e)
71.05 (1) intro.	71.01 (3) intro.	(3) (f)	71.13 (1)
(1) (a)	71.03 (2) intro.	(4)	71.11 (15)
(1) (b)	71.03 (2) (a)	(4m) (a) 1st part	(11) (a)
(1) (c)	(2) (b)	(4m) (a) last part	(24) (c)
(1) (d)	(2) (c)	(4m) (b) 1st part	(12)
(1) (f)	71.01 (3) (a)	(4m) (b) last part	71.14 (1)
(1) (g)	(3) (b)	(6) intro.	71.11 (16)
(1) (h)	(3) (c)	(6) (a)	(17)
(1m)	(3) (d)	(6) (b)	71.12 (2)
(1n) (a), (b)	(3) (e)	(6) (c), (d), (e)	71.11 (18)
(2) intro.	71.09 (6) intro.	(1)	(19) (a)
(2) (a)	(6) (a)	(2)	71.11 (20) (a)
(2) (b)	(6) (b)	(3)	(20) (b)
(2) (c)	(6) (c)	(4)	(20) (c)
(2) (d)	(6) (d)	71.115 (1) intro.	repealed ch. 557
(2) (e)	(6) (e)	(1) (a)	71.11 (21) (a)
71.06 (1) intro.	71.09 (1) intro.	(1) (b)	repealed ch. 557
(1) (a) to (m)	(1) (a) to (m)	(1) (c)	71.11 (21) (b)
(2) intro.	(2) intro.	(2)	(21) (c)
(2) (a) to (h)	(2) (a) to (h)	(3)	71.10 (10) (b)
(3) (a)	(5) (a)	(4)	71.11 (21) (d)
(3) (b)	(5) (b)	(5)	repealed ch. 557
71.08	71.10 (7)	(6)	71.11 (21) (e)
71.09 (1)	71.11 (1)	71.12 1st part	71.10 (10) (c)
(2) 1st part	71.07 (6)	last part	71.11 (21) (f)
(2) last sent.	71.11 (2)	71.14	71.11 (22)
(3) 1st part	71.10 (1)	71.16 (1)	71.12 (1)
(3) last sent.	71.11 (45)	(2) (a)	71.12 (3)
(4) (a) 1st part	(43)	(2) (b)	71.12 (5)
(4) (a) last sent.	71.10 (2)	(3)	(6)
(4) (b)	71.11 (40)	71.17 (1)	71.13 (2)
(4) (c)	repealed ch. 557	(3)	71.12 (7)
(5)	71.10 (3) (a)	(4)	71.10 (10) (a)
(6)	71.11 (5)	(5) 1st part	(10) (d)
(7)	71.10 (5)	(5) last part	repealed ch. 557
(8)	71.11 (4)	(6)	71.10 (10) (f)
(9)	(6)	(7)	71.12 (4)
(10)	(41)	(8)	71.11 (19) (c)
(11)	(43)	71.18 (1)	71.10 (10) (g)
			(11)
			71.10 (4)

Stats. 1945	Stats. 1947
(2)	71.14 (6)
(3)	71.13 (5)
(4)	71.14 (7)
71.19 (1)	71.14 (2)
(2)	(3)
(3)	(4)
(4)	(5)
71.20	71.11 (44)
71.22 (1)	71.11 (24) (a)
(2)	(24) (b)
71.24	repealed ch. 557
71.25 (1)	71.11 (7) (a)
(2)	(7) (b)
71.26 (1) 1st part	71.01 (2) (a)
(1) last part	71.09 (3)
(2) 1st part	71.01 (2) (b)
(2) last part	71.09 (4)
(3)	71.01 (2) (c)
(4)	(2) (d)
(5)	repealed ch. 557
(6)	71.14 (8)
(7)	(9)
71.27	71.11 (19) (b)
71.35 (1) to (6)	71.13 (4) (a) to (f)
71.36 (1) to (9)	71.13 (3) (a) to (i)
71.37	71.11 (23)
71.61 (1)	71.16 (1)
(2)	(2)
(3)	(3)
(4)	(4)
(6)	(5)
(7)	(6)
(8)	(7)
(9)	(8)
(10)	(9)

**71.01 History:** 1947 c. 318; 1947 c. 411 s. 6 (215.30 (5)); 1947 c. 557; 1947 c. 612 s. 1; Stats. 1947 s. 71.01; 1949 c. 537; 1951 c. 685; 1953 c. 364, 614, 648; 1955 c. 10; 1955 c. 368 s. 4; 1955 c. 447; 1957 c. 127, 339; 1959 c. 527; 1961 c. 129, 348, 620; 1963 c. 280, 335; 1963 c. 459 s. 19; 1965 c. 163, 249, 437; 1969 c. 276 ss. 590 (1), 592 (7).

On equality, exercises of police power and exercises of taxing power see notes to sec. 1, art. I; on legislative power generally and delegation of power see notes to sec. 1, art. IV; on judicial power generally see notes to sec. 2, art. VII; and on the rule of taxation (income taxes) see notes to sec. 1, art. VIII.

"Upon such income as is derived from sources, within the state or within its jurisdiction," meant such income as issued directly from property or business located within the state, and not income from loans made therein by nonresidents, though secured upon property within the state. State ex rel. Manitowoc G. Co. v. Tax Comm. 161 W 111, 152 NW 848.

Sec. 1087m—2 (3), Stats. 1911, did not impose an income tax on the income of a trust estate—consisting of moneys, stocks, bonds and other securities—created by a resident testator in favor of nonresident beneficiaries, which trust estate was being administered by a nonresident trustee appointed by and accounting to a county court of this state, if none of such income was derived from property located or business transacted within this

state. Bayfield County v. Pishon, 162 W 466, 156 NW 463.

Dividends derived from stocks and interest derived from notes and mortgages constituting a trust estate which have been received by a resident trustee are taxable as income, even though the beneficiary is a nonresident and also a co-trustee. State ex rel. Wisconsin T. Co. v. Widule, 164 W 56, 159 NW 630.

An ore dock used exclusively as a railroad terminal should be taxed as a railroad, even though it is operated by an individual person or an independent corporation under contract with a railroad corporation. It is exempt from income tax. Superior v. Allouez Bay D. Co. 166 W 76, 164 NW 362.

See note to sec. 13, art. I, on exercises of taxing power, citing State ex rel. Sallie F. Moon Co. v. Tax Comm. 166 W 287, 163 NW 639, 165 NW 470.

A corporation organized to conduct a school and to own and deal in real and personal property for a profit, which occasionally pays a small dividend to its stockholders, is not exempt as a corporation "not organized or conducted for pecuniary profit." St. John's Military Academy v. Larson, 168 W 357, 170 NW 269.

A Wisconsin trust company, administering a trust in Wisconsin, consented to the payment of corporate dividends at Philadelphia directly to one of the beneficiaries of the trust residing there. The beneficiary sent receipts for such payments to the Wisconsin trust company and that company credited and debited the income account of the trust estate with the amounts so paid, when the receipts were received. The transactions constituted in law payments to the Wisconsin trust company of taxable income. State ex rel. Wisconsin T. Co. v. Phelps, 172 W 147, 176 NW 863, 178 NW 471.

A light and power company which has leased all of its property to a traction company under an agreement requiring the traction company to pay all taxes is not liable for an income tax based on the proceeds of such lease. The statute does not require a separate assessment against the owner or that it must be actually engaged in operating its power plant in order to be taxed as a public utility. Wisconsin E. P. Co. v. Lake, 186 W 199, 202 NW 195.

A holding company is not exempt from taxation on income from stock and bonds of a public utility because the latter's taxes are paid direct to the state treasurer. Wisconsin P. S. Corp. v. Tax Comm. 198 W 259, 224 NW 130.

The doctrine of the adoption by the courts of the practical construction of ambiguous statutes made by administrative officers over a long period of years does not apply to the erroneous construction placed by the tax commission upon the unambiguous statutes relating to income taxation and the taxation of public utilities as applied to the income of such utilities from non-operating property. Chicago & Northwestern R. Co. v. Tax Comm. 199 W 368, 226 NW 293.

The transfer of stock by Wisconsin executors to a foreign corporation in trust for the benefit of the testator's widow divested the executors of legal title so that they were not subject to the state income tax for dividends

declared upon the stock transferred. *Overton v. Tax Comm.* 204 W 614, 236 NW 526.

The salary paid to a resident for personal services rendered outside the state was subject to income taxation under the provision that income derived from personal services shall follow the residence of the recipient. *Dromey v. Tax Comm.* 227 W 267, 278 NW 400.

The mere fact that the care and maintenance of crypts in a mausoleum may be "religious" does not exempt from taxation, under 71.05 (1) (d), Stats. 1937, the income from a fund set apart by a mausoleum corporation for care and maintenance, since it is not the purpose for which the fund is brought into existence that determines exemption but rather the purpose, character and organization of the corporation itself. *First Wisconsin Trust Co. v. Tax Comm.* 238 W 199, 298 NW 595.

There must be more than an "intention" to acquire a new or different legal domicile; and until the old domicile has been actually abandoned and an intended new home has been actually and permanently occupied and established elsewhere, the latter cannot be considered the new domicile. *Baker v. Dept. of Taxation*, 246 W 611, 18 NW (2d) 331.

Income of a Minnesota resident who, in addition to his regular salary as estimator and general office manager for a Minneapolis contractor, was to receive 15 per cent of the net profits on construction work outside of Minneapolis and was to assume 15 per cent of any net losses thereon, was, as to income received by him as his share of the net profits of a construction project in Wisconsin, income derived from "business transacted" within this state, and, hence, was taxable to him here. *Stocke v. Dept. of Taxation*, 249 W 408, 25 NW (2d) 65.

The plaintiff, who spent most of the weekdays, Monday to Friday, except his vacation periods, in a place in Wisconsin where he had all of his business activities, spent in the aggregate more than 7 months of each of the years in question in Wisconsin. He waived his right to raise the constitutionality of the provision where he did not raise the question by pleadings or otherwise in the trial of an action in circuit court to enjoin the collection of income taxes assessed against him, and attempted to raise the question for the first time on his motion for a rehearing in the same court. *Baker v. Leenhouts*, 257 W 584, 44 NW (2d) 544.

In 71.01, Stats. 1943-1945, "income as is derived from . . . business transacted within the state," had reference to income of a type made taxable by ensuing statutory provisions, and, hence, in respect to a personal holding corporation organized under the laws of Delaware, the holding of meetings by it, collecting dividends, and looking after investments, in Wisconsin, were not in themselves activities which produced income which was taxable in Wisconsin if such ensuing statutory provisions then in effect imposed no income tax on the income received by such corporation on its investments. *Cudahy v. Dept. of Taxation*, 261 W 126, 52 NW (2d) 467.

Income taxation of nonresident interstate truckers is discussed and an apportionment formula approved in *Moore M. F. Lines v.*

*Dept. of Taxation*, 14 W (2d) 377, 111 NW (2d) 148.

Where the corpus was composed of intangible personal property and the trustees were all nonresidents of Wisconsin, the situs of the income from these intangibles would not be Wisconsin, and thus the income therefrom would not be taxable under 71.01 (1). *Dept. of Taxation v. Pabst*, 15 W (2d) 195, 112 NW (2d) 161.

See note to 227.16, on parties and proceedings for review, citing *Gray v. Morgan*, 371 F (2d) 172.

Wisconsin income taxation—husband and wife partnership. *Stiles*, 51 MLR 378.

**71.015 History:** 1959 c. 259 s. 25; Stats. 1959 s. 71.015.

**71.02 History:** 1947 c. 318; Stats. 1947 s. 71.02; 1953 c. 61, 540; 1965 c. 163, 437; 1967 c. 205, 226; 1969 c. 203.

While a taxpayer on the accrual basis who receives notes in the ordinary course of business must include them as income at their face value, only the fair market value of notes received by a taxpayer who uses a cash basis method can be considered income. Proof of any difference between the face value of the notes and the fair market value thereof must be supplied by the taxpayer. *Woller v. Dept. of Taxation*, 35 W (2d) 227, 151 NW (2d) 170.

**71.03 History:** 1947 c. 318; Stats. 1947 s. 71.03; 1949 c. 167, 537; 1951 c. 600; 1953 c. 61 s. 61; 1953 c. 471, 528, 648; 1955 c. 10, 571; 1957 c. 143, 517; 1961 c. 247, 348; 1963 c. 224, 267, 386; 1965 c. 163; 1967 c. 239; 1969 c. 276 s. 590 (1).

1. Gross income.
2. Exclusions.

#### 1. Gross Income.

Corporate shares were bought as an investment in 1907 and sold in 1914 at a profit. All the enhancement in value had occurred when the income tax law became operative, so no part of the profit realized on the sale could be taxed. *State ex rel. Bundy v. Nygaard*, 163 W 307, 158 NW 87.

