

TAX 2

Received July 20, 1972
2:20 p.m. *Cary J. Puls*

ORDER OF THE
WISCONSIN DEPARTMENT OF REVENUE
ADOPTING RULES AND RULE CHANGES

Pursuant to the authority vested in the Wisconsin Department of Revenue by Section 71.11(24) (a) of the statutes, the said department hereby adopts the rules and rule changes as attached hereto.

These rules and rule changes relate to franchise and income taxation and are to become effective September 1, 1973.

WISCONSIN DEPARTMENT OF REVENUE

By

Edward A. Wiegner

Edward A. Wiegner
Secretary of Revenue

STATE OF WISCONSIN)
) ss
DEPARTMENT OF REVENUE)


TO ALL TO WHOM THESE PRESENTS COME, GREETINGS:

I, EDWARD A. WIEGNER, Secretary of the Wisconsin Department of Revenue and custodian of the official records of the Wisconsin Department of Revenue, do hereby certify that the annexed rules and changes in rules of the Wisconsin Department of Revenue relating to franchise and income taxation as follows:

1. Tax 2.39 relating to apportionment of income of multistate businesses.
2. Tax 2.40 relating to nonapportionable income of interstate businesses.
3. Tax 2.49 relating to apportionment of income of interstate finance companies.
4. Tax 2.50 relating to apportionment of income of certain interstate public utilities.
5. Changes in Tax 2.42, 2.43, 2.45, 2.46, 2.47 and 2.48,

have been approved by me and have been compared with the originals on file in the department and are true and correct copies of such originals.

IN TESTIMONY WHEREOF, I have hereunto set my hand at the State Office Building, 201 E. Washington Avenue, in the City of Madison, Wisconsin, this 20th day of July, 1973.



Edward A. Wiegner, Secretary
Wisconsin Department of Revenue

Tax 2.45 Apportionment in special cases. (Section 71.07(5), Wis. Stats.)

When the business of any person, other than a "financial organization" or "public utility," as defined in s. 71.07(2)(d), Wis. Stats., within Wisconsin is an integral part of a unitary business conducted within and without Wisconsin, but because of unusual or unique circumstances the portion of the income of such person derived from business transacted in Wisconsin cannot be ascertained with reasonable certainty by use of the apportionment formula provided in section 71.07(2), Wis. Stats., (or by separate accounting in view of the unitary nature of the business), the department will substitute in the place of some or all of the statutory apportionment factors such other factor or factors as will reasonably apportion to Wisconsin the business income properly assignable to Wisconsin. In any case in which an apportionment of business income is made pursuant to this regulation, the taxpayer, at the time of the assessment, will be apprised of the factors used in the formula adopted.

Change the titles of Tax 2.46, 2.47, 2.48 to reflect the change in statutory reference as follows: (There is no change to the body of Tax 2.46, 2.47 or 2.48.)

Tax 2.46 Apportionment of business income of interstate air carriers. (Section 71.07(2)(e), Wis. Stats.)

Tax 2.47 Apportionment of net business income of interstate motor carriers of property. (1) (Section 71.07(2)(e), Wis. Stats.)

Tax 2.48 Apportionment of net business incomes of interstate pipeline companies. (Section 71.07(2)(e), Wis. Stats.)

Add the following to Tax 2.42:

(4) This rule is superseded by Wis. Adm. Code section Tax 2.39 with respect to the reporting of income for the purposes of franchise or income taxation in the calendar year 1973, or corresponding fiscal years, and for calendar and fiscal years thereafter.

Add the following to Tax 2.43:

(2) This rule is superseded by Wis. Adm. Code section Tax 2.40 with respect to the reporting of income for the purposes of franchise or income taxation in the calendar year 1973, or corresponding fiscal years, and for calendar and fiscal years thereafter.

Tax 2.40 Nonapportionable income. (Section 71.07(1) and (2), Wis. Stats.) (1) For the calendar year 1973, or corresponding fiscal years, and for calendar and fiscal years thereafter, expenses related to nonapportionable income must be deducted therefrom to determine the net nonapportionable income. Directly related expenses must be deducted in full, whereas expenses related to both business income and nonapportionable income shall be prorated in a manner which fairly distributes the deduction between such incomes.

(2) For all businesses which apportion their income to Wisconsin, other than "financial organizations" and "public utilities" as defined in s. 71.07(2)(d), Wis. Stats., nonapportionable dividends and interest received which follow the residence of the recipient shall first be reduced by deductible dividends received, and the balance shall be limited to the amount by which total apportionable and nonapportionable interest and non-deductible dividends received exceeds the sum of the expenses related thereto and deductible interest paid. If the latter sum exceeds such total interest and non-deductible dividends received, no deduction from total net income can be made for nonapportionable interest and dividends received. In no event can dividends and interest received which follow the residence of the recipient exceed the total amount of such nonapportionable interest and dividends received.

(3) For "financial organizations" (except insurance companies) and "public utilities" as defined in s. 71.07(2)(d), Wis. Stats., dividends and interest received which follow the residence of the recipient must be reduced by related expenses and deductible dividends received. Interest paid and deductible is deemed to be related expense in an amount determined by multiplying the total of such interest paid by a fraction, the numerator of which is the average tax basis of the intangible property producing, or capable of producing, such income and the denominator of which is the depreciated average tax basis of the total property owned and used in the production of all income during the year. This paragraph shall also apply to all other businesses not covered by (2) above.

(4) Total nonapportionable income or loss and Wisconsin nonapportionable income or loss must be adjusted for federal income taxes if federal income taxes are deductible in determining total company net income.

(5) The total net income or loss of the business must be adjusted to eliminate all of the net nonapportionable income or loss to determine the apportionable income or loss to which the apportionment percentage is applied. The resulting income or loss apportioned to Wisconsin must then be adjusted to include the Wisconsin net nonapportionable income or loss.

Tax 2.39 Apportionment method. (Sec. 71.07(2), Wis. Stats.) (1) For the reporting of income for the purposes of franchise or income taxation in the calendar year 1973, or corresponding fiscal years, and for calendar and fiscal years thereafter, the factors used in the apportionment method for all businesses except "financial organizations" and "public utilities" as defined in Section 71.07(2)(d) are the property factor, the payroll factor and the sales factor. Property, payroll or sales related to the production of nonapportionable income under Sec. 71.07(1) shall not be included in either the numerator or the denominator of any of the apportionment factors.

(2) In order to use the apportionment method the taxpayer must have income from business activity subject to taxation by this state and at least one other state or foreign country. Income from business activity includes only business (apportionable) income. As used in this rule a taxpayer is subject to taxation or taxable in a state or foreign country if the state or foreign country has jurisdiction to impose an income tax or a franchise tax measured by net income.

(3)(a) Property factor; numerator; denominator. The numerator of the property factor shall include the average value of the real and tangible personal property owned or rented by the taxpayer in this state and used by the taxpayer in the production of business (apportionable) income during the tax period. The denominator shall include the average value of all of such property located everywhere. Property in transit on the date or dates for determining the average value shall be considered to be at the destination for purposes of the property factor. The value of mobile or movable property such as construction equipment, trucks or leased electronic equipment which is located within and without this

state during the tax period shall be determined for purposes of the numerator of the factor on the basis of a ratio of time used within the state to total time used during the tax period. However, an automobile assigned to a traveling employee shall be included in the numerator of the factor if the employee's compensation is assigned to this state under the payroll factor.

(3)(b) Property factor; owned property. Property owned by the taxpayer is valued at its original cost. As a general rule "original cost" is deemed to be the basis of the property for federal income tax purposes (prior to any federal adjustments) at the time of acquisition by the taxpayer and adjusted by subsequent capital additions or improvements thereto and partial disposition thereof, by reason of sale, exchange, abandonment, etc. If original cost of property is unascertainable, the property is included in the factor at its fair market value as of the date of acquisition by the taxpayer. Inventories shall be included in the factor in accordance with the valuation method used for Wisconsin income or franchise tax purposes. Property acquired by gift or inheritance shall be included in the factor at its basis for federal income tax purposes.