Where property is willed in trust to be invested and a specific amount per year paid out of the net income to a designated beneficiary for life, and such beneficiary's interest in the estate is appraised and the statutory inheritance tax paid, the yearly income received by the trustee for the beneficiary is subject to income taxation. *State ex rel. Hickox v. Widule*, 166 W 113, 163 NW 648.

Royalties received by the owner from the lessee of a mine are "income." Such royalties are "rent" and "rentals" and were subject to income taxation if received by a resident of this state, though the mine was located in another state. The law of such foreign state is not controlling upon the question whether or not such royalties are "rentals" as that word is used here. *Pfister L. Co. v. Milwaukee*, 166 W 223, 165 NW 23.

Dividends paid out of earnings or profits that had accrued prior to 1911 are not taxable to a stockholder. *State ex rel. Moon v. Nygaard*, 170 W 415, 175 NW 810.

In 1916 a firm received a large fee for services commenced in 1909 and continued down

to and into 1916. In 1916 the firm claimed deductions for services rendered and expenses incurred before 1911. The items were not allowed. State ex rel. Houghton v. Phelps, 171 W 13, 176 NW 217.

"By the provisions of the income tax law the term income includes 'all profits derived from the transaction of business or from the sale of real estate or other capital assets' . . . . This statutory definition gives to the word income its ordinary meaning as used in every day language, that is, that income is a profit or gain derived from capital or labor or from both combined." Westby v. Bekkedal, 172 W 114, 119, 178 NW 451, 453.

The board of review, in ascertaining the value of corporate stock at the time of a sale thereof, may disregard an entry in the books of the corporation which served only to balance the appraised value and the sale value. Lewis v. Racine, 179 W 210, 190 NW 476.

Sales of furniture on the instalment plan and secured by conditional sales contracts should be included in the income return of the seller, such inclusion not working an injustice in view of the provision permitting the deduction of losses. State ex rel. Waldheim & Co. v. Tax Comm. 187 W 539, 204 NW 481.

A company buying deferred payment paper secured by conditional sale agreements as chattel mortgages which deducts all its expense of investment must consider the entire profit on all paper as income received during the year of purchase. Motors A. Co. v. Tax Comm. 193 W 41, 214 NW 64.

Where a corporation engaged in producing wood products distributed them in kind between its 2 stockholders in accordance with their respective holdings of stock, and thus apparently had no taxable income, the tax commission may look behind the transactions and determine the amount of the real income to the corporation. Cliffs C. Co. v. Tax Comm. 193 W 295, 214 NW 447.

To give rise to income taxable as profits there must be a sale of capital assets at a profit, and generally, but not necessarily, the sale must be for money; but mere exchanges of property constituting capital assets do not give rise to a taxable gain. Miller v. Tax Comm. 195 W 219, 217 NW 568.

For sale of property to give rise to income as regards tax, its selling price must exceed its cost. Where stock was purchased prior to January 1, 1911 for \$471,000, valued on that date at \$39,000 less than its subsequent (1924) selling price of \$132,000, the difference in value between 1911 and 1924 was not taxable. Falk v. Tax Comm. 201 W 292, 230 NW 64.

An assessment based on assumption of profit which had not yet come into existence was invalid. Katz v. Tax Comm. 210 W 625, 246 NW 439.

While continuing businesses selling goods on the instalment plan may be required to report as income the amount outstanding in the form of instalment contracts, this principle does not necessarily apply to isolated or occasional contracts. Lawrence v. Tax Comm. 213 W 273, 251 NW 242.

The increase in value of stock received as a gift from a nonresident of the state represented by the difference between original cost

to the donor and the market value as of date of gift was not taxable income under 71.02 (2) (d), Stats. 1929. Siesel v. Tax Comm. 217 W 661, 259 NW 839.

Where a stockholder transferred stock of a corporation undergoing liquidation to his personal holding corporation, the transferee's rights were the same as those of any other stockholder, and all liquidating dividends received by the transferee were legally of the same kind as if received by the transferor, and were assessable against the transferee as "dividends", and were not assessable as "income from the sale of capital assets" nor as "other gains, profits or income" (71.02 (2) (d), (h), Stats. 1921 and 1923). Hope Inv. Co. v. Tax Comm. 218 W 140, 259 NW 628.

The sum taken by the father as trustee of property he held in trust for his minor son's support was taxable income of the father rather than reimbursement for the support of his son. Gilkey v. Wisconsin Tax Comm. 228 W 297, 280 NW 406.

The dividends paid to a resident of this state by a common law business trust conducted for profit and doing business under a declaration of trust pursuant to which certificates were issued to 5 or more persons for membership were taxable as "gross income." The dividends received by a corporation organized for profit "are conclusively presumed to be taxable income and are not subject to analysis or elimination as to portions as to which the trust, if taxed, could claim an exemption." Ellinger v. Tax Comm. 229 W 71, 281 NW 701.

Where stocks of separate corporations are exchanged on a basis of agreed value which is more than the cost thereof, taxable income results. In a transaction whereby one party exchanged his shares of bank stock, at an agreed value basis of \$100,000, for the other's shares of aluminum stock, at an agreed value basis of \$100,000, each realized a taxable profit, measured by the difference between the agreed value of the stock which he received in the transaction and the cost to him of that which he transferred. Schuette v. Tax Comm. 234 W 574, 292 NW 9.

Where a contract between M and a newly formed corporation and bondholders' committee provided that if the company earned a specified net profit within 5 years, M would receive certain nonpar stock (transferred to him and by him transferred to trustees) as compensation or bonus for his services, in addition to his other compensation, M did not acquire complete ownership of the stock in 1929 when the agreements were entered into, but when the stock was received by M from the trustees in 1932 it constituted income to him, to the amount of its value, taxable to him as such in 1932. Meyer v. Conway, 235 W 76, 292 NW 309.

Considered with a stipulation and trust instrument between the parties to a divorce proceeding, providing for a division of the real estate and setting up a trust for the benefit of the wife during her lifetime, and the minor children, and providing that such division and distribution of the husband's estate should be final and permanent, the judgment of divorce, confirming the stipulation and trust instrument, and adjudging that the pro-

visions for the wife and children were in lieu of alimony and other provisions for the support of the children, and that such division and distribution of the husband's estate should be final and permanent, made a final division of the husband's estate, so that that part of the income of the trust payable to the wife was the income of the wife and could not be taxed as the income of the husband. *Friedmann v. Tax Comm.* 235 W 237, 292 NW 894.

Where a corporation, selling all of its property to a newly formed corporation, received shares of preferred stock in the buyer corporation as partial payments, the stock so received was to be valued at market value, not at par value, in determining for purposes of income taxation the gain realized by the seller corporation from the transaction. (State ex rel. *Van Dyke v. Cary*, 181 W 564, and other cases, explained.) *Fox River Paper Co. v. Dept. of Taxation*, 241 W 321, 6 NW (2d) 187.

To justify an income tax from the avails of a construction job there must be an income as a result of that job. Where a highway contractor completed 87 per cent of the work under a construction contract in 1936 and received payments in 1936 which would have resulted in a profit and the contract covered only the work done in 1936, but did not complete the job until 1937 and sustained a loss on the job as a whole, the department of taxation was not justified in computing a "profit" on that part of the work done in 1936 and assessing an income tax thereon as for a "profit" in 1936. (State ex rel. *Waldheim & Co. v. Tax Comm.* 187 W 539, and *Wisconsin Ornamental I. & B. Co. v. Tax Comm.* 202 W 355, distinguished.) *Abel v. Dept. of Taxation*, 241 W 350, 6 NW (2d) 232.

Amounts withheld by the U. S. government from the salary of a federal employe for purposes of the federal civil service retirement act constituted "gross income" of such employe. *Kjer v. Dept. of Taxation*, 249 W 286, 24 NW (2d) 604.

A merger under 196.80 (1) (c) did not result in liquidation of the merged corporation, was not a taxable incident, and hence there was no taxable gain. *Wisconsin E. P. Co. v. Dept. of Taxation*, 251 W 346, 29 NW (2d) 711.

The provision that the basis for computing the profit or loss on the "sale" of property acquired by gift after 1922 but prior to July 31, 1943, shall be the same as it would have been had the sale been made by the last preceding owner who did not acquire it by gift, confines the determination of the basis of loss to a sale and requires a sale by the donee as the starting point, and hence donees of stock acquired by them in 1936, which had no market value either at the time of transfer to them or thereafter and was never sold by them but was canceled in 1944 in a corporate reorganization, had no basis for a claim for a loss. The words "or other disposition" do not carry over into the provision for determining the profit or loss on the "sale" of property acquired by gift after 1922 but prior to July 31, 1943. *Harvey v. Dept. of Taxation*, 254 W 220, 35 NW (2d) 906.

An income tax which was imposed by Canada on dividends payable to a Wisconsin resident, on shares of stock owned by him in 3 Canadian corporations, created a personal lia-

bility, so that the payment of such income taxes to the Canadian government by these 3 corporations discharged the personal indebtedness of the shareholder-taxpayer and this resulted in a constructive receipt of the amount thereof by him, so as to render the same subject to income taxation by the state, in addition to the net amount actually received by him. *Marine Nat. Ex. Bank v. Dept. of Taxation*, 12 W (2d) 154, 107 NW (2d) 157.

Accruability of income is determined by the right to receive the income, so that, when the right to receive an amount becomes fixed, the right accrues and a taxpayer on an accrual basis must so report it whether he actually receives it or not in that year. *Lavo Co. v. Dept. of Taxation*, 13 W (2d) 185, 108 NW (2d) 385.

On the valuation of a franchise and good will upon a sale to a successor corporation see *Copland v. Dept. of Taxation*, 16 W (2d) 543, 114 NW (2d) 858.

Transfers of appreciated jointly held property to a wife pursuant to a divorce judgment as a property division did not create taxable income for the husband under 71.03 (1) (g). *Dept. of Taxation v. Siegman*, 24 W (2d) 92, 128 NW (2d) 658.

In defining "income" as that term is used in this section of the Wisconsin tax laws (which section sets forth sources from which gross income is derived and the requirement of inclusion therein), the supreme court emphasizes anew that receipt of economic gain or increment, while income, is not taxable income until realized, and that the critical issue surrounding realization is not whether but when a receipt shall be taxed. *Uecker v. Dept. of Taxation*, 36 W (2d) 530, 153 NW (2d) 614.

An absolute contract of sale of a large block of corporate stock, part of which was delivered and paid for at the time of the contract, and the balance to be delivered in instalments as paid for, rendered the total profits of the sale taxable income of the year the contract of sale was made. *Richardson v. Conway*, 42 F (2d) 875.

Benefits payable under the railroad retirement act of 1937 are not exempt from income tax under 71.05 (1), Stats. 1937, but only the amount thereof which exceeds contributions by an employe constitutes taxable income under ch. 71. 27 Atty. Gen. 655.

## 2. Exclusions.

Annual instalments of commissions paid a deceased partner's estate are not taxable "income," where the present value of future payments to be made the estate had been computed and subjected to inheritance tax, since the payments constituted but the corpus or principal of the estate. *Herzberg v. Tax Comm.* 194 W 126, 215 NW 936.

The corpus of an estate of a decedent in the hands of the executrix, which had paid an inheritance tax, is not subject to an income tax imposed by a law thereafter enacted. *Norris v. Tax Comm.* 205 W 626, 237 NW 113, 238 NW 415.

**71.035 History:** 1951 c. 600; Stats. 1951 s. 71.035; 1953 c. 61; 1955 c. 652; 1965 c. 163; 1969 c. 276 s. 590 (1).

**71.04 History:** 1947 c. 318, 557; Stats. 1947

s. 71.04; 1949 c. 170; 1951 c. 709, 720; 1953 c. 61, 183, 648; 1955 c. 67, 87, 326, 571; 1957 c. 283, 612; 1959 c. 681; 1961 c. 246, 467, 620; 1963 c. 6, 164, 223, 224, 433, 436, 459, 537; 1965 c. 163, 433, 614; 1967 c. 281, 287; 1969 c. 11, 206; 1969 c. 276 ss. 326, 590 (1), (2), (3); 1969 c. 366 s. 117 (2) (a); 1969 c. 390, 392.

1. Payments for services.
2. Expenses.
3. Taxes.
4. Dividends.
5. Losses.

#### 1. *Payments for Services.*

A firm is entitled to a deduction from its gross income in any year of a reasonable allowance paid to the members of the firm for their services in producing such income, whether rendered in the same or any preceding year. State ex rel. Houghton v. Phelps, 171 W 13, 176 NW 217.