(3)(c) Property factor; rented property. Property rented by the taxpayer is valued at 8 times the net annual rental determined as at arm's length. Net annual rental is the annual rental paid by the taxpayer less any annual rental received by the taxpayer from sub-rentals. In exceptional cases this may result in a negative value or clearly inaccurate valuation. In those instances any other method which will properly reflect the value may be required by the department or may be requested by the taxpayer, but in no case shall the net annual rental be less than an amount which bears the same ratio to the total annual rental paid by the taxpayer as the value of the part of the property used by the taxpayer bears to the total value of the same rental property. The "annual rental" is the amount paid as rental for the property for a 12 month

period. Where property is rented for less than a 12 month period, the net rent paid for the actual period of rental shall constitute the "annual rental" for the tax period. However, where a taxpayer has rented property for a term of 12 or more months and the current tax period covers a period of less than 12 months due, for example, to a reorganization or change of accounting period, the net rent paid for the short tax period shall be annualized. If the rental term is for less than 12 months, the rent shall be adjusted accordingly. Annual rent is the actual sum of money or other consideration payable, directly or indirectly, by the taxpayer or for its benefit for the use of the property, and includes:

1. any amount payable for the use of real or tangible personal property, or any part thereof, whether designated as a fixed sum of money or as a percentage of sales, profits or otherwise; and
2. any amount payable as additional rent or in lieu of rents, such as interest, taxes, insurance, repairs or any other items which are required to be paid by the terms of the lease or other arrangement, but does not include amounts paid as service charges, such as utilities, janitor services, etc. If a payment includes rent and other charges unsegregated, the amount of rent shall be determined by making a reasonable allocation between the rent and the other items. "Annual rental" does not include incidental day-to-day expenses such as hotel or motel accommodations, daily rental of automobiles, etc.

(3)(d) Property factor; leasehold improvements. Leasehold improvements shall, for the purposes of the property factor, be treated as property owned by the taxpayer regardless of whether the taxpayer is entitled to remove the improvements or the improvements revert to the lessor upon expiration of the lease. The original cost of leasehold improvements shall be included in the factor.

(3)(e) Property factor; construction in progress. Property or equipment under construction during the tax period (except inventoriable goods in process) shall be excluded from the factor until such property is actually used by the taxpayer in the regular course of his trade or business. If the property is partially used by the taxpayer in the regular course of his trade or business

while under construction, the value of the property to the extent used shall be included in the property factor.

(3)(f) Property factor; averaging property values. As a general rule the "average value" of property shall be determined by averaging the values at the beginning and ending of the tax period, but the department of revenue may require or allow the averaging of monthly values during the tax period if reasonably required to properly reflect the average value of the taxpayer's property. Averaging by monthly values will generally be applied if substantial fluctuations in the values of the property exist during the tax period, or where property is acquired after the beginning of the tax period or disposed of before the end of the tax period.

(4) Payroll factor; what is compensation. The term "compensation" includes wages, salaries, commissions and any other form of remuneration paid to employees for personal services. Compensation includes the value of board, rent, housing, lodging, and other benefits or services furnished to employees by the taxpayer in return for personal services, provided that such amounts constitute income to the recipient under the federal internal revenue code. In the case of employees not subject to the federal internal revenue code, e.g., those employed in foreign countries, the determination of whether such benefits or services would constitute income to the employees shall be made as though such employees were subject to the federal internal revenue code. Compensation includes deductible management or service fees paid to a related corporation as consideration for the performance of personal services, and the situs of such fees is in this state if such services are performed in this state. The recipient of such fees shall not include the compensation paid to its employees with respect to such personal services in either the numerator or denominator of its payroll factor. Except for such management or service fees, payments made to an independent contractor or any other person not properly classifiable as an employee are excluded.

(5)(a) Sales factor; sales made in general business operations. 1. For the purposes of the sales factor, the term "sales" means generally all gross receipts derived by a taxpayer from transactions and activities in the course of its regular trade or business operations which produce business (apportionable) income.

2. In the case of a taxpayer whose business activity consists of manufacturing and selling or purchasing and reselling goods or products, "sales" includes all gross receipts from the sales of such goods or products (or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year) held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business. Gross receipts for this purpose means gross sales, less returns and allowances, and includes all interest income, service charges, carrying charges, or time-price differential charges incidental to such sales. Federal and state excise taxes (including sales taxes) shall be included as part of such receipts if such taxes are passed on to the buyer or included as part of the selling price of the product.