#### 2. *Expenses.*

It was proper to disallow as a deduction from a corporation's income tax return a reserve set up for a claim against the corporation, which was then in litigation, regardless of whether the claim was strictly contingent or not. The legislature has broad power to determine what deductions may be made; an "income" for purposes of taxation, is not identical with an income for other purposes. If the statute does not authorize a deduction the commission cannot allow one on equitable principles. Where an assessment of income tax was made final before 71.06 (3), Stats. 1923, became effective, the tax commission properly added interest to taxes assessed, as the statute was passed before the time came to certify the tax and place it on the roll. State ex rel. Crucible S. Co. v. Tax Comm. 185 W 525, 201 NW 764.

Depreciation of a sawmill in determining income tax on the theory that the value of a mill depreciates in proportion that timber sawed bears to timber available for sawing held unauthorized "use, wear and tear." Wisconsin B. Co. v. Tax Comm. 198 W 439, 224 NW 483.

The United States Leather Company, a strictly holding company, owned the stock in 3 Wisconsin corporations, namely the Union Tanning Company, the Rib Lake Lumber Company and the Copper River Land Company. A new corporation was organized under the laws of Delaware and named the Rib Lake Lumber Company of Delaware. This company took over the assets of the Rib Lake Lumber Company of Wisconsin, and the Copper River Land Company, and as part of the transaction, and in payment for the assets of the corporations absorbed, issued bonds to the amount of \$4,000,000. The state for several years taxed the Rib Lake Lumber Company of Delaware as the owner of the property thus transferred. Later the tax commission denied the Rib Lake Lumber Company of Delaware a deduction claimed on account of interest paid on said bonds. The state could not proceed for years on the theory that the Delaware company owned said assets and later to proceed on the theory that there was no change in ownership of the assets and, therefore, no deduction

could be allowed for interest. The interest deduction claimed was allowed. Rib Lake L. Co. v. Tax Comm. 212 W 412, 249 NW 322.

To be deductible as expenses, advertising expenses must be reasonable. Advertising expenses paid for by a corporation are neither "ordinary" nor "necessary" when the advertising cannot benefit the corporation. American Stores Dairy Co. v. Dept. of Taxation, 246 W 396, 17 NW (2d) 596.

Where new bonds were issued by a corporation to replace outstanding bonds, and the old bonds were called and paid with the money derived from the sale of the new bonds, the interest paid on the old bonds during the overlapping period was deductible from income of the successor corporation for that year as "ordinary and necessary expenses." Wisconsin E. P. Co. v. Dept. of Taxation, 251 W 346, 29 NW (2d) 711.

A contribution by a corporation to a fund for enlarging 2 hospitals subscribed in response to a written solicitation asking employers to make "a gift to the community," with no provision that the employees of subscribers, or their families, would fare any differently from the general public in the enjoyment of the improvement which the subscription procured, was not deductible as an ordinary and necessary "business expense," but was deductible only as a charitable contribution. For a contribution to be deductible as an ordinary and necessary business expense there must not only be a business motivation but there must also be a direct relationship between the expense and the anticipated return to the corporation; a charitable contribution, although motivated by reasons of good business, need not be made in contemplation of any immediate and particular return in direct proportion to the amount of the contribution; it is not the broad motivation for the contribution which determines its character as a business expense, but rather the anticipated return to the donor resulting from the contribution. Dept. of Taxation v. Belle City M. I. Co. 258 W 101, 45 NW (2d) 68.

Where a corporation, to change its capital structure consisting solely of common stock, issued a preferred stock dividend and purchased and retired 80 per cent of the outstanding common stock, paying for it in part with the proceeds of a \$500,000 loan made for that purpose, the purchase and retirement of the stock did not relate to the corporation's activities giving rise to its income, and the interest paid on the loan was not deductible under 71.04 (2). Pelton Steel Casting Co. v. Dept. of Taxation, 268 W 271, 67 NW (2d) 294.

Payments which a business corporation made to a private club for dues for officers and employees of the corporation were not deductible by the corporation for income-tax purposes as "ordinary and necessary expenses" of the corporation. Forsberg Paper Box Co. v. Dept. of Taxation, 14 W (2d) 93, 109 NW (2d) 457.

Under 71.04 (2), in determining the reasonableness of a contract between related parties, the test is whether the same contract would have been entered into between strangers. Capitol Lumber Co. v. Dept. of Taxation, 17 W (2d) 105, 115 NW (2d) 606.

Where the stock of a corporation was pub-

licly held, and the entire issue of preferred stock was retired by the corporation, and the motivation for the transaction was to improve the status of the body corporate, not to favor any individual shareholders or a special group thereof, the corporation's payment of interest on the money borrowed for the purpose of retiring the issue must be considered ordinary and necessary expenses in the operation of business from which its income was derived, so as to be deductible under 71.04 (2). *Basic Products Corp. v. Dept. of Taxation*, 19 W (2d) 183, 120 NW (2d) 161.

In determining the issue of whether a particular expense charge which a public utility is ordered to make on its books constitutes ordinary and necessary business expenses within the meaning of 71.04 (2), the fact that such a charge is labeled by the public service commission as "depreciation" is of little moment because labels do not and should not determine what is an ordinary and necessary business expense of a public utility, but what is controlling is how the commission requires the utility to handle the deduction on its books. *Milwaukee G. L. Co. v. Dept. of Taxation*, 23 W (2d) 195, 127 NW (2d) 64.

### 3. Taxes.

No deduction can be allowed for taxes paid on property other than that which produced the taxed income. *State ex rel. Hickox v. Widule*, 166 W 113, 163 NW 648.

Although under 196.80 (1) (c), Stats. 1937, the surviving utility corporation succeeded to the liabilities and obligations of the merged corporation to the same extent as though it had incurred them in the first instance, such circumstance did not constitute the survivor as the corporation incurring the liabilities, and, in respect to federal taxes of the merged corporation unpaid at the time of the merger, the surviving corporation did not incur or pay them as taxes on its business, but paid them as obligations of the merged corporation to which it succeeded. *Wisconsin E. P. Co. v. Dept. of Taxation*, 251 W 346, 29 NW (2d) 711.

A taxpayer on a cash basis who, while contesting an additional assessment of back taxes on income, made a deposit of the amount thereof with the state treasurer under 71.12 (2), was not entitled to take, in such taxpayer's return of income for the year in which such deposit was made, a deduction of the deposited amount as "taxes paid" during such year; the contested taxes not being "paid" until transfer of the deposit by the state treasurer to the department of taxation, and this not occurring until a subsequent year and after the determination of the assessment controversy by the supreme court. *Smith v. Dept. of Taxation*, 264 W 389, 59 NW (2d) 479.

Payments made by employes of carriers under the railroad retirement act of 1937 are not deductible from gross income. 27 Atty. Gen. 655.

### 4. Dividends.

Where a corporation paid an income tax on its entire income for a certain year, and the income of a second corporation for that year, consisting wholly of dividends paid on stock held by it in the first corporation, was

held exempt, the income of a third corporation, consisting of dividends received by it in that year upon stock held by it in the second corporation, was not exempt under the statute. *State ex rel. Columbia C. Co. v. Tax Comm.* 166 W 369, 165 NW 382.

Dividends declared by a foreign corporation out of income received as dividends from a domestic corporation that had paid an income tax, and the stock of which, except as to qualifying shares, was all owned by the foreign corporation, are not exempt from taxation when received by a person subject to the Wisconsin income tax law. The fact that profits passing from one corporation to another have paid an income tax does not exempt them from the payment of another such tax, an income tax being levied on the right to receive income or profits. *Paine v. Oshkosh*, 190 W 69, 208 NW 790.

Where a stockholder transferred the stock of a corporation undergoing liquidation to his personal holding corporation, liquidating dividends received by the transferee were deductible to the extent that they were attributable to income of the liquidating corporation on which such corporation had been taxed. *Hope Inv. Co. v. Tax Comm.* 218 W 140, 259 NW 628.

Language similar to that in 71.04 (4) prior to its amendment in 1957 is discussed in *Greenebaum v. Dept. of Taxation*, 1 W (2d) 234, 83 NW (2d) 682.

### 5. Losses.

The fact that a person purchased bonds at a premium does not entitle him to deduct annually from the interest received a pro rata share of such premium in order that the capital may be kept unimpaired and that it may not be taxed as income. *Van Dyke v. Milwaukee*, 159 W 460, 146 NW 812, 150 NW 509.

The amendment made by sec. 6, ch. 310, Laws 1923, is not retroactive so as to affect a deduction for a loss from the sale of property in 1922. *State ex rel. Kieckhefer v. Cary* 186 W 613, 203 NW 307.

71.03 (3), Stats. 1923, permits losses, sustained because of the failure of purchasers of furniture on conditional sales contracts to make payments, to be deducted by the seller in return for subsequent years, but the gross sales must be reported as income. *State ex rel. Waldheim & Co. v. Tax Comm.* 187 W 539, 204 NW 481.

In 1918 the alien property custodian seized taxpayer's stock and held it until 1921. Dividends were not reported as income and the loss from the seizure was not claimed as a deduction until in 1924 an assessment was made on 1918 income. If there was a loss it was not ascertained or claimed in 1918 and the deduction is not allowable as of 1918 income. *State ex rel. Berger v. Cary*, 192 W 433, 211 NW 284.

Where a taxpayer delivered stock in trust to use to protect remaining stock, there was no sale and resulting loss deductible from income. *O. H. Ingram Co. v. Tax Comm.* 202 W 202, 231 NW 160.

The time at which that loss was actually sustained must be held to have been on October 1, 1925, when the corporation unconditionally and irretrievably parted with all of

its assets. Therefore the plaintiff's loss was then actually sustained because it was then definitely complete, absolute and irretrievable *Pick v. Tax Comm.* 225 W 102, 273 NW 537.

Deductible losses for income tax purposes must be established by closed transactions. The transaction here in question was closed. *Bissell v. Tax Comm.* 234 W 421, 291 NW 325.

Where there is total extinguishment of value accompanied by abandonment of property, there is a loss within the meaning of this subsection authorizing the deduction for income-tax purposes of "losses actually sustained," but a loss claimed by reason of diminution in value as distinguished from extinguishment of value must be established by sale. An amount of bond discount and expense incurred by a merged corporation on the issuance of its bonds, and not recovered through amortization when they were retired by the successor corporation, did not constitute a deductible loss of the successor, within this subsection. *Wisconsin E. P. Co. v. Dept. of Taxation*, 251 W 346, 29 NW (2d) 711.

**71.045 History:** 1965 c. 642; Stats. 1965 s. 71.045.

**71.046 History:** 1947 c. 370; Stats. 1947 s. 71.046; 1953 c. 438; 1959 c. 197; 1965 c. 163; 1969 c. 276 s. 590 (1).

**Editor's Note:** In *Klar Piquet Mining Co. v. Platteville*, 163 W 215, 157 NW 763, and in *Pfeister Land Co. v. Milwaukee*, 166 W 223, 165 NW 23, the supreme court held that the income tax law of 1911 did not authorize depletion allowances.

**71.047 History:** 1967 c. 61; Stats. 1967 s. 71.047.

**71.05 History:** 1965 c. 163 s. 74df; 1965 c. 218, 433, 437, 614; Stats. 1965 s. 71.05; 1967 c. 226, 239; 1969 c. 206; 1969 c. 276 ss. 327, 590 (1), (2); 1969 c. 366 s. 117 (2) (a); 1969 c. 392.

**71.06 History:** 1947 c. 318; Stats. 1947 s. 71.06; 1955 c. 660; 1965 c. 163.

71.045, Stats. 1935, was properly applied by the tax commission—in determining the 1936 taxable income of a foreign corporation doing business within and without the state and taxable only on income derived from business within the state as computed by a ratio prescribed in 71.07. *Bowman Dairy Co. v. Tax Comm.* 240 W 1, 1 NW (2d) 905.

Where 4 corporations were merged pursuant to 181.06, Stats. 1949, the entity was not entitled to offset against its net business income the net business losses sustained by the merged corporations in prior years, this privilege being confined to the identical taxpayer who sustained the business loss. *Fall River C. Co. v. Dept. of Taxation*, 3 W (2d) 632, 89 NW (2d) 203.

**71.07 History:** 1947 c. 318; Stats. 1947 s. 71.07; 1949 c. 171; 1951 c. 720; 1955 c. 67 s. 3 to 6; 1959 c. 488; 1961 c. 348, 652; 1963 c. 224; 1965 c. 163, 433; 1969 c. 206; 1969 c. 276 s. 590 (1); 1969 c. 392 s. 84g.