(5)(b) Sales factor; sales made in other types of business activity. As applied to a taxpayer engaged in business activity other than or in addition to the manufacturing and selling or purchasing and reselling of property, "sales" includes the gross receipts from the taxpayer's business activity.

1. If the business activity consists of providing services, such as the operation of an advertising agency or the performance of equipment service contracts or the performance of research and development contracts, "sales" includes the gross receipts from the performance of such services including fees, commissions and similar items.

2. If the business activity consists of performing cost plus fixed fee contracts, such as the operation of a government-owned plant for a fee, gross receipts includes the taxpayer's reimbursed cost plus the fee.

3. If the business activity is the renting of real or tangible personal property, "sales" includes the gross receipts from the rental, lease, or licensing the use of the property.

4. If the business activity is the sale, assignment, or licensing of intangible personal property such as patents and copyrights, "sales" includes the gross receipts therefrom.

(5)(c) Sales factor; what sales of tangible personal property are in this state.

1. Gross receipts from the sales of tangible personal property (except sales to the United States Government: see Tax 2.39(5)(d)) are in this state if the property is delivered or shipped to a purchaser within this state regardless of the f.o.b. point or other conditions of sale, or if the property is shipped from an office, store, warehouse, factory, or other place of storage in this state and the taxpayer is not taxable in the state of destination.

2. Property shall be deemed to be delivered or shipped to a purchaser within this state if the recipient is in this state, even though the property is ordered from outside this state.

3. Property is delivered or shipped to a purchaser within this state if the shipment terminates in this state, even though the property is subsequently transferred by the purchaser to another state.

4. The term "purchaser within this state" shall include a recipient other than the purchaser if the taxpayer, at the designation of the purchaser, delivers to or has the property shipped to such a recipient within this state.

5. When property being shipped by a seller from the state of origin to a consignee in another state is diverted while enroute to a purchaser in this state, or the designee of a purchaser who is in this state, the sale is in this state.

6. If the taxpayer is not taxable in the state of destination for lack of sufficient nexus or by operation of Public Law 86-272, 15 U.S.C.A., Sec.

381-385, the sale is attributed to this state if the property is shipped from an office, store, warehouse, factory, or other place of storage in this state.

7. If a taxpayer whose salesman operates from an office located in this state makes a sale to a purchaser in another state in which the taxpayer is not taxable and the property is shipped directly by a third party to the purchasers, the following rules apply:

- a. If the taxpayer is taxable in the state from which the third party ships the property, then the sale is in such state.
- b. If the taxpayer is not taxable in the state from which the property is shipped, then the sale is in this state.

(5)(d) Sales factor; sales to the United States Government. Gross receipts from the sales of tangible personal property to the United States Government, including its agencies and instrumentalities, are in this state if the property is shipped from an office, store, warehouse, factory, or other place of storage in this state. For the purposes of this regulation, only sales for which the United States Government makes direct payment to the seller pursuant to the terms of its contract constitute sales to the United States Government. Thus, sales by a subcontractor to the prime contractor, the party to the contract with the United States Government, do not constitute sales to the United States Government.

(5)(e) Sales factor; numerator. The numerator of the sales factor will include the gross receipts from sales which are attributable to this state, and includes all interest income, service charges, carrying charges, or time-price differential charges incidental to such sales regardless of the place where the accounting records are maintained or the location of the contract or other evidence of indebtedness.

(5)(f) Sales factor; numerator; sales other than sales of tangible personal property.

1. In General: Sec. 71.07(2)(c)3 contains provisions for including gross receipts from transactions other than sales of tangible personal property in the numerator of the sales factor.

2. Under this section gross receipts are attributed to this state if the income producing activity which gave rise to the receipts is performed wholly within this state. If the income producing activity is performed within and without this state such receipts are attributed to this state in accordance with Subdivision 5 of this paragraph.

3. Income producing activity; defined. The term "income producing activity" means the act or acts directly engaged in by the taxpayer for the ultimate purpose of obtaining gains or profit. Such activity does not include activities performed on behalf of a taxpayer, such as those conducted on its behalf by an independent contractor. Accordingly, the income producing activity includes but is not limited to the following:

- a. The rendering of personal services by employees or the utilization of tangible and intangible property by the taxpayer in performing a service.
- b. The sale, rental, leasing, or licensing the use of or other use of real property.
- c. The rental, leasing, licensing the use of or other use of tangible personal property.
- d. The sale, licensing the use of or other use of intangible personal property such as patents, copyrights, trademarks, trade names, etc.