1. Situs of income.
2. Allocation and apportionment.
3. Departmental rules.
4. Residence period proration.

### 1. Situs of Income.

The income received by a resident of the state from a partnership of which he is a member and which is doing business and has all its property located outside the state, all the profits distributed being derived from sources outside the state, is not taxable. *State ex rel. Arpin v. Eberhardt*, 158 W 20, 147 NW 1016.

Plaintiff, a foreign corporation, erected patented coke and gas ovens in Wisconsin, furnishing the necessary materials and engineering. The purchaser furnished the labor under the supervision of plaintiff's technicians and experts. The situs of the income derived from the entire contract was not in Wisconsin (except as to certain conceded items), and the income arose from a transaction of interstate commerce, and was not subject to state income tax assessment. *Koppers Co. v. Milwaukee*, 191 W 397, 211 NW 147.

The domicile of the owner is the situs of personal property for the purposes of taxation unless the property has acquired an actual situs elsewhere. *Stone v. Tax Comm.* 197 W 71, 221 NW 376.

Income derived by a resident of Wisconsin from contracts with associations in other states for publishing year books for them and soliciting advertising in such publications for a certain percentage of the money collected by him for advertising space, which enterprise involved the employment of no capital except to cover personal expenses, is taxable as income derived from personal services. *State ex rel. Lerner v. Tax Comm.* 213 W 267, 251 NW 456.

The state assessed as income of the plaintiff (a Delaware corporation whose principal business was in Wisconsin) profits derived from a sale, executed outside this state, of certificates of corporate stock kept without the state, and also the profits from the sale of patent rights in its home state. As to non-residents there must be no imposition of income taxes upon income derived from property or business located without the state; that the situs of such intangibles as corporate stock and patent rights is the domicile of the owner; that since property of this character, owned by a foreign corporation, is not located within the state of Wisconsin, it is not subject to an income tax levied by this state. *Newport Co. v. Tax Comm.* 219 W 293, 261 NW 884.

The income of a subsidiary foreign corporation, engaged solely in manufacturing in Wisconsin, and disposing of its entire product to a parent corporation operating a chain of retail stores outside Wisconsin, the subsidiary merely maintaining a business office in Illinois, was derived wholly from "business transacted within the state," so as to be wholly taxable here. *American Stores Dairy Co. v. Dept. of Taxation*, 246 W 396, 17 NW (2d) 596.

"Income derived from personal services," means such income or gains as result from the performance of services or labor without the material aid of capital. *Wiik v. Dept. of Taxation*, 249 W 325, 24 NW (2d) 685.

Interest paid by the U. S. government and by the state, respectively, on federal income-tax refunds and Wisconsin privilege-divi-

dend-tax refunds to a foreign corporation, engaged in business within and without Wisconsin, and reporting its income for Wisconsin income-tax purposes under the statutory apportionment method prescribed in 71.07 (2), is not income from "business," but is within the category of "all other income," which follows the residence of the recipient and is to be deducted from the corporation's total net income before the apportionment formula is applied so as to determine the amount apportionable to Wisconsin. Dept. of Taxation v. Aluminum Goods Mfg. Co. 275 W 389, 82 NW (2d) 349.

The income of a Wisconsin resident and professional engineer from a firm in which he was a partner, which had its principal office in New York, which did no actual construction work and did not employ contractors, was derived from a profession and not from a business, and the taxation of this income therefore followed his residence under 71.07 (1), Stats. 1953, 1955, so as to be taxable thereunder for the years in question. Whitney v. Dept. of Taxation, 16 W (2d) 274, 114 NW (2d) 445.

Even though some manufacturing was done and sales were made from warehouses outside of Wisconsin, 100% of sales could be used in the tax ratio since the Wisconsin office played a major part in all sales. Globe-Union, Inc. v. Dept. of Taxation, 20 W (2d) 213, 121 NW (2d) 894.

A Wisconsin manufacturer who contracted with out-of-state warehouse corporations to store goods and make sales subject to certain limitations was engaged in business outside the state and the tax apportionment statute should be applied. Under the facts the sales were not made in Wisconsin. Applied Power Ind. v. Dept. of Taxation, 25 W (2d) 219, 130 NW (2d) 841.

## 2. Allocation and Apportionment.

Income derived from sales of goods manufactured within and sold without the state is taxable income whether the sales are directly from the factory or from branch houses in other states. United States G. Co. v. Oak Creek, 161 W 211, 153 NW 241, affirmed 247 US 321.

The income of a partnership engaged in buying and selling commodities is ascertained by deducting from the gross proceeds of its sales the expenses of carrying on the business. Where a Wisconsin partnership and a distinct New York partnership entered into a contract which created a new partnership, the Wisconsin partnership doing the buying and the New York partnership doing the selling, the income of the new partnership distributed to the 2 distinct partnerships was taxable against them respectively in the states where they were located. Westby v. Bekkedal, 172 W 114, 178 NW 451.

In assessing the income of a nonresident, the tax commission should use the method of computation which will most clearly disclose the amount of income actually earned within the state. Standard Oil Co. (Indiana) v. Tax Comm. 197 W 630, 223 NW 85.

71.02 (3)(d), Stats. 1929, relates to a single taxpayer doing business within and without the state but not to a group of affiliated cor-

porations, as such. Curtis Companies, Inc. v. Tax Comm. 214 W 85, 251 NW 497.

Where a Wisconsin corporation having its factories and home office in Wisconsin, did all of its manufacturing in such factories, and sold a portion of its products directly through sales offices located in Wisconsin, and sold the balance to customers outside of Wisconsin through representatives located in other states who merely solicited proposals which were submitted for acceptance at the home office from where all shipments were made—the entire income of the corporation from such manufacture and sale of its products was income "derived from business transacted and property located within the state" and taxable as such. Trane Co. v. Tax Comm. 235 W 516, 292 NW 897.

The use of the ratio method in determining taxable income (in the case of a taxpayer doing business within and without the state) is based on the theory that a single taxpayer is involved and that the application to this taxpayer's total income of a percentage which is the average of the ratios gives a fair approximation of the entire income of this taxpayer in this state, and on this theory the use of ratios is sustainable. Burroughs Adding Machine Co. v. Tax Comm. 237 W 423, 297 NW 574.

71.02 (3)(d), Stats. 1933, has no application to taxpayer corporations domiciled in the state, and engaged solely in the business of manufacturing electric power within the state, and selling such power. Northern States P. Co. v. Tax Comm. 237 W 433, 297 NW 578.

Income from intangibles consisting of securities physically located in Wisconsin but owned by a foreign corporation is nonapportionable income following the residence of the recipient. Briggs & Stratton Corp. v. Dept. of Taxation, 248 W 160, 21 NW (2d) 441.

In computing the net income of a foreign corporation doing business both within and without the state apportionable to Wisconsin the department of taxation is required to deduct from exempt interest received by the taxpayer all of the interest paid by it, and the statute as so applied does not violate the constitutional rights of the taxpayer. Armour & Co. v. Dept. of Taxation, 252 W 468, 32 NW (2d) 324.

Where certain sales of a product manufactured by a manufacturer in another state were effected through the solicitation of customers in other states than Wisconsin by salesmen of a Wisconsin corporation and the shipment of such product directly to such customers by the manufacturer, but the practice otherwise followed was that the customer directed his order to the Wisconsin corporation at its home office in Wisconsin and received confirmation that it had there sold him a quantity of such product, that the manufacturer billed the Wisconsin corporation, and that the Wisconsin corporation remitted to the manufacturer regardless of whether the customer had paid the bill which the Wisconsin corporation had sent to him in its own name, such sales were by the Wisconsin corporation as vendor, rather than by the manufacturer through the Wisconsin corporation as its agent, and the Wisconsin corporation was "transacting business in Wis-

consin" in respect to such sales, so that its income derived therefrom, although not wholly taxable in Wisconsin because it was engaged in business both within and without the state, was apportionable to Wisconsin for taxation. (United States Glue Co. v. Oak Creek, 161 W 211, distinguished.) Dept. of Taxation v. Ansul Chemical Co. 260 W 96, 49 NW (2d) 893.

Where a Wisconsin corporation owned and operated plants in Wisconsin and Iowa, the president was the general manager of both plants, all sales, advertising, purchasing, and accounting for both plants were done in Wisconsin, collections were made and all bills paid in Wisconsin, the company's only research laboratory and only machine shop were located in Wisconsin, and the Iowa plant was not equipped to print the company's products to conform to the customer's orders, the business was a "unitary" business, and the business in Wisconsin was an "integral" part thereof, so that the company was entitled, under 71.07 (2), Stats. 1949, to report its income to the Wisconsin taxing authorities on the apportionment basis. Celon Co. v. Dept. of Taxation, 269 W 372, 69 NW (2d) 453.

A foreign newspaper corporation operating a paper mill in Wisconsin could use the prevailing market price for newsprint paper in determining the tax due this state, rather than the cost of production plus a profit margin, even though the paper was produced at a loss. Kansas City Star Co. v. Dept. of Taxation, 8 W (2d) 441, 99 NW (2d) 718.

The action of the board of tax appeals, in holding that in the absence of definite proof the property factor should be based on sales, was arbitrary and capricious for ignoring the weight of the property factor in the statutory formula, and improperly reducing the three-factor formula to a two-factor formula in this case. Dept. of Taxation v. Blatz Brew. Co. 12 W (2d) 615, 108 NW (2d) 319.

The tax-apportionment formula contained in 71.07 (2) did not intend to allocate business income among the sum of the states in which business was done, since, once a taxpayer is engaged in business within and without this state, entitling the taxpayer to use the apportionment formula, Wisconsin is restricted to taxing "only on such income as is derived from business transacted and property located within the state". Dept. of Taxation v. Blatz Brew. Co. 12 W (2d) 615, 108 NW (2d) 319.

Where a Wisconsin taxpayer corporation, not making a separate accounting, was engaged in the brewing of beer in Milwaukee, and in the sale thereof in Wisconsin to distributors located both within and without the state, in returnable containers which were returned when empty to Milwaukee, and the taxpayer corporation also owned neon advertising signs and certain other property located throughout the United States, the nature of such property outside the state did not constitute "engaged in business" by the taxpayer corporation outside the state, within the meaning of 71.07 (2) prescribing a formula for the taxation of apportionable income in cases of taxpayers engaged in business within and without the state. Dept. of Taxation v. Blatz Brew. Co. 12 W (2d) 615, 108 NW (2d) 319.

See note to 71.01, citing Moore M. F. Lines v.

Dept. of Taxation, 14 W (2d) 377, 111 NW (2d) 148.

The application of a formula adopted under 71.07 (5) to a unitary multistate trucking business, consisting of the 3 factors of revenue miles, payroll and originating revenue, is not arbitrary or unreasonable. In determining validity of a formula the court must not only look at the challenged factor but also its relation to the other factors and the composite result. A taxpayer who attacks a formula apportionment of income has the burden of showing by clear and cogent evidence that it results in extraterritorial values being taxed. W. R. Arthur & Co. v. Dept. of Taxation, 18 W (2d) 225, 118 NW (2d) 168.

Wisconsin does not tax corporate income on a consolidated basis but adheres to the legal entity theory, i.e., each separate legal entity is required to file its own separate return. The 1949 amendment to 71.07 (2) did not change the Wisconsin practice so as to permit or require the filing of consolidated returns by 2 or more separate entities operating as an economic unit. Interstate Finance Corp. v. Dept. of Taxation, 28 W (2d) 262, 137 NW (2d) 38.

71.07, prescribing the arithmetical formula applicable to an interstate unitary entity engaged in multistate operations, represents a legislative decision and a legislative finding of fact that each of the factors to be used in calculating the tax is equally significant in producing a company's income. Racine v. Morgan, 39 W (2d) 268, 159 NW (2d) 129.

Commissions and courts may go behind legal entities and determine whether circumstances prove that they are devices to evade taxation. The reorganization of the Palmolive Company, a Wisconsin corporation, by creation of a parent company, and sales of products to the parent company diverting profits from the Wisconsin company was a fraud under the Wisconsin tax laws authorizing apportionment of the parent company's income to the Wisconsin company. Palmolive Co. v. Conway, 43 F (2d) 226.

Sales of automobiles in Michigan by the Wisconsin sales subsidiary of a Michigan corporation (Buick Motor Company) were subject to taxation under the Wisconsin income tax law. Buick Motor Co. v. Milwaukee, 48 F (2d) 801.

State taxation of foreign corporations in the context of the due process clause. Fine, 1962 WLR 378.

### 3. Departmental Rules.

The provision in 71.07 (5) that if the income properly assignable to Wisconsin cannot be ascertained with reasonable certainty by either the separate accounting or the apportionment method, then the same shall be apportioned and allocated under such rules and regulations as the department of taxation may prescribe, does not authorize the department to prescribe some other method in the absence of any showing that the taxpayer's Wisconsin income cannot be ascertained with reasonable certainty by either method, and in the absence of any rules and regulations. Celon Co. v. Dept. of Taxation, 269 W 372, 69 NW (2d) 453.