4. Costs of performance; defined. The term "costs of performance" means direct costs determined in a manner consistent with generally accepted accounting principles and in accordance with accepted conditions or practices in the trade or business of the taxpayer.

5. Application. a. Receipts from sales, other than sales of tangible personal property, are in this state if the income producing activity is performed wholly within this state or a greater proportion of the income producing activity is performed in this state than in any other state, based on costs of performance.

b. The following are special rules for determining when receipts from the income producing activities described below are in this state:

(i) Gross receipts from the sales, lease, rental or other use of real property are in this state if the real property is located in this state.

(ii) Gross receipts from the rental, lease, licensing the use of or other use of tangible personal property shall be assigned to this state if the property is within this state during the entire period of rental, lease, license or other use. If the property is within and without this state during such period, gross receipts attributable to this state shall be based upon the ratio which the time the property was used in this state bears to the total time the property was used everywhere during such period.

(iii) Gross receipts from the performance of personal services are in this state if: such services are performed in this state; or the services are performed both in and outside this state and a greater proportion of the services are performed in this state than in any other state, based on costs of performance.

c. The provisions of sections (5)(b)2 and (5)(f) herein shall also apply to sales, other than sales of tangible personal property, to the United States Government.

(6) "Business (apportionable) income" defined. "Business (apportionable) income" is income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.

(7) "State" defined. "State" means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

Tax 2.49 Apportionment of net business incomes of interstate finance companies. (Section 71.07(2)(e), Wis. Stats.) (1) For the calendar year 1973, or corresponding fiscal years, and thereafter, the business (apportionable) income of a finance company engaged in business within and without Wisconsin shall be apportioned to Wisconsin on the basis of the arithmetical average of the following two ratios:

(a) The ratio of gross receipts in Wisconsin to the total gross receipts everywhere. "Gross receipts" includes all business income associated with the lending of money in the normal course of business such as interest, discounts, finance charges or fees and service charges or fees. Gains from sales of assets, charges to a related corporation for personal services of employees and miscellaneous income are not includable in "gross receipts" for the purpose of computing this factor. "Gross receipts" will be assigned as income to this state if the transaction producing the income was principally negotiated in this state.

(b) The ratio of the total compensation paid to employees located in this state to the total compensation paid to employees located everywhere, determined in accordance with the provisions of s. 71.07(2)(b) and Wis. Adm. Code s. Tax 2.39(2). "Compensation paid to employees" includes deductible management or service fees paid to a related corporation directly or indirectly for the performance of personal services, and the situs of such fees is in this state if such services are performed in this state. The recipient of such fees shall not include the compensation paid to its employees with respect to such personal services in either the numerator or denominator of its payroll factor.

(2) If the leasing of tangible personal property represents a substantial source of business (apportionable) income, in addition to the "gross receipts" described in paragraph (1)(a), the department may authorize or direct the use of any other method to effect an equitable apportionment of the taxpayer's income.

(3) The term "finance company" means any "financial organization" defined in s. 71.07(2)(d), except any type of insurance company.

Tax 2.50 Apportionment of net business income of interstate public utilities (Section 71.07(2)(e), Wis. Stats.) (1) For the calendar year 1973, or corresponding fiscal years, and for calendar and fiscal years thereafter, except as provided in ss. (2) below, the business income of "public utilities", as defined in s. 71.07 (2)(d)2, Wis. Stats., operating within and without Wisconsin, shall be apportioned to Wisconsin on the basis of the ratio obtained by taking the arithmetical average of the 3 ratios provided in ss. 71.07(2)(a), (b) and (c), Wis. Stats., and Wis. Adm. Code s. Tax 2.39.

(2) The apportionable income of interstate air carriers, interstate motor carriers and interstate pipeline companies shall be apportioned to Wisconsin as provided in Wis. Adm. Code s. Tax 2.46, Tax 2.47 and Tax 2.48, respectively.