### 4. Residence Period Proration.

71.09 (2), Stats. 1929, subjects a taxpayer,

domiciled in the state during only part of a year, to income tax only for the percentage of the tax applicable to that part of the year, on income that follows residence. *McCarty v. Tax Comm.* 215 W 645, 255 NW 913.

With respect to a taxpayer domiciled in the state during only part of the tax year, where that part of his income earned and received while a nonresident, and attributable to transactions outside the jurisdiction of the state, is readily apportionable with reasonable certainty, i. e., separable from that part of his income received while a resident, a formula using his total income for the year in determining his tax liability for the proportionate time he lived within the state cannot be applied. With respect to a taxpayer who took up his residence within the state during the tax year, income earned and received from the sale of corporate stock, dividends, and salary while the taxpayer was a nonresident was not taxable under 71.09 (2), providing that liability to taxation for income which follows the residence of the recipient shall be determined by the ratio of time which residence within the state bears to the entire tax year. *Greene v. Tax Comm.* 221 W 531, 266 NW 270.

On an appeal from a judgment confirming an assessment of the income taxes against a taxpayer who was a resident of the state during only part of the taxable year, it will be presumed that the taxpayer's income for the year was properly allocated where there was no evidence of the actual allocation in the record, the appellant taxpayer assigned no error as to the computation of the taxes, and the respondent tax commission filed no motion for review. The assessment of the normal income tax, surtax and emergency tax on incomes received in the preceding year is not invalid as to a person who removed from the state during the income year and who was a nonresident when the assessments were made, with respect to income from stock and bonds received by him while a resident of the state. The receipt of income by a resident of the state furnishes a proper basis for the assessment of a tax on that income after the recipient has become a nonresident. *Scobie v. Tax Comm.* 225 W 529, 275 NW 531.

**71.08 History:** 1947 c. 236, 318, 557, 600; Stats. 1947 s. 71.08; 1949 c. 423; 1951 c. 720 s. 4 to 6; 1953 c. 614 s. 5 to 7; 1959 c. 221; 1961 c. 33, 404; 1965 c. 163, 437, 516; 1969 c. 64; 1969 c. 276 s. 590 (1).

Because of the specific provisions of 71.095 (6), Stats. 1935, all other statutory provisions which are applicable generally to the filing, allowance, and barring of claims are inapplicable to the state's claim for income taxes; and to have them allowed and paid out of the estate it is not necessary to file them as provided or within the time limited by an order made under 313.03. *Estate of Adams*, 224 W 237, 272 NW 19.

The sum taken by a father as trustee of property he held in trust for his minor son's support was taxable income of the father rather than reimbursement for the son's support. *Gilkey v. Tax Comm.* 228 W 297, 280 NW 406.

Under trusts created by a resident settlor

and administered by a nonresident trustee, under which it was the duty of the trustee to accumulate the income and add it to the trusts during the terms thereof, and under which the settlor's wife was only a contingent beneficiary having no right to receive anything from the trusts, unless she survived the termination thereof, such income was lawfully converted into capital immediately on receipt thereof by the trustee, and became part of the principal of the trusts prior to the termination thereof, so that the subsequent receipt by the settlor's wife of the principal of the trusts, such termination constituted the receipt by her of "capital" and not "income", and as such capital it was not subject to an income tax to be paid by her. *Mahler v. Conway*, 236 W 582, 295 NW 772.

Under a trust providing that profits derived by the trustee from the sale of securities of the trust estate should be regarded and treated as principal, profits or capital gains so derived by the trustee and treated as principal and added to the corpus of the trust in a certain taxable year, constituted "nondistributable or contingently distributable income not distributed" properly taxable to the trustee, within 71.095 (4), Stats. 1935, where the settlor, although having the power to revoke the trust, did not exercise such power during the year in question. *First Wisconsin Trust Co. v. Dept. of Taxation*, 237 W 135, 294 NW 868.

Under a testamentary trust containing no direction for setting aside income, no part of the yearly income of the trust remaining undistributed in the hands of the trustees after the annual payment to the life beneficiary is exempt from taxation, as trust income "permanently set aside pursuant to the terms of the will" for the charitable legatees, since, until the contingencies on which some of the charitable bequests depend are resolved, it cannot be ascertained what amounts will ultimately reach the respective charitable legatees, even though the income and other property held by the trustees may be sufficient to pay all the other legacies. *Coulter v. Dept. of Taxation*, 259 W 115, 47 NW (2d) 303.

Notwithstanding 253.03 (1), Stats. 1955, the county court had no jurisdiction to determine that there was no gift tax liability to the state on the part of a decedent or his estate. *Estate of Michels*, 3 W (2d) 353, 88 NW (2d) 726.

The exemption of trust income from income taxation, as provided for by the 1947 amendment to 71.08 (9), will not be permitted unless it can be readily ascertained what amount will ultimately reach the institutions mentioned in the statute. *Dept. of Taxation v. La Crosse*, 11 W (2d) 345, 105 NW (2d) 800.

Trusts having nonresident trustees who made policy decisions, with only the mechanics of the purchase or sale of securities carried out by a local agent who had no power and never exercised any power either to alter or to modify decisions of a nonresident company engaged to advise trustees, were not "administered" in this state, for purposes of income taxation, within the meaning of 71.08 (8). *Dept. of Taxation v. Pabst*, 15 W (2d) 195, 112 NW (2d) 161.

Under 71.08 (1) to (6) an estate of a decedent is considered a tax entity, since every ad-

ministrator or executor is required to file an income tax return for all of the income received by the decedent during that portion of the year covered by the return preceding the demise of the decedent, and for all receipts by him from the estate of the decedent during the year covered by the return if such receipts would have been taxable as income to the decedent had he survived, and thus, a special administrator is liable in tax for all the income received by it or him unless the income is clearly within the express language of a statutory exemption provision. *Estate of Greenwald*, 17 W (2d) 533, 117 NW (2d) 609.

The trust relation between the personal representative of a decedent and the beneficiaries of his estate is one which is imposed by law and is not a charitable-trust relation as contemplated by 71.08 (9), relating to the exemption of trust income from income taxation in certain instances. *Estate of Greenwald*, 17 W (2d) 533, 117 NW (2d) 609.

As used in the provision of 71.08 (8) that trustees of trust estates created by declaration of trust shall annually make a return of all income received by them as such to the assessor of incomes of the county in which the trust is being "administered", the word "administered", as applied to an inter vivos trust of intangibles, means simply conducting the business of the trust; and a proper application of the statute requires the conclusion that the trust is being administered in Wisconsin within the meaning of the statute if the major portion of the trust business is conducted in Wisconsin. *Pabst v. Dept. of Taxation*, 19 W (2d) 313, 120 NW (2d) 77.

Tax accounting problems of personal representatives. *Haushalter*, 47 MLR 57.

Tax accounting problems of trustees. *Hinners*, 47 MLR 147.

**71.09 History:** 1947 c. 23, 318, 557, 600; Stats. 1947 s. 71.09; 1949 c. 243, 526; 1951 c. 720; 1953 c. 614 s. 8 to 11; 1955 c. 22, 652; 1957 c. 474; 1959 c. 19, 222, 253, 480; 1961 c. 348 s. 3; 1961 c. 466, 478; 1961 c. 620 ss. 9 to 11b, 31; 1961 c. 622, 652; Stats. 1961 s. 71.05 (5), 71.09, 71.15 (10); 1963 c. 224, 385, 455, 560, 566, 580; Stats. 1963 s. 71.05 (5), 71.09, 71.15 (10), (11); 1965 c. 21; 1965 c. 163 ss. 74dc, 74fc to 74 gc, 76p and 76q; 1965 c. 249; 1965 c. 433 ss. 83, 84, 121; 1965 c. 622; Stats. 1965 s. 71.09; 1967 c. 26, 223, 235; 1969 c. 63, 154, 211; 1969 c. 276 ss. 582 (1), (12), (15), 590 (1), (2), 606.

Assessors of income must assess incomes for the year they are dealing with, in accordance with the law as it stands on January 1 succeeding the year of the income assessed, unless there be subsequent to said day a retroactive amendment made to the statute. *State ex rel. Kieckhefer v. Cary*, 186 W 613, 203 NW 397.

Delay in assessing income of a railroad company from nonoperating property did not result in substantial injustice by virtue of 10% interest on back taxes, so as to entitle the company to remission of interest. *Chicago & Northwestern R. Co. v. Tax Comm.* 199 W 368, 226 NW 293.

71.09 (7), Stats. 1965, enacted by ch. 580, Laws 1963, is in no way a property-tax law and the administration of the law is in no way related to the collection of property taxes; it is

a relief law in its purpose and operation. *State ex rel. Morgan v. Harvey*, 30 W (2d) 1, 139 NW (2d) 585.

**71.10 History:** 1947 c. 104, 318, 557, 600; Stats. 1947 s. 71.10; 1949 c. 99, 112, 243, 537; 1951 c. 198, 212, 685; 1951 c. 720 s. 8, 9, 10; 1953 c. 364; 1953 c. 614 s. 12 to 14; 1955 c. 3 s. 1 to 5a; 1955 c. 10, 131, 256, 335; 1957 c. 145, 679; 1961 c. 129, 130, 132, 408, 620; 1963 c. 23, 223, 224, 278, 394, 537; 1965 c. 163, 249, 433, 437, 625; 1967 c. 287; 1969 c. 65, 190, 211; 1969 c. 276 s. 590 (1), (2); 1969 c. 392 s. 87 (9).

1. Filing individual returns.
2. Refunds and credits.

#### 1. Filing Individual Returns.

A tax on income of a wife omitted in the return made by her husband may be assessed against her when the omission is discovered. *State ex rel. Berger v. Cary*, 192 W 433, 211 NW 284.

A husband and wife do not have the option of having their income taxes computed on joint or separate returns. *Amerpohl v. Tax Comm.* 225 W 62, 272 NW 472.

Where a husband and wife filed a joint return of income, and the tax was computed and paid on the combined taxable income, the tax commission was not precluded, after the statutory requirement of computing the tax on the combined taxable income had been declared unconstitutional, from making a corrected assessment against the husband, within the statutory period therefor, based on his separate income, although such corrected assessment resulted in a larger taxable income as to him. *Miller v. Dept. of Taxation*, 241 W 145, 5 N W(2d) 749.

Under a partnership agreement between husband and wife for the carrying on the husband's insurance-agency business, whereby the wife was given no interest as co-owner and no right in the management and performed no services, but contributed the use of her securities as collateral for loans to carry advanced premiums, and was to receive half of the profits of the business after payment of an annual salary to the husband, there was no partnership, and the board of tax appeals should have affirmed the original assessment of the assessor assessing the whole of the profits against the husband. *Thomas v. Dept. of Taxation*, 250 W 8, 26 NW (2d) 310.

#### 2. Refunds and Credits.

Under 71.10 (1), Stats. 1925, providing that if a prior tax assessment of a corporation is in excess of the actual taxable income received in any such previous year, the tax commission shall credit such corporation with such excess, the provision is intended to apply only where the taxpayer had been required to pay an unjust tax by reason of an overassessment of income; and where the overassessment occurred during a year when the taxpayer was not required to pay any income tax, the overassessment should not be credited on the next year's income tax. *Oconto County v. Tax Comm.* 193 W 488, 214 NW 445.

**71.11 History:** 1947 c. 318, 382, 557, 600; Stats. 1947 s. 71.11; 1949 c. 168, 243; 1951 c. 75, 76, 714; 1951 c. 720 s. 11 to 13; 1953 c. 61,

184, 285, 303, 614; 1955 c. 3, 36; 1957 c. 145; 1959 c. 19, 489, 664; 1961 c. 129, 131, 474, 620; 1963 c. 182, 224, 488; 1965 c. 163, 249, 433; 1967 c. 287; 1969 c. 232, 261; 1969 c. 276 s. 590 (1), (2), (3); 1969 c. 314.

**Editor's Note:** 71.10, Stats. 1925, which was repealed by ch. 539, Laws 1927, provided for the reassessment of incomes of corporations received after 1915. It was interpreted and applied in the following cases: Northwestern Lumber Co. v. Tax Comm. 202 W 372, 231 NW 865; Rust-Owen Lumber Co. v. Tax Comm. 202 W 385, 231 NW 870; John S. Owen Lumber Co. v. Tax Comm. 202 W 391, 231 NW 872; New Dellis Lumber Co. v. Tax Comm. 202 W 396, 231 NW 873; and First Nat. Bank v. Tax Comm. 202 W 423, 232 NW 843.

1. Tax evasion, general.
2. Tax evasion, corporate.
3. Method of accounting.
4. Office audit.
5. Field audit.
6. Additional assessments.
7. Departmental rules.
8. Penalties.
9. Divulging information.

#### 1. Tax Evasion, General.

When charged with making a false and fraudulent tax return of corporate income, a defendant who relied on the verification in due form of the return as a compliance with the law, when it was advantageous for him to do so, is estopped from claiming that the return was not a verified one on the ground that the verification was not in fact made as required by law. *State ex rel. Marachowsky v. Kerl*, 258 W 309, 45 NW (2d) 668.

The evidence warranted findings of the board of tax appeals that an attorney, who obtained an extension of time for filing a return of income for each of the years 1936 to 1943, but paid no more attention to the matter until compelled to do so by the department of taxation in 1947, had failed to file reports for such years with intent to defeat the tax assessments required by law, and hence warranted the board's affirmance of an assessment made against the taxpayer for each of such years at twice the normal rate. Under like evidence as to the years 1944 and 1945, the board should have made the same findings as to those years and affirmed the double assessment made against the taxpayer for each of such years. *McKinnon v. Dept. of Taxation*, 261 W 564, 53 NW (2d) 169.

In order to impose the penalty provided under 71.11 (6), of an assessment of income taxes at twice the normal rate for making an incorrect income-tax report with intent to defeat or evade the tax due, such intent must be proved before the board of tax appeals by clear and convincing evidence, so that, on review of a decision of the board finding such intent, the provision in 227.20 (1) (d) that the reviewing court may reverse or modify the decision of the board only if the same is unsupported by "substantial evidence in view of the entire record," means evidence which is clear and convincing. Evidence relating to the taxpayer's failure to report net taxable income of \$90,161.99, out of a total of \$113,533.84, during the years of 1944, 1945 and 1946,

established by clear and convincing proof that the taxpayer made incorrect income-tax returns for the 3 years in question with intent to defeat and evade the income taxes due on his income for such years. *Platon v. Dept. of Taxation*, 264 W 254, 58 NW (2d) 712.

Amounts assessed under 71.11 (6) are not deductible as "taxes paid or assessed" for the purpose of determining federal income tax. Such amounts are a penalty, civil sanction or deterrent and not a tax. *Miller Scrap Iron & Steel Co. v. United States*, 169 F Supp. 432.

#### 2. Tax Evasion, Corporate.

71.11 (7) (a) is not applicable if the inter-corporate contract or arrangement does not establish an unfair price for the products and is not a device adopted for the purpose of evading income taxes. 71.11 (7) (b) does not constitute a source of power to disregard the corporate identities of parent and subsidiary corporations or intercorporate contracts, except as such disregard may be authorized by 71.11 (7) (a). *Curtis Companies, Inc. v. Tax Comm.* 214 W 85, 251 NW 497.

Where an investment corporation distributed as a dividend stock which it owned in another corporation, and shortly thereafter the stockholders sold such stock at a profit and received the proceeds, such distribution to its stockholders did not constitute a tax-evasion sale to them, and therefore such profit did not constitute taxable income of the investment corporation and was not assessable against it. *Walter Alexander Co. v. Tax Comm.* 215 W 293, 254 NW 544.

The tax commission, where an intercorporate agreement falls within the description of 71.11 (7) (a), is under a duty to determine the income which the subsidiary corporation would have had in Wisconsin except for the income-diverting contract. The commission's use of a percentage of total consolidated income, arrived at by taking an arithmetical average of the ratio of the subsidiary's tangible property, sales and manufacturing costs in Wisconsin to total consolidated property, sales and manufacturing costs of the parent and all its subsidiaries everywhere, did not establish what such subsidiary would have earned in Wisconsin, except for the income-diverting contract, since the method thus used attributed to the subsidiary that portion of the parent's income which constituted the latter's legitimate profit from the activities of the subsidiary in Wisconsin. In determining what the taxable income of a subsidiary would have been in Wisconsin except for an income-diverting contract with the parent corporation whose manufactured products the subsidiary is selling, a consideration of the usual or customary commissions and the normal and usual expenses of selling and servicing, the profit or loss on trade-ins, and other such matters represents a proper method of approach. *Burroughs Adding Machine Co. v. Tax Comm.* 237 W 423, 297 NW 574.

A finding of the tax commission that a contract between a parent corporation and a subsidiary corporation is unfair, in the sense that thereunder the subsidiary disposes of products in such a manner as to create improper net income, does not confer jurisdic-

tion on the commission to discard methods prescribed by statute for determining the true taxable income of the subsidiary in Wisconsin, nor to devise other methods of computation. *Northern States P. Co. v. Tax Comm.* 237 W 433, 297 NW 578.

When a subsidiary corporation conducts its business so as to benefit the members or stockholders of the parent company by selling the subsidiary's products at less than a fair price, or where a corporation whose stock is substantially owned by another corporation acquires and disposes of the products of the parent company in such a manner as to create an artificial loss or improper net income, the department of taxation may justly determine the amount of the subsidiary's taxable income, and the department may inquire into the corporate agreements between subsidiary and parent. *American Stores Dairy Co. v. Dept. of Taxation*, 246 W 396, 17 NW (2d) 596.

The computation of a subsidiary corporation's state income tax by deducting from state income such proportion of the parent corporation's federal income taxes as would be attributable to the state income was not erroneous. Strict mathematical certainty is not to be expected in assessing corporation income taxes. *Buick Motor Co. v. Milwaukee*, 48 F (2d) 801.

### 3. Method of Accounting.

The tax commission has the right to permit a taxpayer to report his sales on an installment basis, and later to revoke the permission and require reports on an accrual basis. *State ex rel. Waldheim & Co. v. Tax Comm.* 187 W 539, 204 NW 481.

If an income-tax return does not clearly reflect the taxable income, the commission may require the report which does, but is not authorized to impose an unlawful tax. A manufacturer may not postpone reports on long-term contracts until the contracts are completed. Income must be reported for the year in which earned. *Wisconsin O. I. & B. Co. v. Tax Comm.* 202 W 355, 229 NW 646, 233 NW 72.

A taxpayer in 1925 having changed from the cash method to the accrual method regarding incomes, bills receivable earned before 1920 were properly included in an additional assessment in 1927. *Kelly v. Tax Comm.* 203 W 639, 234 NW 701.

### 4. Office Audit.

The tax commission could assess additional income tax where not advised by the taxpayer's report of the manner in which deductions were arrived at. *Wisconsin B. Co. v. Tax Comm.* 198 W 439, 224 NW 483.

The value placed on stock as of January 1, 1911, in an inheritance tax proceeding was not controlling in imposing additional income tax. *O. H. Ingram Co. v. Tax Comm.* 202 W 202, 231 NW 160.

The department of taxation may use information other than the return in making an office audit. *Dept. of Taxation v. O. H. Kindt Mfg. Co.* 13 W (2d) 258, 108 NW (2d) 535.

### 5. Field Audit.

The field audit contemplates a complete review of the taxpayer's books for the purpose

of establishing accurately and finally the facts with respect to its income. The field audit was therefore intended to foreclose any further inquiry into the facts relative to the taxpayer's income for the years under audit. This being true, every item or fact bearing either upon the propriety of an additional assessment or of a refund is material and should be examined in the course of a hearing. When a hearing is had upon an assessment proposed as the result of a field audit, the taxpayer must establish its right to a refund as defensive matter. In this case the taxpayer did not make the facts, upon which a claim for refund depends, a ground for objecting to the additional assessment, nor were these facts put forward on the hearing as defensive matter bearing upon the propriety or amount of the additional assessment. The hearing having proceeded without a consideration of the matters relating to a refund, the jurisdiction of the tax commission to come to a decision upon the basis of the audit, objections and hearing is not affected by an application for a refund. When the commission made a determination and additional assessment, the taxpayer's right to a refund terminated. So, likewise, did the jurisdiction of the commission to consider the claims for refund as applied to any of the years for which an additional assessment was made. *Newport Co. v. Tax Comm.* 219 W 293, 261 NW 884.

Where a taxpayer had filed no return, the department of taxation was authorized by 71.11, Stats. 1941, to make an investigation and to make an assessment of income on the basis thereof. *Baker v. Dept. of Taxation*, 250 W 439, 27 NW (2d) 467.

See note to 73.01, citing *Neu's Supply Line, Inc. v. Dept. of Taxation*, 39 W (2d) 584, 159 NW (2d) 742.

### 6. Additional Assessments.

The tax commission was not authorized to add in 1923 to income for that year income omitted in 1913, where the omission was not reported until 1918. *State ex rel. Courteen v. Cary*, 183 W 128, 197 NW 587.

The tax commission is presumed to have acted according to law in making its original assessment of an income tax against a corporation as well as when making a new assessment for the same year; its power to make such new assessment is limited to the correction of errors in the return due to fraud or mistake on the part of the taxpayer. No such new assessment can be made on the same basis of fact as that on which the original assessment was made. A later showing that a building was "of reinforced concrete and masonry construction" which had been returned as a "concrete building," did not present new fact, justifying a reassessment of the rate of depreciation. *State ex rel. Schuster R. Co. v. Lyons*, 184 W 175, 197 NW 585, 199 NW 48.

A taxpayer owned stock in a lumber company which owned stock in a railroad company. On June 10, 1908, the lumber company declared a dividend payable to its stockholders in stock of the railroad company, but the dividend was not paid to the taxpayer until 1915. In 1917 the lumber company purchased property of the railroad company and paid to

each stockholder of the railroad company, including the taxpayer, a 100% dividend, but the taxpayer did not report this as income in his 1917 report. Upon a reaudit, the tax commission determined that it was income received in the year 1917 and subject to an income tax. *O. H. Ingram Co. v. Tax Comm.* 202 W 202, 231 NW 160.

The tax commission, having refrained from assessing income because of a U. S. supreme court decision, was not precluded from levying assessment within the time limited by statute subsequent to the overruling of such decision. *Laabs v. Tax Comm.* 218 W 414, 261 NW 404.

Where a taxpayer paid the emergency relief tax levied on his 1931 income pursuant to sec. 4, ch. 29, Spl. S. 1931-32, under protest, but subsequently the taxing authorities made a field audit covering all of the taxpayer's 1929, 1930 and 1931 income, which disclosed unreported 1929 and 1930 income, resulting in an additional assessment of normal income tax and teachers' surtax for 1931 because of the use of the 1929, 1930 and 1931 averaged income for the purpose of those taxes as required by 71.10 (1m) (a), Stats. 1931, the taxpayer's failure to request a hearing on such additional assessment for 1931 after notice of the result of the field audit operated, under 71.12 and 71.17(3), to bar his claim for refund of the emergency relief tax paid under protest, notwithstanding that the field audit in question disclosed no unreported income for 1931 and resulted in no additional assessment for emergency relief tax for 1931. *Bechaud v. Tax Comm.* 235 W 23, 290 NW 632.

Where the department of taxation exercises its statutory power to levy an assessment against a taxpayer because in its judgment the return does not disclose the taxpayer's entire income, and the assessment is disputed, the burden of proof is on the taxpayer to show error in the additional assessment because the additional assessment is presumed to be correct, but failure to specify the basis for the additional assessment rendered the same incomplete and invalid, hence the presumption could not be invoked. *Woller v. Dept. of Taxation*, 35 W (2d) 227, 151 NW (2d) 170.

When a taxpayer makes an inaccurate or improper determination of its net taxable income properly assessable, and compels the department of revenue to conduct an audit in order to determine that a substantial amount of "net taxable property assessable" exists, the 6-year statute of limitations is brought into play, for under those circumstances it is reasonable that the department should have an additional period to investigate and make an assessment. *A. O. Smith Corp. v. Dept. of Revenue*, 43 W (2d) 420, 168 NW (2d) 887.

A legislative enactment of 1965, which deleted the word "taxable" from the phrase "net taxable income properly assessable" did not effect any change in substance to 71.11 (21), it appearing that the change was made to conform to 71.02 (1), which gives the definition of the term "net income" to mean, for corporations, "gross income" less allowable deductions. *A. O. Smith Corp. v. Dept. of Revenue*, 43 W (2d) 420, 168 NW (2d) 887.

#### 7. Departmental Rules.

In determining the taxable income de-

rived from the purchase of stock in the same corporation at different times and prices and the sale by the holder of any of the shares thereof, the average cost of all such shares held by the seller is a proper basis for computation, regardless of whether the certificates can be identified with particular purchases and selling prices. Hence, a rule or regulation prescribing such method of computation, adopted by the tax commission pursuant to the power conferred is a reasonable administrative measure which does not tax as income that which is not income, nor result in fictitious cost but establishes the actual cost. *Long v. Tax Comm.* 208 W 668, 242 NW 562.

The settlor, in establishing the trusteeship, was not entitled to rely on a regulation made by the tax commission to the effect that where a power is retained by the settlor of a trust to revest in himself title to any part of the corpus of the trust "then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor," where the regulation was contrary to 71.08 (9) making "nondistributable, or contingently distributable income not distributed" taxable to the trustee and hence the commission's subsequent retroactive revocation of its regulation did not invade rights of the settlor under the 14th Amendment. *First Wisconsin Trust Co. v. Dept. of Taxation*, 237 W 135, 294 NW 868.

Although a rule of an administrative body may not become effective as a "general law" until published, it will be presumed by the supreme court that the tax commission, in adopting, pursuant to rule-making powers, the average-cost rule as the basis for determining gain or loss on sales of stock, did what was necessary to render the rule effective, in the absence of proof to the contrary. *Whitman v. Dept. of Taxation*, 240 W 564, 4 NW (2d) 180.

Income tax collections may be invested in appropriate securities the same as other state funds. The provisions of 71.10 (4m), Stats. 1947, do not preclude such handling of said funds. 36 Atty. Gen. 298.

#### 8. Penalties.

See note to sec. 8, art. I, on double jeopardy, citing *State v. Roggensack*, 15 W (2d) 625, 113 NW (2d) 389, 114 NW (2d) 459.

The violation of 71.11 (42) is a misdemeanor. *State ex rel. Gaynon v. Krueger*, 31 W (2d) 609, 143 NW (2d) 437.

The statute of limitations upon the crimes specified in 71.11 (11) and (12), Stats. 1935, runs from the time of commission of such crimes. 25 Atty. Gen. 237.

Wisconsin criminal tax fraud problems. *Lipton and Petrie*, 48 MLR 1.

#### 9. Divulging Information.

In an action to foreclose a purchase-money mortgage affecting resort property in which the purchaser counterclaimed to rescind on the ground of material fraudulent representations as to income and book value, the circuit court in granting the purchaser's motion permitting him to inspect the seller's books and records reflecting the cost of the resort assets and to obtain from the department of taxation income tax returns pertinent to the period in-

volved, did not abuse its discretion, where in passing on the application the court had before it the pleadings, adverse examination, and other supporting affidavits which disclosed the nature of the representations which the purchaser claimed were made to induce him to purchase the property. *Wisconsin Steel T. & B. Co. v. Donlin*, 23 W (2d) 379, 127 NW (2d) 5.

Where income from property condemned under ch. 32, Stats. 1963, was a significant factor in determining fair market value, the attorney general, as a public officer upon whom the duty was imposed to litigate condemnation cases for the state, was, pursuant to 71.11 (44), entitled to have access to and use the condemnee's income tax returns (which disclosed property income) in the litigation. *Loeb v. Board of Regents*, 29 W (2d) 159, 138 NW (2d) 227.

The identity and ability of the complainant and his duty to investigate the tax status of the taxpayer and the sufficiency of the investigation to disclose a crime could not be reasonably inferred by taking judicial notice of 71.11 (44) (c) (the tax-return secrecy statute), based on the department's theory that it could be presumed therefrom that the complainant was either an agent or an employee, for it was not reasonable to infer competency, agency, or employment. *State ex rel. Pflanz v. County Court*, 36 W (2d) 550, 153 NW (2d) 559.

71.11 (44), concerning the divulging of information from income and gift-tax returns, as repealed and recreated by ch. 303, Laws 1953, and as affected by chs. 184 and 285, Laws 1953, is construed in 42 Atty. Gen. 256.

**71.12 History:** 1947 c. 318, 557; Stats. 1947 s. 71.12; 1949 c. 30, 180, 634; 1951 c. 720; 1955 c. 12; 1961 c. 620; 1967 c. 26; 1969 c. 190, 211; 1969 c. 276 ss. 582 (12), (15), 590 (1), (2), 606.

A New York partnership was estopped to dispute an assessment by failing to appear in Wisconsin before the board of review, although not notified of the return or of the assessment, where it was in fact represented by a Wisconsin partnership, the 2 constituting a new partnership distinct from each. *Westby v. Bekkedal*, 172 W 114, 178 NW 451.

A complaint alleging an additional income tax assessment by the tax commission without any evidence on which to base the assessment was sufficient on demurrer. *Yawkey-Bissell L. Co. v. Wolf River*, 199 W 631, 227 NW 244.

The erroneous failure of a taxpayer to object to assessment of income made by himself does not bar his right to question a subsequent additional assessment to which he has duly objected and made disclosure in the statutory manner. *Whitbeck v. Tax Comm.* 207 W 58, 240 NW 804.

Equity will not enjoin an apprehended illegal tax assessment, nor an alleged illegal assessment where there is an adequate legal remedy. 71.12-71.16, Stats. 1931, provide an adequate and complete remedy for an illegal assessment of income taxes, in the absence of extraordinary facts or circumstances. Consequently, an assessor of incomes (a state officer) cannot be enjoined from making an audit of the books of a resident of the state relating to his business outside of the state for the purpose of determining whether income

therefrom is taxable under state law, or from making an assessment of income derived from sources without the state until there has been a judicial determination of the taxability of such income, as in such an action it cannot be presumed that the assessor will act illegally. *Wagner v. Leenhouts*, 208 W 292, 242 NW 144; appeal dismissed *Wagner v. Leenhouts*, 287 U. S. 571.

The tax commission has no power to pass upon an assessment except as that assessment came before it in the regular manner provided by law. *Elwell v. Tax Comm.* 218 W 607, 261 NW 674.

Under 71.10, 71.12 to 71.17, Stats. 1929, a taxpayer was liable for penalties and interest on income taxes although, prior to their becoming delinquent, he had tendered the amount of an assessment which he deemed correct and which the tax commission ultimately determined to be correct. In an action to recover delinquent income taxes the taxpayer, having failed to appeal from the determination of the commission, was bound by such determination. *State v. Baker*, 232 W 383, 286 NW 535, 287 NW 690.

71.10 (6) (a), Stats. 1945, permitting a taxpayer to deposit the amount of contested additional income taxes with the state treasurer, was enacted for the purpose of giving the taxpayer protection against a penalty and assuring the collection of a tax when declared due by the settlement of the dispute. *Smith v. Dept. of Taxation*, 264 W 389, 59 NW (2d) 479.

A deposit of gift taxes with the state treasurer under 71.12 (2) was in effect a deposit in escrow, and the amount of the same did not constitute public funds, and hence a refund thereof was not an expenditure of public funds for a private purpose. *Fulton Foundation v. Dept. of Taxation*, 13 W (2d) 1, 108 NW (2d) 312.

See note to sec. 9, art. I, citing *Metzger v. Dept. of Taxation*, 35 W (2d) 119, 150 NW (2d) 421.

The last sentence of 71.12 (3), Stats. 1947, authorizes the department of taxation to waive the requirement of 71.12 (1) that application for abatement be filed within 30 days. 37 Atty. Gen. 491.

**71.13 History:** 1947 c. 9, 318, 338, 557; Stats. 1947 s. 71.13; 1949 c. 281; 1951 c. 720; 1955 c. 10, 12; 1959 c. 228 s. 66; 1961 c. 128, 620; 1963 c. 322; 1965 c. 163, 249; 1965 c. 433 s. 89; 1965 c. 577; 1969 c. 88, 202, 211, 241; 1969 c. 276 ss. 328, 582 (15), 590 (1), (2).

On collection of fees by the clerk of circuit court see notes to 59.42.

An action of debt may be maintained for collection of delinquent income taxes either before or after delivery to the sheriff of the schedule and warrant. 18 Atty. Gen. 42.

Income tax warrants need be entered by the clerk of circuit court only in the delinquent income tax docket. 25 Atty. Gen. 246.

A delinquent income-tax warrant should be issued in the name of the state of Wisconsin. Filing a transcript of delinquent income-tax warrants with the proper officer operates as a quasi-garnishment of wages of a public employe. The return on a delinquent income-tax warrant should be made to both clerk of court and tax commission. The principal of delin-

quent income tax continues to bear interest after docketing. In foreclosing mortgage against debtor in a delinquent income tax warrant the state should be made party. 25 Atty. Gen. 526.

The state, proceeding under 71.13 (3), Stats. 1937, cannot reach a fireman's pension by order of a court in supplementary proceedings but can reach the pension only by proceeding under 304.21. 28 Atty. Gen. 220.

The lien of a delinquent income-tax or gift-tax warrant filed under 71.13 (3) (b), Stats. 1951, and docketed as provided in 270.745, is the same as the lien provided in 270.79, for a docketed judgment. 42 Atty. Gen. 115.

**71.135 History:** 1963 c. 224; Stats. 1963 s. 71.135; 1965 c. 163 s. 76; 1969 c. 276 s. 590 (1), (2).

**71.14 History:** 1947 c. 318, 557; Stats. 1947 s. 71.14; 1949 c. 180, 600; 1951 c. 319; 1953 c. 59, 61, 527, 614, 648; 1955 c. 3, 10, 204, 366, 610; 1957 c. 78; 1957 c. 259 ss. 48 to 50; 1957 c. 383, 430; 1957 c. 672 ss. 52, 53; 1959 c. 19; 1959 c. 228 s. 66; 1959 c. 247, 260; 1959 c. 659 ss. 73, 79; 1961 c. 336, 348, 620, 621; 1963 c. 6, 84, 223, 224, 459, 563, 579; 1965 c. 114, 163, 249, 378; 1965 c. 433 s. 90; 1965 c. 597, 625; 1967 c. 92 s. 22; 1967 c. 110; 1969 c. 276 s. 590 (1), (2).

The tax commission, in apportioning between a village and a town for purposes of division of income taxes the income of a taxpayer whose plant was located in both the village and the town, properly apportioned the income by applying the method of apportionment contained in 71.07. State ex rel. Greenfield v. Conway, 221 W 369, 266 NW 907.

The only meaning that can be ascribed to the phrase "situs of the income producing such taxes" in 71.14 (2a), Stats. 1957-1961, is that the department of taxation is to return the distributable portion of the tax receipts to the municipality from which it came. To execute this directive, the weighted average method is the better method to be used when distributing receipts from entities doing business both within and without the state. Racine v. Morgan, 39 W (2d) 268, 159 NW (2d) 129.

The provision, limiting amount of income taxes apportioned to municipality to a percentage of assessed valuation, applies to the year in which taxes are collected. 27 Atty. Gen. 64.

The provision for deduction of a claim for overpayment of income-tax distribution in the apportionment next following the allowance thereof is directory only and deduction may be made in a subsequent apportionment. 36 Atty. Gen. 246.

The 3-year period within which a local unit could file a claim for erroneous payment of income taxes under 71.14 (7), commenced to run from the receipt of the August 15 distribution, both as to amounts distributed in the May 15 and August 15 distributions of that year. 44 Atty. Gen. 64.

**71.15 History:** 1947 c. 318, 557; Stats. 1947 s. 71.15; 1953 c. 614, 648; 1955 c. 3, 22, 67, 131; 1959 c. 19, 488; 1961 c. 129, 620, 652; 1963 c. 224, 385; 1965 c. 163, 249, 433.

**71.17 History:** 1955 c. 335; Stats. 1955 s. 71.17; 1957 c. 488; 1959 c. 19, 342; 1961 c. 620; 1963 c. 6; 1969 c. 276 s. 590 (1).

**71.18 History:** 1955 c. 240; 1955 c. 660 s. 3; Stats. 1955 s. 71.18; 1959 c. 542; 1969 c. 276 s. 590 (1).

71.18, levying on urban-transit companies a special income tax, in lieu of other taxes, of 50 per cent on all taxable income in excess of 8 per cent of the depreciated cost of property used and useful in providing urban mass-transportation service, indicates that 8 per cent is to be considered a maximum, but there is no mandatory requirement that the public service commission allow an 8 per cent return. Milwaukee & S. T. Corp. v. Public Service Comm. 13 W (2d) 384, 108 NW (2d) 729.

**71.19 History:** 1961 c. 620; Stats. 1961 s. 71.19; 1963 c. 81, 82, 120, 248, 273, 429, 459; 1965 c. 433; 1969 c. 276 s. 590 (1).

**71.20 History:** 1961 c. 620, 652; Stats. 1961 s. 71.20; 1963 c. 224, 252, 472, 519, 560, 562; 1965 c. 236, 454; 1967 c. 43; 1969 c. 204, 211, 232; 1969 c. 276 ss. 590 (2), (3), 598 (1).

**71.21 History:** 1961 c. 620; Stats. 1961 s. 71.21; 1963 c. 51, 69, 224, 459; 1965 c. 249, 451, 492, 649; 1969 c. 276 s. 590 (1).

**71.22 History:** 1963 c. 224; Stats. 1963 s. 71.22; 1965 c. 163; 1967 c. 287.

**71.23 History:** 1961 c. 620; Stats. 1961 s. 71.23.

**71.26 History:** 1961 c. 620; Stats. 1961 s. 71.26; 1965 c. 236; 1969 c. 204.

**71.30 History:** 1961 c. 620; Stats. 1961 s. 71.30.

**71.301 History:** 1955 c. 571; Stats. 1955 s. 71.301; 1963 c. 17; 1965 c. 163.

Since January 1, 1911, a corporation owned stock in other corporations, the fair market value of which had substantially increased; and in 1917 such stocks were distributed pro rata among the stockholders of the company. The distribution of stock was equivalent to a distribution of money, and the increase in value since January 1, 1911, represented income which was taxable. Morgan v. Tax Comm. 195 W 405, 217 NW 407, 218 NW 810.

The giving of notes by a corporation for a premium and accumulated dividends on its preferred stock owned by an investment company in accordance with provisions attached thereto, although involving an exchange of the preferred stock for the notes, was not done pursuant to reorganization and therefore did not constitute a tax-free "reorganization." Walter Alexander Co. v. Tax Comm. 215 W 293, 254 NW 544.

**71.302 History:** 1955 c. 571; Stats. 1955 s. 71.302.

**71.303 History:** 1955 c. 571; Stats. 1955 s. 71.303.

**71.305 History:** 1955 c. 571; Stats. 1955 s. 71.305.

**71.307 History:** 1955 c. 571; Stats. 1955 s. 71.307; 1969 c. 276 s. 590 (1).

**71.311 History:** 1955 c. 571; Stats. 1955 s. 71.311.

**71.312 History:** 1955 c. 571; Stats. 1955 s. 71.312; 1969 c. 276 s. 590 (1).

**71.316 History:** 1955 c. 571; Stats. 1955 s. 71.316.

The term "dividends", as used in 71.02 (2) (b), Stats. 1921 and 1923, was construed in *Falk v. Tax Comm.* 218 W 130, 259 NW 624.

The term "dividend" has a well settled meaning, which does not extend to commercial benefits to a stockholder from buying the corporation's products at a discount for the purpose of dealing therein. *Northwest Eng. Corp. v. Dept. of Taxation*, 241 W 324, 6 NW (2d) 198.

**71.317 History:** 1955 c. 571; Stats. 1955 s. 71.317; 1965 c. 163.

**71.331 History:** 1955 c. 571; Stats. 1955 s. 71.331.

Under 71.02 (2)(b), Stats. 1927, the amount received by a stockholder for his shares on liquidation of a corporation in excess of cost thereof is taxable, though the transaction is but an exchange of stock for the corporation's property. In *re Bellin's Estate*, 210 W 670, 247 NW 331.

A taxpayer was not entitled to deduct from his return of income a claimed loss on stock of a bank, where during the year the assets of the bank were still in process of liquidation and no final distribution had been made. *Marshall v. Tax Comm.* 222 W 221, 267 NW 913.

Even though it may seem very probable in a certain year that a stockholder's stock has become worthless he is not entitled to deduct the loss in that year, if there are any corporate assets still in the process of liquidation. *Koehring Co. v. Tax Comm.* 241 W 138, 5 NW (2d) 766.

**71.332 History:** 1955 c. 571; Stats. 1955 s. 71.332.

**71.333 History:** 1955 c. 571; Stats. 1955 s. 71.333; 1965 c. 163; 1969 c. 276 s. 590 (1).

**71.334 History:** 1955 c. 571; Stats. 1955 s. 71.334; 1969 c. 276 s. 590 (1).

**71.336 History:** 1955 c. 571; Stats. 1955 s. 71.336.

**71.337 History:** 1955 c. 571; Stats. 1955 s. 71.337; 1961 c. 190; 1969 c. 276 s. 590 (1).

**71.346 History:** 1955 c. 571; Stats. 1955 s. 71.346.

A mere disposition of operating assets and distribution of the proceeds does not constitute a liquidating operation if ultimate liquidation is not contemplated. The legislative intent in 71.02 (2) (b), Stats. 1931, is that when a corporation has liquidated or is liquidating, as that term is commonly understood, the beginning of that process will be taken, for the purpose of determining taxability of dividends, to be the time when in pursuance of its plans to liquidate, although without formal resolution for dissolution, it begins to dispose of operating assets and to distribute the proceeds or the assets themselves to the stockholders. *Larson v. Tax Comm.* 233 W 190, 288 NW 250.

**71.351 History:** 1955 c. 571; Stats. 1955 s. 71.351.

Where plaintiff, a corporation engaged in conducting an experimental laboratory, induced lumber companies to advance money to assist research work to find means of utilizing sawmill waste products, and a corporation was organized with a capital of one million dollars, to which plaintiff assigned certain patents as payment for corporate stock, the transaction was merely a substitution of one form of evidence of ownership for another, and such issue of stock was not a gain or profit or increase in actual value, taxable as income under 71.02 (2)(d) and (h), Stats. 1925. (*Miller v. Tax Comm.* 195 W 219, 217 NW 568, followed.) *C. F. Burgess Laboratories v. Conway*, 195 W 324, 218 NW 172.

Where a patentee of a clutch and 2 associates formed a corporation to which the patentee assigned the patent, and in exchange therefor the 3 received stock in an amount which gave them control of the corporation, and the amount of stock received by each was substantially in proportion to his interest in the property prior to the exchange, there was no taxable gain to any of the parties in the exchange transaction, and, hence, the basis for amortization of the patent by the transferee corporation was not the cost of the patent to it but the cost thereof to the transferor patentee. *Industrial Clutch Co. v. Dept. of Taxation*, 241 W 518, 6 NW (2d) 645.

**71.354 History:** 1955 c. 571; Stats. 1955 s. 71.354.

A taxpayer's exchange of his stock in a corporation for stock of a second corporation which acquired all the assets to stay in the business of the first corporation, pursuant to a plan of reorganization for the sole purpose of separating the management and control of the business from stock ownership, resulted in no taxable gain to the taxpayer. *Cudahy v. Tax Comm.* 226 W 342, 276 NW 759.

Shares of common stock received by a chain store manager from a chain store corporation, in exchange for his surrender of a managerial contract—which contract had been entered into in connection with his surrender of shares of classified stock and which contract provided that the corporation would pay him each year as added compensation, in addition to his regular salary the same profits of his store as he formerly received while holding the classified stock—constituted compensation to the manager, and was not exempt from income taxation as received in exchange for "stock" or for "securities" pursuant to a plan of corporate reorganization, the contract surrendered being neither "stock" nor a "security." *Whitman v. Dept. of Taxation*, 240 W 564, 4 NW (2d) 180.

Transfer of business through tax-free reorganization. *Willis*, 43 MLR 399.

**71.355 History:** 1955 c. 571; Stats. 1955 s. 71.355; 1969 c. 276 s. 590 (1).

**71.356 History:** 1955 c. 571; Stats. 1955 s. 71.356.

**71.357 History:** 1955 c. 571; Stats. 1955 s. 71.357.

**71.358 History:** 1955 c. 571; Stats. 1955 s. 71.358; 1969 c. 276 s. 590 (1).

**71.361 History:** 1955 c. 571; Stats. 1955 s. 71.361.

**71.362 History:** 1955 c. 571; Stats. 1955 s. 71.362; 1969 c. 276 s. 590 (1).

**71.368 History:** 1955 c. 571; Stats. 1955 s. 71.368; 1961 c. 33.

**71.371 History:** 1955 c. 571; Stats. 1955 s. 71.371.

**71.372 History:** 1955 c. 571; Stats. 1955 s. 71.372.

**71.373 History:** 1955 c. 571; Stats. 1955 s. 71.373.

## CHAPTER 72.

### Inheritance Tax Act.

**72.01 History:** 1899 c. 355; 1901 c. 245; 1903 c. 44, 249; 1905 c. 96; Supl. 1906 s. 1087—1; 1911 c. 663 s. 135; 1913 c. 627, 643; 1915 c. 253 s. 2; 1915 c. 498; 1917 c. 321, 322; 1921 c. 7 s. 2; Stats. 1921 s. 72.01; 1929 c. 298; 1929 c. 462 s. 1; 1939 c. 168, 204, 405; 1939 c. 515 s. 6b; 1945 c. 280, 569; 1949 c. 172; 1951 c. 510; 1953 c. 61 s. 67; 1953 c. 499; 1957 c. 144; 1959 c. 221; 1965 c. 218; 1967 c. 239.

1. General.
2. While a resident of the state.
3. Transfers in contemplation of death.
4. Transfers to take effect on death.
5. Transfers under power of appointment.
6. Joint interests.
7. Insurance part of estate.
8. Basis of tax.
9. Reciprocity as to nonresident decedents.

#### 1. General.

On equality, inherent rights, and exercises of taxing power see notes to sec. 1, art. I; on legislative power generally and delegation of power see notes to sec. 1, art. IV; on judicial power generally see notes to sec. 2, art. VII; and on the rule of taxation (privilege taxes) see notes to sec. 1, art. VIII.

An annuity bequeathed by a testator to his wife is subject to an inheritance tax. State ex rel. Kemp Smith v. Widule, 161 W 389, 154 NW 695.

An allowance made to a widow under sec. 3935 (2), Stats. 1913, for the support of herself and children pending the administration of her husband's estate is not a "transfer" within the meaning of sec. 1087 and is not subject to an inheritance tax. Estate of Smith v. Smith, 161 W 588, 155 NW 109.

An inheritance tax is a tax, not upon property inherited, but upon the right to receive such property. The property serves as a measure of the tax and furnishes a means of enforcing it against the person liable to pay. The state must have jurisdiction of the transfer of the property to be received; and if the state has nothing to do with the transfer it has no jurisdiction to impose a tax. Estate of Shepard, 184 W 88, 197 NW 344.

Taxes paid on lands in a sister state which had not become due when the owner died, and which were not debts of his, are not deductible

in fixing the Wisconsin inheritance taxes. Will of Kelly, 187 W 422, 204 NW 475.

Corporate stock transferred upon the exercising of an option of a surviving stockholder given by a deceased stockholder's will pursuant to a mutual contract was a transfer under the will, and not under the contract, rendering it subject to an inheritance tax. Will of Jones, 206 W 482, 240 NW 186.

The provisions of ch. 72, Stats. 1929, disclose a complete scheme for the valuing of interests in estates given by will and for the imposing of the tax upon such interests transferred as of the date of death of the testator, and for the payment of the tax upon its imposition, whether the actual enjoyment of the interest transferred be present or future. The tax is imposed upon the right to receive and is fixed by the value of that right. Will of Merrill, 212 W 15, 248 NW 909.

That the residuum of the testatrix's estate passed to the surviving residuary legatee on the death of the testatrix so that this transfer then became subject to an inheritance tax, and that on the death of the residuary legatee shortly thereafter the property passed from her to her heirs so that, in the administration of her estate, the second transfer also became subject to an inheritance tax on the interest which then passed from her to her heirs, did not result in "double taxation." Will of Marshall, 236 W 132, 294 NW 527.

A transfer by will to trustees, to be used to erect a memorial monument costing \$20,000 on the testator's burial lot, on which there was already a \$3,000 monument, was subject to inheritance tax and properly taxable to the trustees under this section, and it was not free from inheritance tax as a reasonable expense under 318.01 (4), Stats. 1945. Will of Volkering, 253 W 186, 32 NW (2d) 263.

An inheritance tax is not a tax on property or property rights, but is an excise tax levied on the transfer or transaction, and the amount of the property involved is used merely as a measure of the amount of the tax. Estate of Atkinson, 261 W 481, 53 NW (2d) 185.

A bonus payment by an employer to the estate of a deceased employe, not made pursuant to contract, is not a transfer subject to inheritance tax. Estate of Stevens, 266 W 331, 63 NW (2d) 732.

Payments made to a widow pursuant to an antenuptial contract, in lieu of all dower and inheritance rights, are taxable as a transfer "by the intestate laws of this state". Estate of Heuel, 4 W (2d) 400, 90 NW (2d) 634.

The inheritance tax in Wisconsin, imposed pursuant to ch. 72, Stats. 1961, is a tax upon the transfer, transaction, or right to receive property, and the transaction on which it is imposed is the passing of property from the dead to the living. The transfer upon which the tax is imposed, as contemplated by the statute, occurs and the tax accrues as of the time of death of the transferor. Estate of Perry, 35 W (2d) 412, 151 NW (2d) 58.

Property received by a child from a parent, by devise or descent, descends from the child and not from the parent upon the death of the child, unmarried and under age, and the transfer is taxed as coming from the